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## Attorney Disqualification for a Conflict of Interest in Federal Civil Litigation: A Confusing Body of Law in Need of Organization

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ATTORNEY DISQUALIFICATION FOR A CONFLICT OF  
INTEREST IN FEDERAL CIVIL LITIGATION: A  
CONFUSING BODY OF LAW IN NEED OF  
ORGANIZATION\*

I. INTRODUCTION

Over the past ten years it has become increasingly popular for litigants to move<sup>1</sup> for the disqualification of opposing counsel for a conflict

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\* The subject of attorney disqualification for a conflict of interest arises in many contexts. Federal and state courts deal with the issue in both civil and criminal actions. Any attempt to deal with all of the possible situations in which the issue arises is beyond the scope of this note. This note deals only with the issue of conflict of interests arising in civil litigation in federal courts.

The subject of this note has been discussed in numerous law reviews over the past thirty years. The authors of practically every article written on the subject have concentrated upon the relationship between the courts' treatment of motions to disqualify counsel for a conflict of interest and the standards suggested by the American Bar Association. See generally Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657 (1957); Liebman, *The Changing Law of Disqualification: The Role of Presumption and Policy*, 73 NW. U.L. REV. 996 (1979); Comment, *Subsequent Representation and the Model Rules of Professional Conduct: An Evaluation of Rules 1.9 and 1.10*, 1984 ARIZ. ST. L.J. 161; Note, *Ethical Considerations When an Attorney Opposes a Former Client: The Need for a Realistic Application of Canon Nine*, 52 CHI.[-]KENT L. REV. 525 (1975) [hereinafter cited as Note, *Ethical Considerations*]; Note, *Ethical Problems for the Law Firm of a Former Government Attorney: Firm or Individual Disqualification?*, 1977 DUKE L.J. 512 [hereinafter cited as Note, *Ethical Problems*]; Note, *The Second Circuit and Attorney Disqualification—Silver Chrysler Steers in a New Direction*, 44 FORDHAM L. REV. 130 (1975-76) [hereinafter cited as Note, *New Direction*]; *Unchanging Rules in Changing Times: The Canons of Ethics and Intra-Firm Conflicts of Interest*, 73 YALE L.J. 1058 (1964) [hereinafter cited as *Unchanging Rules*]. See also Sutton, *How Vulnerable is the Code of Professional Responsibility?*, 57 N.C.L. REV. 497 (1979) (reporter for the ABA committee which wrote the Model Code of Professional Responsibility criticizes courts as having misapplied various provisions of the Code). Because so many previous authors have concentrated upon the significance of the ABA standards, another such endeavor would be redundant. This note attempts only to sort out the various court decisions on attorney disqualification for a conflict of interest, and to present a means of determining in advance of litigation whether the courts will permit a given representation. While any attempt to discuss the issues involved in such cases necessarily involves some discussion of the ABA standards, this note will confine such discussions to the footnotes for the most part.

1. "A motion to disqualify counsel is the proper method for a party-litigant to bring the issues of a conflict of interest or breaches of ethical duties to the attention of the court." *Musicus v. Westinghouse Elec. Corp.*, 621 F.2d 742, 744 (5th Cir. 1980) (citing *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 376 (S.D. Tex. 1969)). See also Peterson, *Rebuttable Presumptions and Intra-Firm Screening: The New Seventh Circuit Approach to Vicarious Disqualification of Litigation Counsel*, 59 NOTRE DAME L. REV. 399, 401 (1984) (issue may be raised when opposing attorney who is suspected of a conflict of interest files a motion to declare quali-

of interest.<sup>2</sup> Such motions give rise to a multiplicity of issues.<sup>3</sup> While

fiction and the opposing party follows with a cross motion to disqualify the attorney).

Standing is not generally an issue when the courts are faced with motions to disqualify counsel for a conflict of interest. *Kevlik v. Goldstein*, 724 F.2d 844, 847-48 (1st Cir. 1984) (adopting standard that any attorney has standing to raise a potential violation of the Model Code of Professional Responsibility) (citing *United States v. Clarkson*, 567 F.2d 270, 271 n.1 (4th Cir. 1977); *Brown & Williamson Tobacco Corp. v. Daniel Int'l Corp.*, 563 F.2d 673 (5th Cir.)); *cf.* *Wilson P. Abraham Const. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir. 1977) (movant need not be ex-client, but if movant is not ex-client, presumption of disclosed confidences will not apply to adverse subsequent representation in substantially related matter); *Whiting Corp. v. White Mach. Corp.*, No. 73 C 107 (N.D. Ill. Apr. 21, 1977), *reprinted as appendix to Whiting Corp. v. Whiting Mach. Corp.*, 567 F.2d 713, 716 (7th Cir. 1977) (without regard to whether movant is ex-client, "once appraised of an alleged breach of professional responsibility [the court] has a duty to determine whether there is any substance to the accusations"), *aff'd*, 567 F.2d 713 (7th Cir. 1977) (per curiam). *But see Murchison v. Kirby*, 201 F. Supp. 122 (S.D.N.Y. 1961) (only a former or present client has standing to raise a conflict of interest). In *Murchison*, the court stated:

While . . . any member of the public may present an accusation of breach of professional conduct against an attorney to the appropriate bar association . . . this does not mean that he may come into court in an action in which he is an interested party and seek to disqualify the opposing attorney, solely on the ground of violation of the Canons of Ethics.

*Id.* at 123. *Cf.* *Melamed v. ITT Continental Baking Co.*, 592 F.2d 290, 294 (6th Cir. 1979) (while any party to litigation has "a right . . . to call the attention of the District Judge to the possible conflict of interest . . . this fact should not be construed as automatically granting a right to an appeal of a denial of disqualification where . . . the would-be appellant cannot show a possibility of injury"). *See also* 7 C.J.S. *Attorney and Client* § 47 (1980).

As standing generally is not an issue, the motion to disqualify counsel can be raised by any party to the litigation, or the judge can raise the issue on his own accord. *See W.E. Bassett Co. v. H.C. Cook Co.*, 201 F. Supp. 821, 823 (D. Conn. 1961) (hearing held *sua sponte* to determine whether plaintiff's attorney should be disqualified), *aff'd*, 302 F.2d 268 (2d Cir. 1962). The procedure for the motion is governed by rules seven through sixteen of the Federal Rules of Civil Procedure. The partial text of such a motion is set down in *Cord v. Smith*, 338 F.2d 516, 519 n.1 (9th Cir. 1964).

If an action is brought in federal court on the basis of either federal question or diversity jurisdiction, federal common law governs the court's decision to disqualify counsel. *IBM Corp. v. Levin*, 579 F.2d 271, 279 n.2 (3d Cir. 1978) (conduct of practitioners before the federal courts must be governed by the rules of those courts rather than the state courts); *Cord v. Smith*, 338 F.2d 516, 524 (9th Cir. 1964) (The Erie doctrine is not controlling upon questions of attorney conduct before federal courts).

2. The policies underlying disqualification for a conflict of interest are twofold. First, the policies are substantially similar to the policies for making attorney-client communications privileged, i.e., "to encourage free discussion by the client . . . and . . . to deter the advertent or inadvertent use of privileged communications to the advantage or disadvantage of a new client." *Kevlik v. Goldstein*, 724 F.2d 844, 849-50 (1st Cir. 1984) (citations omitted). Second, such disqualifications are intended to promote faith in the profession by the general public. *Emle Indus. v. Patentex, Inc.*, 478 F.2d 562, 565 (2d Cir. 1973). In *Emle*, the court wrote: "The dynamics of litigation are far too subtle, the attorney's role in that process is far too critical, and the public's interest in the outcome is

the various district courts and courts of appeals that have considered such motions (and appeals therefrom) have generated consistent resolutions of many of the issues raised,<sup>4</sup> much confusion still exists concerning some of the more critical issues.<sup>5</sup>

The court's power to disqualify attorneys for a conflict of interest stems from the district court's duty to regulate the conduct of attorneys practicing before it.<sup>6</sup> When determining whether a challenged repre-

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far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer's representation in a given case." *Id.* at 571. See generally *Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 646 F.2d 1020, 1027 (5th Cir.) (disqualification is imposed because it would be "grossly unfair to permit an attorney to reveal confidences of his former client," and disqualification encourages communication between the attorney and client and preserves the integrity of the judicial system in the eyes of the public), *cert. denied*, 454 U.S. 895 (1981). See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 ("Confidentiality of Information") (1983); *id.* Rule 1.9 ("Conflict of Interest: Former Client"); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1979) ("A Lawyer Should Preserve the Confidences and Secrets of a Client"); *id.* Canon 5 ("A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client"); *id.* Canon 9 ("A Lawyer Should Avoid Even The Appearance of Impropriety").

3. The issues raised are as follows: a) Are communications between a party and the challenged attorney "privileged?"; b) Is the challenged representation adverse to the interests of a party whose communications are privileged?; c) Is there a substantial relationship between the current representation and the legally protected relationship?; d) What evidence establishes the existence of a substantial relationship?; e) Which party has the burden of proving the existence of a substantial relationship?; f) What is the effect of proof of the existence of a substantial relationship?; g) If an individual attorney in a firm has a conflict of interest, must the entire firm be vicariously disqualified?

For a discussion of each of the issues involved, see *infra* notes 35 (is communication privileged?), 44-54 (substantial relationship) & 131-216 (vicarious disqualification) and accompanying text.

4. The courts agree upon several propositions. The "substantial relationship test" is the proper test for deciding whether an attorney should be directly disqualified for a conflict of interest. See *infra* notes 49-54 and accompanying text. The moving party bears the burden of proving the existence of a substantial relationship between the current and previous representations. See *infra* note 54 and accompanying text. Proof of a substantial relationship results in a presumption of disclosed confidences between the client and attorney. See *infra* notes 55-60 and accompanying text. Disqualification of any attorney in a firm for a conflict of interest subjects other attorneys at the firm of the disqualified attorney to potential vicarious disqualification. See *infra* notes 131-41 and accompanying text. Vicarious disqualification is accomplished by application of a presumption of shared confidences. See *infra* notes 132-33 and accompanying text.

5. The courts are split over a number of issues. See *infra* note 53 and accompanying text (What evidence proves a substantial representation?), notes 59-130 and accompanying text (Is the presumption of disclosed confidences rebuttable?), notes 131-91 and accompanying text (Whether the presumption of shared confidences is rebuttable?) & notes 192-216 and accompanying text (Can a firm shield attorneys from vicarious disqualification by employing "screening"?).

6. See *Ceramco, Inc. v. Lee Pharmaceuticals*, 510 F.2d 268, 271 (2d Cir. 1975) ("courts have not only the supervisory power but also the duty and re-

sentation is permissible, the courts generally discuss the standards suggested by the American Bar Association (ABA).<sup>7</sup> Practically every federal court recognizes that the ABA has established the proper standards of conduct for attorneys practicing before the court.<sup>8</sup> Although the ABA standards carry great weight in a court's examination of an attorney's conduct, "[t]he scope of such an inquiry . . . should encompass more than the ABA [standards]."<sup>9</sup> The courts also rely upon principles of trustee, fiduciary and agency law.<sup>10</sup>

sponsibility to disqualify counsel for unethical conduct prejudicial to his adversaries"); see also *Kevlik v. Goldstein*, 724 F.2d 844, 847 (1st Cir. 1984); *Trust Corp. of Mont. v. Piper Aircraft Corp.*, 701 F.2d 85, 87 (9th Cir. 1983); *Central Milk Producers Coop. v. Sentry Food Stores, Inc.*, 573 F.2d 988, 992 (8th Cir. 1978); *Woods v. Covington County Bank*, 537 F.2d 804, 810 (5th Cir. 1976); *United States v. Ott*, 489 F.2d 872, 874 (7th Cir. 1973); *Richardson v. Hamilton Int'l Corp.*, 469 F.2d 1382, 1385 (3d Cir. 1972), cert. denied, 411 U.S. 986 (1973); *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 376 (S.D. Tex. 1969). That the court possesses the power to disqualify counsel for a conflict of interest has been recognized for nearly 100 years. See generally *Brown v. Miller*, 286 F. 994 (D.C. Cir. 1923) (attorney disqualified); *In re Boone*, 83 F. 944 (C.C.N.D. Cal. 1897) (attorney disbarred).

7. For a discussion of how the courts apply the ABA standards, see *infra* notes 28-43, 49-50 & 138-41 and accompanying text.

8. See, e.g., *Kevlik v. Goldstein*, 724 F.2d 844, 846-47 (1st Cir. 1984) (rule 4(d) of the Rules of the United States District Court for the District of New Hampshire adopts the Code); *IBM Corp. v. Levin*, 579 F.2d 271, 279 n.2 (3d Cir. 1978) (rule 6 of the Rules of the United States District Court for the District of New Jersey adopts the Code to govern attorney conduct); *Central Milk Prod. Coop. v. Sentry Food Stores, Inc.*, 573 F.2d 988, 993 (8th Cir. 1978) (Code carries great weight in a court's examination of an attorney's conduct); *NCK Org. v. Bregman*, 542 F.2d 128, 129 n.2 (2d Cir. 1976) (Code is recognized by federal courts in Second Circuit); *Kadish v. Commodity Futures Trading Comm'n*, 548 F. Supp. 1030, 1032 (N.D. Ill. 1982) (Code is appropriate guideline for conduct of attorneys admitted to practice before the district court in the Northern District of Illinois); *Financial Gen. Bankshares, Inc. v. Metzger*, 523 F. Supp. 744, 762 n.62 (D.D.C. 1981) (Code has been adopted by the D.C. Circuit as the appropriate guidelines for conduct of attorneys practicing before the courts in the District of Columbia); *Telos, Inc. v. Hawaiian Tel. Co.*, 397 F. Supp. 1314, 1315 n.5 (D. Hawaii 1975) (rule 1(g) of the Rules of Civil Procedure for the United States District Court for the District of Hawaii adopts the Code); cf. *Sutton, supra* note \*, at 501 & n.11 (the Code's disciplinary rules have been adopted by statute or court rules in every state); Comment, *Disqualification of Counsel: Adverse Interests and Revolving Doors*, 81 COLUM. L. REV. 199, 200 n.8 (1981). But cf. *Little & Rush, Resolving Conflict Between Professional Ethics Opinions and Antitrust Laws*, 15 GA. L. REV. 341 (1981) (strict enforcement of the Code could lead to potential antitrust actions against the ABA and local Bar Associations); *Sutton, supra* note \*, at 515 (the Code was never intended to provide procedural rules for deciding disqualification motions).

9. *Woods v. Covington County Bank*, 537 F.2d 804, 810 (5th Cir. 1976) (citing *International Elec. Corp. v. Flanzer*, 527 F.2d 1288, 1293 (2d Cir. 1975); *J.P. Foley & Co. v. Vanderbilt*, 523 F.2d 1357, 1359-60 (2d Cir. 1975) (Gurfein, J., concurring); *Handelman v. Weiss*, 368 F. Supp. 258, 263 (S.D.N.Y. 1973)).

10. See, e.g., *Fund of Funds, Ltd. v. Arthur Anderson & Co.*, 567 F.2d 225 (2d Cir. 1977). In *Fund of Funds*, the court of appeals stated, "While we explicitly place reliance on [the Code], the import of our decision was to safeguard against

In determining whether to disqualify a challenged attorney for a conflict of interest, the courts often apply two presumptions: the presumption of "disclosed confidences" and the presumption of "shared confidences."<sup>11</sup> The courts apply the presumption of disclosed confidences to disqualify an attorney who undertakes an adverse representation against a former client. The presumption of disclosed confidences generally is irrebuttable. The courts apply the presumption of shared confidences to disqualify vicariously an attorney who undertakes a representation adverse to the interests of a former client of an attorney with whom the disqualified attorney is, or was, associated. The presumption of shared confidences might be rebuttable, depending upon the factual situation surrounding the motion for disqualification. Because subtle distinctions in the situations surrounding such motions often are determinative in the outcome of the motions, the law of attorney disqualification for conflict of interest is fact-sensitive, intricate, and confused.

Unless some consistent thread can be found throughout the reported opinions much confusion is bound to exist concerning the appropriate legal standards governing motions to disqualify counsel for a conflict of interest. Whether the presumption of "disclosed confidences" is ever rebuttable is a matter of growing controversy among the courts.<sup>12</sup> Additionally, the courts often disagree as to what circumstances render the presumption of "shared confidences" rebuttable and

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indirect breach of 'the lawyer's [fiduciary] duty of absolute fidelity . . . .' " *Id.* at 234 (quoting *Ceramco, Inc. v. Lee Pharmaceuticals*, 510 F.2d 268, 271 (2d Cir. 1975)). The court added in a footnote: "In New York, as elsewhere, it is beyond doubt that a lawyer is bound to conduct himself as a fiduciary or trustee of his or her client's interests, and that he or she must exercise the utmost good faith, honesty, integrity and fidelity." *Id.* at 233 n.16. The concept that the attorney is the "fiduciary," "trustee," or "agent" of the client has been discussed in many other decisions. *See, e.g.*, *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386 (2d Cir. 1976) (trustee or fiduciary); *Hafter v. Farkas*, 498 F.2d 587, 589 (2d Cir. 1974) (trustee or fiduciary); *Brinkley v. Farmers Elevator Mut. Ins. Co.*, 485 F.2d 1283, 1286 (10th Cir. 1973) (agent); *Hensley v. United States*, 281 F.2d 605, 607 (D.C. Cir. 1960) (agent); *Rothman v. Wilson*, 121 F.2d 1000, 1006 (9th Cir. 1941) (agent); *see generally* *Spector v. Mermelstein*, 361 F. Supp. 30, 38 n.15 (S.D.N.Y. 1972) (listing cases where attorney found to be fiduciary), *aff'd in part and remanded in part*, 485 F.2d 474 (2d Cir. 1973); *cf.* *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1317 (7th Cir.) (attorney's obligation to client goes "far beyond the principles of agency"), *cert. denied*, 439 U.S. 955 (1978). *See also* Note, *Sanctions for Attorney's Representation of Conflicting Interests*, 57 COLUM. L. REV. 994 (1957) ("Since lawyers are fiduciaries in the highest sense, the duty to refrain from representing conflict interests applies to them with special force.") (footnote omitted).

11. For a discussion of the presumptions, see *infra* notes 55-130 (disclosed confidences) & 131-216 (shared confidences) and accompanying text. For a brief discussion of the difference between the two presumptions, see Comment, *The Chinese Wall Defense to Law-Firm Disqualification*, 128 U. PA. L. REV. 677, 682 n.24 (1980).

12. For a discussion of the controversy over whether the presumption of disclosed confidences is rebuttable, see *infra* notes 59-130 and accompanying text.

as to what a challenged attorney must prove in order to rebut the presumption.<sup>13</sup> The latter question raises the issue of whether a law firm can "screen" its attorneys to avoid vicarious disqualification.<sup>14</sup>

This note examines the recent cases on attorney disqualification for a conflict of interest and proposes to resolve much of the confusion existing in this area of the law. The note traces the history of the problem, beginning with the first major case in the area, *T.C. Theatre Corp. v. Warner Brothers Pictures*.<sup>15</sup> Particular attention is focused upon the Seventh Circuit "Quintet," a series of five cases decided by the Seventh Circuit Court of Appeals over the past six years.<sup>16</sup> *Armstrong v. McAlpin*<sup>17</sup> is also discussed with some detail.

As motions for disqualification probably will arise more frequently in the coming years unless unforeseeable circumstances reverse the current trend toward larger firms and government apprenticeships,<sup>18</sup> this

13. For a discussion of the presumption of shared confidences, see *infra* notes 131-216 and accompanying text.

14. For a discussion of whether a firm can avoid vicarious disqualification of its attorneys by employing screening procedures, see *infra* notes 192-216 and accompanying text.

15. 113 F. Supp. 265 (S.D.N.Y. 1953). For a discussion of *T.C. Theatre*, see *infra* notes 46-51 & 56-58 and accompanying text.

16. From August 16, 1979 to September 16, 1983, the Seventh Circuit decided a series of five appeals of district court decisions on motions to disqualify counsel based on a conflict of interest. In this note, the five appeals will be collectively referred to as the Seventh Circuit Quintet. For a discussion of the Seventh Circuit Quintet, see *infra* notes 61-99, 144-48, 151-63, 176-77 & 182-202 and accompanying text. See generally Peterson, *supra* note 1 (analysis of four of the cases within the Quintet).

17. 625 F.2d 433 (2d Cir. 1980) (en banc), *vacated*, 449 U.S. 1106 (1981).

18. See Jenkins, *Working Both Sides of the Court*, STUDENT LAW., Feb. 1977, at 34 (notes that the turnover of government attorneys into private practice is substantial); Comment, *Conflicts of Interest and the Former Government Attorney*, 65 GEO. L.J. 1025, 1026 n.6 (1977) (government attorneys that enter private practice may face ethical conflicts in representing "private clients in matters which the attorney handled while a government employee"); Comment, *supra* note 11 (as the average size of American law firms continues to grow, so does the likelihood of a potential conflict of interest).

In addition to the probability that parties will continue to file disqualification motions with equal or greater frequency because of the potential for increased frequency of actual conflicts of interest, there is a growing concern within the judiciary that such motions are being interposed for tactical reasons such as delay. See *Board of Educ. v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979) (courts are becoming reluctant to disqualify counsel because motions to disqualify often are interposed solely for the tactical purpose of causing delay) (citing *Allegaert v. Perot*, 565 F.2d 246, 251 (2d Cir. 1977); *J.P. Foley & Co. v. Vanderbilt*, 523 F.2d 1357, 1360 (2d Cir. 1975) (Gurfein, J., concurring)); *International Elec. Corp. v. Flanzer*, 527 F.2d 1288, 1289 (2d Cir. 1975) ("Such moves and countermoves by adversaries appear to have become common tools of the litigation process."); cf. *Kevlik v. Goldstein*, 724 F.2d 844, 848 (1st Cir. 1984) ("disqualification motions can be tactical in nature, designed to harass opposing counsel"). It is suggested that if uniform standards existed for consistently resolving the many issues involved in disqualification motions, then the delay

note concludes that there is a growing need for a uniform body of law in this area to benefit the public,<sup>19</sup> the bench,<sup>20</sup> and the bar.<sup>21</sup> The best

which currently is produced by such motions would be reduced and the desirability of raising such motions would subside accordingly.

19. The public needs a uniform body of law in the area of attorney disqualification for a conflict of interest because potential clients must be able to select their attorneys freely and without fear that their attorney will be disqualified from the representation at some later time. See Note, *supra* note 10, at 1000. If members of the public knew precisely what obligations an attorney owes to them as well as to former clients, they would be saved from the timely and costly process of retaining new counsel after proceedings already have begun. See Comment, *supra* note \*, at 164 (early recognition of the conflict could avoid these harms to the clients). See also *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 719-20 (7th Cir. 1982) (substitute counsel may not be able to "master the nuances of the legal and factual matters late in the litigation of a complex case") (quoting Comment, *The Availability of the Work Product of a Disqualified Attorney: What Standard?*, 127 U. PA. L. REV. 1607, 1630-35 (1979)); Peterson, *supra* note 1, at 400-01 (litigant will suffer monetary as well as psychological hardship from increased legal fees, loss of trial momentum, and necessity of obtaining new counsel with whom the litigant has never worked); Comment, *supra* note \*, at 164 (client faces delay and the added expense of hiring new counsel who may not have adequate time to prepare the case); Comment, *supra* note 8, at 206 ("[d]isqualification . . . may subject both the client and the disqualified attorney to significant hardships") (footnote omitted); Comment, *supra* note 11, at 679 (disqualification subjects client to higher costs); cf. *First Wis. Mortgage Trust v. First Wis. Corp.*, 571 F.2d 390, 399 (7th Cir. 1978) ("substitute counsel should not be allowed to make use of the legal memoranda and loan file analyses which never should have been prepared"). But see *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225, 227 n.3, 236 (2d Cir. 1977) (the client need not necessarily lose the work product of the disqualified attorney; plaintiff's complaint will not be dismissed merely because his counsel was disqualified for a conflict of interest).

Additionally, it is suggested that if the courts are able to dispose of such motions without much delay, the desirability of interposing such a motion for tactical reasons would be tempered and clients would be saved the expense of defending against such motions. This is so because there is little to be gained by interposing a motion for the purpose of delay when the court is able to dispose of the motion through a summary proceeding.

20. It is suggested that the bench is in need of a uniform body of law in the area for reasons of judicial economy. First, if a uniformly accepted body of law controlled the courts' decisions on motions for attorney disqualification for a conflict of interest, district courts could waste less time determining what is the proper law to be applied, and they could concentrate their efforts on deciding such motions on the merits. Secondly, it is suggested that once a uniform body of law existed there would be less need for decisions by the appellate courts, as the district courts would be able to determine properly the correct rule in the first place, and litigants would be less willing to waste the cost of an appeal when an adverse outcome reasonably could be expected.

21. If an attorney is disqualified for a conflict of interest, it is likely that the client will refuse to pay for the attorney's services. Comment, *supra* note 8, at 206 (disqualification subjects attorney to significant economic hardships); Note, *supra* note 10, at 1000 (lawyer suffers direct financial loss or incurs the dissatisfaction of the client). Additionally, disqualification tends to cast a shadow upon an attorney's otherwise untarnished reputation. See, e.g., *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 720 (7th Cir. 1982) ("granting of a disqualification motion all too often impairs the reputation of the disqualified firm



way to meet this growing need would be a United States Supreme Court decision addressing the issues involved. The Supreme Court, however, has consistently denied certiorari in such cases.<sup>22</sup> In fact, the Court only has granted certiorari twice, declaring that the federal courts of appeals lack jurisdiction to entertain interlocutory appeals both from the denial of disqualification in civil litigation<sup>23</sup> and from the grant of disqualifica-

or attorney"); *Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 646 F.2d 1020, 1025 n.6, 1027 (5th Cir.) (attorney is subjected to loss of both reputation and fees), *cert. denied*, 454 U.S. 895 (1981); *Government of India v. Cook Indus.*, 569 F.2d 737, 741 (2d Cir. 1978) (Mansfield, J., concurring) (attorney's reputation will "needlessly" suffer unless he is given a chance to clear his name); *E.Z. Paintr Corp. v. Padco, Inc.*, No. 4-81-92 (D. Minn. Nov. 9, 1983) (attorney's reputation may be blemished with an "undeserved and unfair stigma"). It is suggested that if a uniform, unambiguous standard existed for deciding motions to disqualify attorneys for a conflict of interest, then attorneys could make an intelligent preliminary determination as to whether to accept a retainer.

The fact that disqualification tarnishes an attorney's reputation is especially disconcerting because, in many cases, the court expressly will state that the attorney's conduct was not "truly" unethical; yet, the attorney still will be disqualified. *See, e.g.*, *Whiting Corp. v. White Mach. Corp.*, 567 F.2d 713, 716 (7th Cir. 1977) (disqualified firm is innocent of any wrongdoing); *Richardson v. Hamilton Int'l Corp.*, 469 F.2d 1382, 1385 (3d Cir. 1972) (disqualified attorney acted "in good faith and had the best interests of [the plaintiffs] at heart"); *cert. denied*, 411 U.S. 986 (1973); *Chugach Elec. Ass'n v. United States Dist. Court*, 370 F.2d 441, 442 (9th Cir. 1966) (court recognized the disqualified attorney's "good faith in resisting disqualification"), *cert. denied*, 389 U.S. 820 (1967); *United States v. Trafficante*, 328 F.2d 117, 120 (5th Cir. 1964) (disqualified attorney was neither "guilty of any intention [sic] wrong, nor has his conduct been such as to suggest any turpitude"); *Motor Mart, Inc. v. SAAB Motors, Inc.*, 359 F. Supp. 156, 158 (S.D.N.Y. 1973) ("no breach of good conduct" by the disqualified attorney) (emphasis in original); *Allied Realty, Inc. v. Exchange Nat'l Bank*, 283 F. Supp. 464, 466, 470 (D. Minn. 1968) (court expressed that the disqualification should not be viewed as attacking or impugning the attorney's character or integrity), *aff'd*, 408 F.2d 1099 (8th Cir.), *cert. denied*, 396 U.S. 823 (1969); *W.E. Bassett Co. v. H.C. Cook Co.*, 201 F. Supp. 821, 825 (D. Conn. 1961) (the case is not one of "irresponsible conduct or contumacy" on the part of the disqualified attorneys), *aff'd*, 302 F.2d 268 (2d Cir. 1962), *cf.* *Fund of Funds, Ltd. v. Arthur Anderson & Co.*, 567 F.2d 225, 227 (2d Cir. 1977) ("Compliance or noncompliance with the Canons of Ethics frequently do not involve morality or venality, but differences of opinions among honest men over the ethical propriety of conduct.").

22. *See, e.g.*, *Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 454 U.S. 895 (1981); *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 439 U.S. 955 (1978); *Richardson v. Hamilton Int'l Corp.*, 411 U.S. 986 (1973); *Allied Realty, Inc. v. Exchange Nat'l Bank*, 396 U.S. 823 (1969); *Chugach Elec. Ass'n v. United States Dist. Court*, 389 U.S. 820 (1967); *Fleischer v. A.A.P., Inc.*, 359 U.S. 1002 (1959). A decision by a district court granting or denying disqualification of counsel and the determination of a court of appeals in such a matter are not included in the mandatory appellate jurisdiction of the Supreme Court. *See generally* 28 U.S.C. §§ 1251-1258 (1982). Therefore, if any review by the Supreme Court is to occur, it must be by grant of certiorari.

23. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981). *See also* Annot., 44 A.L.R. FED. 709 (1979) (analyzes cases in which the appealability of orders granting or denying motions to disqualify counsel has been discussed).

Before the Supreme Court decided *Firestone*, the circuits were split concerning whether a federal court of appeals had jurisdiction to entertain an interlocu-

tion in criminal litigation.<sup>24</sup> In the absence of a Supreme Court decision, the lower courts must resolve the confusion on their own.

This note represents an attempt to relieve some of the confusion currently existing among the courts as to the proper standards for deciding motions to disqualify counsel for a conflict of interest.

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tory appeal of a district court's decision on a motion to disqualify counsel based on a conflict of interest. See 449 U.S. at 373 n.10 (listing cases representing views of 11 circuits on issue of whether federal courts of appeals have jurisdiction to entertain interlocutory appeals of denials of disqualification: six circuits holding no jurisdiction exists and five circuits finding jurisdiction). The Supreme Court's decision in *Firestone* expressly reserved any decision as to whether jurisdiction exists to hear interlocutory appeals of orders granting disqualification in federal civil actions and orders granting or denying disqualification in federal criminal actions. *Id.* at 372 n.8. When the circumstances warrant review, there is precedent supporting the use of a petition to obtain review of an unappealable order under the All Writs Act, 28 U.S.C. § 1651 (1982). See *Cord v. Smith*, 338 F.2d 516, 521 (9th Cir. 1964) (citing *Olympic Refining Co. v. Carter*, 332 F.2d 260, 263-64 (9th Cir. 1964)); *Hartley Pen Co. v. United States Dist. Ct.*, 287 F.2d 324, 328-29 (9th Cir. 1961); see also *Firestone*, 449 U.S. at 378-79 n.13 ("in the exceptional circumstances for which it was designed, a writ of mandamus from the court of appeals might be available"); *Chugach Elec. Ass'n v. United States Dist. Court*, 370 F.2d 441 (9th Cir. 1966) (citing *Cord*). But see *IBM Corp. v. United States*, 480 F.2d 293, 297 (2d Cir. 1973) (en banc) (§ 1651 "may not be used as a substitute for an authorized appeal . . . where . . . the statutory scheme permits appellate review . . . on appeal from the final judgment") (quoting *United States Alkali Export Ass'n v. United States*, 325 U.S. 196, 203 (1945)).

Additionally, the courts of appeals have discretionary jurisdiction over an issue certified by the district court as "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . ." 28 U.S.C. § 1292(b) (1982). See *IBM Corp. v. United States*, 480 F.2d 293 (2d Cir. 1973) (en banc). In *IBM*, the court rejected the petitioner's claim that § 1292(b) provided jurisdiction, because (1) the district court had not certified that a controlling question of law was involved and (2) the appeal was not made directly to the Supreme Court as the statute directed. *Id.* at 296. The court did not state whether § 1292(b) could be used to obtain appellate review by the Supreme Court if the district court had so certified. *Id.* at 295-97. See also *Firestone*, 449 U.S. at 378-79 n.13 ("if dissatisfied with the result in the District Court and absolutely determined that it will be harmed irreparably, a party may seek to have the question certified for interlocutory appellate review"); *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 496 F.2d 800, 805 (2d Cir. 1974) (en banc) (discusses various cases where jurisdiction was premised on different statutes).

Although certification technically is available, it is suggested that the court probably will refuse to certify an issue if the court already has determined that the challenged representation is not improper.

24. *Flanagan v. United States*, 104 S. Ct. 1051 (1984). In *Flanagan*, the Court noted that it had reserved judgment upon those issues in *Firestone*, and said: "We decide today that a District Court's pretrial disqualification of defense counsel in a criminal prosecution is not immediately appealable under 28 U.S.C. § 1291 [(1982)]." *Id.* at 1052. Later in its opinion, the Court noted that the policy supporting § 1291 "is at its strongest in the field of criminal law." *Id.* at 1054 (quoting *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982)).

## II. ADVERSE SUBSEQUENT REPRESENTATION

A. *Direct Disqualification of the Attorney Who Represented the Former Client*

A potential conflict of interest arises whenever an attorney undertakes a representation of a client whose interests are adverse to those of one of the attorney's former clients.<sup>25</sup> This note shall refer to such a situation as "adverse subsequent representation." The potential conflict of interest arises from the attorney's dual obligations: (1) to represent his current client to the best of his ability,<sup>26</sup> and (2) to "preserve the confidences and secrets of [his former] client."<sup>27</sup> The attorney's obligations to his current and former client are set out in both the Model Code of Professional Responsibility (Code)<sup>28</sup> and in the Model Rules of Professional Conduct (Model Rules).<sup>29</sup>

Canons 4,<sup>30</sup> 5,<sup>31</sup> and 9<sup>32</sup> of the Code are implicated whenever an

25. See generally Annot., 52 A.L.R. 2d 1243 (1957) (discussing the propriety of an attorney undertaking an adverse subsequent representation).

26. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1979) ("A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client"); *id.* Canon 6 ("A Lawyer Should Represent a Client Competently"); *id.* Canon 7 ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1983) ("Conflict of Interest: General Rule"). The comments to rule 1.7 state that an attorney's loyalty to a client is impaired when the attorney "cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities [to another client] or interests." *Id.* comment, ¶ 3. The attorney's loyalty to the client is impaired because "[t]he conflict . . . forecloses alternatives that would otherwise be available to the client." *Id.*

In addition to the ABA standards, it is suggested that principles of fiduciary, trustee, and agency law also require an attorney to exercise a high degree of loyalty toward his clients. For a discussion of how the courts have applied such principles to protect former clients, see *supra* note 10.

27. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1979) ("A Lawyer Should Preserve the Confidences and Secrets of a Client"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1983) ("Conflict of Interest: Former Client"). The comments to rule 1.9 provide in pertinent part: "Information acquired by a lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client." *Id.* comment, ¶ 3. For a further discussion of rule 1.9, see *infra* notes 41 & 43. For a discussion of cases holding that the attorney's obligation to his former client stems from principles of fiduciary, trustee, and agency law, see *supra* note 10.

28. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1979). For a discussion of the applicable sections of the Code, see *infra* notes 30-33, 35-40, 43, 138-39 & 142 and accompanying text.

29. MODEL RULES OF PROFESSIONAL CONDUCT (1983). For a discussion of the applicable sections of the Model Rules, see *infra* notes 34, 41-43, 141-42, 153, 181 & 199 and accompanying text.

30. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1979) ("A Lawyer Should Preserve the Confidences and Secrets of a Client").

31. *Id.* Canon 5 ("A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client").

32. *Id.* Canon 9 ("A Lawyer Should Avoid Even the Appearance of Professional Impropriety").

attorney undertakes an adverse subsequent representation.<sup>33</sup> Model Rule 1.9 is implicated as well.<sup>34</sup> The courts have interpreted Canon 4 to prohibit an attorney from undertaking an adverse subsequent representation in which he might reveal "confidences" or "secrets" of the former client.<sup>35</sup> The policies behind Canon 4 are to encourage communication

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33. See, e.g., *Duncan v. Merrill Lynch, Pierce, Fenner & Smith Co.*, 646 F.2d 1020, 1027 (5th Cir. 1981) (when an attorney undertakes an adverse subsequent representation, the representation could result in a violation of Canon 4); *Trone v. Smith*, 621 F.2d 994, 999 (9th Cir. 1980) (adverse subsequent representation implicates Canons 1, 4, 5, 6, 7, and 9); *International Elec. Corp. v. Flanzer*, 527 F.2d 1288, 1291 (2d Cir. 1975) ("Under Canon 4 . . . a lawyer may not accept employment against a former client where the matter is substantially related to the subject-matter of his earlier representation.") (footnote omitted) (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-5 (1970); *id.* DR 4-101(B)); *Emle Ind. v. Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973) (the considerations of Canon 4 "require application of a strict prophylactic rule to prevent any possibility . . . that confidential information acquired from a client during a previous relationship may subsequently be used to the client's disadvantage."); *Richardson v. Hamilton Int'l Corp.*, 469 F.2d 1382, 1384 (3d Cir. 1972) (adverse subsequent representation might violate principles underlying Canon 4); *Telos v. Hawaiian Tel. Co.*, 397 F. Supp. 1314, 1316-17 (D. Hawaii 1975) (Canon 9 requires disqualification where an adverse subsequent representation raises the appearance of impropriety); *Motor Mart, Inc. v. SAAB Motors, Inc.*, 359 F. Supp. 156, 157 (S.D.N.Y. 1973) (adverse subsequent representation should be avoided to preserve ethical standards of Canon 4). See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 legal background (Proposed Final Draft, May 30, 1981) (citing decisions applying Canons 4, 5, and 9 in situations of adverse subsequent representation); Comment, *supra* note 11, at 681 (the "chief ethical concern" with adverse subsequent representation is addressed in Canon 4).

34. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1983) ("Conflict of Interest: Former Client"). For the text of rule 1.9, see *infra* note 43 for a further discussion of rule 1.9, see *infra* notes 41 & 43 and accompanying text.

35. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1979). The disciplinary rule defines "confidences" as "information protected by the attorney-client privilege . . ." *Id.* DR 4-101(A). The disciplinary rule defines "secrets" as "information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." *Id.*

Generally, the controlling question in determining whether a communication is privileged is "whether the client reasonably understood the conference to be confidential." *Kevlik v. Goldstein*, 724 F.2d 844, 849 (1st Cir. 1984) (quoting *C. McCORMICK, EVIDENCE* § 91 at 189 (1972)). *Cf. Allegaert v. Perot*, 565 F.2d 246, 250 (2d Cir. 1977) (client must show that attorney was in position where he could have received "information which his former client might reasonably have assumed the attorney would withhold").

The attorney-client privilege protects communications between a client and his attorney against future disclosure by the attorney. *C. McCORMICK, EVIDENCE*, §§ 88-91 (1972). An attorney-client relationship need never have existed, however, for a court to find that a party's communications with an attorney were privileged. For example, preliminary communications made to the attorney during an initial consultation are privileged. See, e.g., *Arden v. State Bar*, 52 Cal. 2d 310, 341 P.2d 6 (1959) (per curiam) (privilege exists even though client never formally employed attorney); *In re Dupont's Estate*, 60 Cal. App. 2d 276, 140 P.2d 866 (1943) (if privilege depended on whether attorney accepted retainer after hearing facts of case, no potential client would consult with un-

between an attorney and his client<sup>36</sup> and to protect the fiduciary rela-

retained attorneys). *But see In re Yarn Processing Patent Validity Litig.*, 530 F.2d 83, 90 (5th Cir. 1976) (the duties of loyalty and confidentiality do not arise in the absence of an attorney-client relationship). The privilege might exist even though the attorney gratuitously advises the client or where a third party pays the attorney's fees. *C. McCORMICK, supra* § 88. *Cf. Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1318-21 (7th Cir.) (privilege extended to Kerr-McGee because the nationwide association to which Kerr-McGee belonged was a client of the challenged attorney), *cert. denied*, 439 U.S. 955 (1978).

Additionally, the privilege can arise even when a client consults an attorney in a "particular transaction . . . which could have been handled on the client's behalf by a layman." *NCK Org. v. Bregman*, 542 F.2d 128, 133 (2d Cir. 1976) (quoting *Cord v. Smith*, 338 F.2d 516, 524 (9th Cir. 1964)). *Cf. Cord v. Smith*, 338 F.2d 516 (9th Cir. 1964). In *Cord*, the court stated that "[c]lients repose special confidence in, and retain their lawyers because they are lawyers. They are entitled to expect that their lawyers will act as they are supposed to act, without quibble as to what particular services may have been technically legal services." *Id.* at 524. If a party reveals confidences to a person who happens to be an attorney and the party did not intend to consult with the person as an attorney, however, the confidences will not be protected by the court. *C. McCORMICK, supra*, § 88.

Confidential information remains privileged after the attorney-client relationship is terminated. *American Can Co. v. Citrus Feed Co.*, 436 F.2d 1125, 1128 (5th Cir. 1971); *In re Boone*, 83 F. 944, 953 (C.C.N.D. Cal. 1897). *See also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(b) (1983). There is ample case support to sustain the proposition that the privilege is not nullified if the confidential information or communication becomes or is available elsewhere. *See, e.g., Kevlik v. Goldstein*, 724 F.2d 844, 849 (1st Cir. 1984) (privilege exists "without regard to the nature or source of information or the fact that others share the knowledge.") (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-4 (1979)); *NCK Org. v. Bregman*, 542 F.2d 128, 133 (2d Cir. 1976) (privilege exists even though an attorney received information from sources other than client) (citing *H. DRINKER, LEGAL ETHICS* 135 (1953)); *Handelman v. Weiss*, 368 F. Supp. 258, 264 (S.D.N.Y. 1973) (privilege exists although the privileged information is freely available to public); *Marco v. Dulles*, 169 F. Supp. 622, 630 (S.D.N.Y. 1959) (fact that present client possesses all information obtained by his attorney from his former client does not suspend the privilege). The Model Rules, however, permit an attorney to reveal otherwise privileged information in the course of an adverse subsequent representation "when the information has become generally known." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(b) (1983). While the Model Rules advocate a more liberal view of the attorney-client privilege where the former client's confidences have become available publicly, they expand the concept of confidentiality in other areas. *Id.* code comparison, ¶ 2 (confidentiality restriction applies "to all information about a client relating to the representation," thus, avoiding "the constricted definition of 'confidence' that appears in some decisions").

Because an attorney is obligated to protect both confidences and secrets of a former client, the scope of the attorney's obligation to his former client extends beyond the scope of the evidentiary privilege. *See NCK Org. v. Bregman*, 542 F.2d 128, 133 (2d Cir. 1976) (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-4 (1975)).

36. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1979) ("A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client."); *see also Emle Indus. v. Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973) (Canon 4 encourages a client to discuss his problems freely and in depth with his attorney without fear that the information might later be used against the client);

relationship between the attorney and client.<sup>37</sup> Canon 5 is concerned with the attorney's obligation to represent his current client.<sup>38</sup> Canon 5 is implicated because the attorney might be forced to compromise his current client's interests in order to protect his former client's confidences.<sup>39</sup> The policy behind Canon 9 is to promote public trust in the legal profession.<sup>40</sup> Model Rule 1.9 encompasses the policies of Canon 4.<sup>41</sup>

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Richardson v. Hamilton Int'l Corp., 469 F.2d 1382, 1384 (3d Cir. 1972) ("rationale underlying Canon 4 is the principle that a client should be encouraged to reveal to his attorney all possibly pertinent information").

37. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1979) ("Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him.").

38. See *id.* EC 5-1 ("The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties.").

39. See *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 229 (6th Cir. 1978) ("disqualification would be premised upon the possibility that preexisting loyalties to one client may cause him, the attorney, to temper his representation of the other"); *Emle Indus. v. Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973) ("out of excess of good faith, a lawyer might bend too far in . . . refraining from seizing a legitimate opportunity for fear that such a tactic might give rise to an appearance of impropriety").

40. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 9-1 (1979). EC 9-1 states: "Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system. A lawyer should promote public confidence in our system and in the legal profession." *Id.*

The origin of the view that the attorney owes an obligation to the public to protect the confidences of his clients is elusive. Today, however, there is little question that the view is part and parcel of the judicial system. The American Bar Association long has recognized the attorney's obligation to the public at large, and has promulgated the view in the Canons of Professional Ethics, the Model Code of Professional Responsibility, and the Model Rules of Professional Conduct. See generally R. WISE, LEGAL ETHICS 4 (1970 ed.) ("The Code is intended to guide the lawyer in carrying out his duty to society."). For a discussion of the impact of the ABA standards upon a court's ruling on a motion for disqualification of counsel for a conflict of interest, see *supra* notes 8-9 and accompanying text.

41. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1983). The Code comparison for rule 1.9 states:

There is no counterpart to Rule 1.9(a) or (b) in the Disciplinary Rules of the Code. The problem addressed in Rule 1.9(a) sometimes has been dealt with under the rubric of Canon 9 of the Code, which provides that "A lawyer should avoid even the appearance of impropriety." EC 4-6 states that "the obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment."

*Id.* code comparison, ¶ 1.

See also MODEL RULES OF PROFESSIONAL CONDUCT DR 4-101(A) legal background (Alternative Draft/Code of Professional Responsibility Format, May 30, 1981) ("'Confidential information' refers to information relating to the representation of a client."); Kutak, *The Proposed Model Rules of Professional Conduct: A*

While Canons 4, 5, and 9 provide the courts with some guidance in deciding whether to permit an adverse subsequent representation, the Code does not expressly prohibit such representations.<sup>42</sup> It is suggested that it is a result of the Code's failure to address this issue that the courts have found it so difficult to agree upon the proper standards for deciding motions to disqualify counsel for undertaking an adverse subsequent representation. Some relief may be in sight, however, as the Model Rules expressly prohibit such representations under specified circumstances.<sup>43</sup>

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*New Battle of New Orleans?*, THE NEBRASKA TRANSCRIPT Dec./Jan. 1983, at 6. Mr. Kutak, the chairman of the ABA committee that drafted the Model Rules, stated:

[T]he starting point of the Model Rules is expansion of the scope of the general obligation. The Model Rules do not use the existing Code classification of "confidences" and "secrets" and the related distinction regarding information "embarrassing" to the client. The Model Rules assume that clients initially expect that *all* information relating to the representation will be protected. With regard to the exceptions to the principle of confidentiality, the Model Rules, like the 1969 Code, like every predecessor code, and like every scholar who has written on the issue, recognize that the general obligation of confidentiality has outer limits where transcendent values must prevail over secrecy.

*Id.* at 10 (emphasis in original).

42. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 Code comparison, ¶ 1 (1983). The Code comparison reveals that while the Code failed to address directly the problem of an adverse subsequent representation, the courts have dealt with the problem "under the rubric of Canon 9." *Id.* The Code comparison suggests that the courts also have relied upon EC 4-6 when addressing the problem. EC 4-6 provides in pertinent part: "[T]he obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-6 (1979), *quoted in* MODEL RULES OF PROFESSIONAL CONDUCT Rule 9 Code comparison, ¶ 1 (1983). See generally Comment, *supra* note \*, at 168-70 (discussing application of the Code to situations involving adverse subsequent representation).

43. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1983). Rule 1.9 provides:

A lawyer who has formerly represented a client in a matter shall not thereafter:

- (a) represent another person in the same or a substantially related matter in which that person's interests are adverse to the matters of the former client unless the former client consents after consultation; or
- (b) use information relating to the representation to the disadvantage of the former client . . . .

*Id.*

The comments indicate that Rule 1.7 should be consulted to determine whether the interests of the present and former client are adverse. *Id.* comment, ¶ 1. See also *Schloetter v. Railoc, Inc.*, 546 F.2d 706 (7th Cir. 1976). In *Schloetter*, the court held that adverseness is satisfied where the challenged attorney's client is opposing the attorney's former client in the challenged representation. *Id.* at 710.

The Model Rules incorporate the "substantial relationship" test, which the courts have read into the Code and its predecessor, the Canons of Ethics, for the

### 1. *The Substantial Relationship Test*

Generally, the courts prohibit adverse subsequent representation where there is a "substantial relationship" between the matters of the prior representation of the former client and the adverse subsequent representation.<sup>44</sup> In the absence of a substantial relationship, however, the courts will permit an adverse subsequent representation.<sup>45</sup>

past thirty years. For a discussion of the substantial relationship test, see *infra* notes 44-54 and accompanying text.

44. See, e.g., *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1266 (7th Cir. 1983) ("lawyer may not represent an adversary of his former client if the subject matter of the two representations are 'substantially related'"); *Duncan v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 646 F.2d 1020, 1028 (5th Cir.) (once a substantial relationship is proven by the former client, the court will irrebuttably presume that "relevant confidential information was disclosed during the former period of representation"), *cert. denied*, 454 U.S. 895 (1981); *Schloetter v. Railoc, Inc.*, 546 F.2d 706, 710 (7th Cir. 1976) ("where an attorney represents a party in a matter in which the adverse party is that attorney's former client, the attorney will be disqualified if the subject matter of the two representations are 'substantially related'"); *NCK Org. v. Bregman*, 542 F.2d 128, 134 (2d Cir. 1976) (moving party need not show that confidences were actually disclosed, but must show only that the matters are substantially related to matters in the previous representation); *Ceramco, Inc. v. Lee Pharmaceuticals*, 510 F.2d 268, 271 (2d Cir. 1975) (dictum) (disqualification is "a necessary and desirable remedy" where adverse subsequent representation by an attorney embraces substantially related matters to those of former representation); *Canadian Gulf Lines v. Triton Int'l Carriers*, 434 F. Supp. 691, 693 (D. Conn. 1976) ("The law in this Circuit is clear that 'where any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited.'"); see also MODEL RULES OF PROFESSIONAL CONDUCT DR 5-109 legal background (Alternative Draft/Code of Professional Responsibility Format, May 30, 1981) (indicates that most courts have adopted the substantial relationship test); Liebman, *supra* note \*, at 998 (substantial relationship test is accepted standard for disqualification under Canon 4).

45. See, e.g., *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 722 (7th Cir. 1982) (absent substantial relationship, no ethical problem exists); *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 440 F. Supp. 193, 208 (N.D. Ohio 1976) (absent proof of a substantial relationship, it is "axiomatic that no ethical problem results") (citing *Canon v. United States Acoustics Corp.*, 398 F. Supp. 209, 222 (N.D. Ill. 1975), *aff'd in part and reversed in part on other grounds*, 532 F.2d 1118 (7th Cir. 1976) (per curiam)), *aff'd*, 573 F.2d 1310 (6th Cir. 1977), *cert. denied*, 435 U.S. 996 (1978); *United States v. Standard Oil Co.*, 136 F. Supp. 345, 354 (S.D.N.Y. 1955) (attorney need not be disqualified unless a substantial relationship exists between the matters in which he represented the former client and the matters involved in the challenged action). See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 legal background (Proposed Final Draft, May 30, 1981) ("The [substantial relationship] test does not prohibit subsequent adverse representation in an unrelated matter.").

It is suggested that the rationale underlying the courts' use of the substantial relationship test rests upon the perceived distinction between the "client" and the "client's interests" (those interests of the client which the attorney represented). It is only after the attorney-client relationship is terminated that the courts are able to make such a distinction because the "interests" which the attorney represented have become "fixed." *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386-97 (2d Cir. 1976).



When applying the substantial relationship test, the courts most frequently cite *T.C. Theatre Corp. v. Warner Brothers Pictures, Inc.*<sup>46</sup> The potential conflict of interest arose in *T.C. Theatre* because Universal, a party defendant to Warner Brothers, was a former client of the attorney representing T.C. Theatre.<sup>47</sup> In determining whether the challenged attorney should be disqualified, the court examined Canon 6 of the Canons of Professional Ethics<sup>48</sup> (the predecessor of Canon 4 of the Code) and Rule 1.9 of the Model Rules.<sup>49</sup> The court construed Canon 6 to support the proposition that “where any substantial relationship can be shown

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46. 113 F. Supp. 265 (S.D.N.Y. 1953). For other discussion of *T.C. Theatre*, see Liebman, *supra* note \*, at 1001-03; Current Decisions, *Attorney and Client—Representation of Adverse Interests Prohibited*, 26 ROCKY MTN. L. REV. 195 (1953-54); Note, *New Direction*, *supra* note \*, at 133-34.

The reported opinions often credit *T.C. Theatre* as originating the substantial relationship test. Prior to *T.C. Theatre*, however, numerous cases expounded similar, if not identical, standards. See, e.g., *Porter v. Huber*, 68 F. Supp. 132 (W.D. Wash. 1946) (adverse subsequent representation will not be permitted where subsequent representation involves “same matters” as previous representation); *In re Maltby*, 68 Ariz. 153, 202 P.2d 902 (1949) (per curiam) (adverse subsequent representation should not be permitted in same cause of action); *Federal Trust Co. v. Damron*, 124 Neb. 655, 247 N.W. 589 (1933) (adverse subsequent representation involving same subject matter as prior representation is not permitted); *People v. Gerold*, 265 Ill. 448, 107 N.E. 165 (1914) (adverse subsequent representation involving the same general matter as was involved in the prior representation is prohibited). For a further discussion of the common law history of disqualification of counsel from representing interests which are adverse to a former client, see Note, *Disqualification of Attorneys for Representing Interests Adverse to Former Clients*, 64 YALE L.J. 917, 917-21 (1955).

A possible explanation for the fact that so many decisions cite *T.C. Theatre* as the origin of the substantial relationship test may be that the prior cases all dealt with attorneys who undertook adverse subsequent representations in the same matters, while *T.C. Theatre* involved matters which were not quite identical. See *T.C. Theatre*, 113 F. Supp. at 268-69. Additionally, most of the prior decisions were state court actions and *T.C. Theatre* arose in a federal court. Thus, at the very least, *T.C. Theatre* is the first federal decision to utilize the substantial relationship test.

47. 113 F. Supp. at 266-67. T.C. Theatre sued Warner Brothers, Universal, and various other studios for antitrust violations. *Id.* at 266-68. The attorney who T.C. Theatre retained as co-counsel had previously represented Universal as defense counsel in other antitrust litigation. *Id.*

48. CANONS OF PROFESSIONAL ETHICS Canon 6 (1937). Canon 6 provides in pertinent part:

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

*Id.*

49. 113 F. Supp. at 268 (citing CANONS OF PROFESSIONAL ETHICS Canon 6 (1951)). The court added in a footnote, “The Canons of Ethics of the American Bar Association . . . have been adopted by a rule of this court.” *Id.* at 268 n.4. See also *Emle Indus. v. Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973). In *Emle*, the court explained that Canon 4 implicitly incorporates the admonition embodied in old Canon 6. *Id.*

between the subject matter of a former representation and that of a subsequent representation, the latter will be prohibited."<sup>50</sup> Upon determining that a substantial relationship existed between the attorney's previous representation of Universal and his challenged representation of T.C. Theatre, the court disqualified the attorney from continuing to represent T.C. Theatre.<sup>51</sup>

While the courts in every circuit have applied the "substantial relationship" test for the past thirty years,<sup>52</sup> there are no uniformly accepted rules for determining what facts establish a substantial relationship.<sup>53</sup>

50. 113 F. Supp. at 268 (footnote omitted).

51. *Id.* at 271.

52. See, e.g., *Kevlik v. Goldstein*, 724 F.2d 844, 850 (1st Cir. 1984); *Schiessle v. Stephens*, 717 F.2d 417, 420 (7th Cir. 1983); *Trone v. Smith*, 621 F.2d 994, 998 (9th Cir. 1980); *Arkansas v. Dean Foods Prods.*, 605 F.2d 380, 383 (8th Cir. 1979); *In re Yarn Processing Patent Validity Litig.*, 530 F.2d 83, 89 (5th Cir. 1976); *International Elec. Corp. v. Flanzer*, 527 F.2d 1288, 1291 (2d Cir. 1975); *Redd v. Shell Oil Co.*, 518 F.2d 311, 315 (10th Cir. 1975); *Richardson v. Hamilton Int'l Corp.*, 469 F.2d 1382, 1385 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973); *Consolidated Theatres, Inc. v. Warner Bros. Circuit Mngmt. Corp.*, 216 F.2d 920, 924 (2d Cir. 1954). See generally Annot., 56 A.L.R. FED. 189 (1982) (discusses disqualification of a firm for undertaking an adverse subsequent representation); Annot., 51 A.L.R. FED. 678 (1981) (discusses the propriety of a firm undertaking a representation which is adverse to the interests of a former client of an attorney in that firm).

53. See *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 758 (2d Cir. 1975) (Adams, J., concurring). In *Silver Chrysler*, Judge Adams stated that "the question of a 'substantial relationship' between the two matters is not one whose dimensions are delineated with mathematical precision." *Id.* See also *Industrial Parts Distrib., Inc. v. Fram Corp.*, 504 F. Supp. 1194 (D. Kan. 1981); *Renshaw v. Ravert*, 460 F. Supp. 1089 (E.D. Pa. 1978). A perfect example of the lack of a uniform standard among the courts for applying the substantial relationship test is revealed in *Industrial Parts*, where the court attempted to summarize the various decisions concerning what constitutes a substantial relationship. 504 F. Supp. at 1196-97. The court found that the Second Circuit requires "issues" to be "identical" or "essentially the same" in order for a "substantial relationship" to exist. *Id.* at 1197 (citing *Government of India v. Cook Indus.*, 569 F.2d 737, 740 (2d Cir. 1978)). The Sixth Circuit, the court found, requires that "matters" embraced in the two suits be substantially related, but then noted that the circuit fails to reveal how it determines whether the matters are substantially related. *Id.* (citing *General Elec. Co. v. Valeron Corp.*, 608 F.2d 265, 267 (6th Cir. 1979), *cert. denied*, 445 U.S. 930 (1980)). After examining the decisions of the Fifth and Seventh Circuits, the court concluded that these circuits do not distinguish between "issues" and "matters." *Id.* (citing *Church of Scientology v. McLean*, 615 F.2d 691 (5th Cir. 1980); *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978)). The *Industrial Parts* court concluded:

Irrespective of the terms employed in the formulation of the standard, the basic inquiry is whether during the former representation the attorney might have acquired privileged information related to the subsequent representation. . . . To determine whether such a possibility exists . . . the Court must 'examine the facts, circumstances and legal issues' of the previous representation.

*Id.* (emphasis in original) (quoting *Realco Servs. Inc. v. Holt*, 479 F. Supp. 867, 872 (E.D. Pa. 1979)) (further citations omitted).

The courts do agree, however, that the movant bears the burden of proving the existence of a substantial relationship.<sup>54</sup>

## 2. *The Presumption of Disclosed Confidences*

The courts generally agree that once the moving party meets its burden of establishing a substantial relationship between the current and previous representations, the moving party gains the benefit of the presumption of disclosed confidences—a presumption that the former client disclosed relevant confidential information to the challenged attorney during the course of the previous representation. There is a split of authority among the courts, however, whether the presumption is rebuttable.<sup>55</sup>

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It is suggested that the *Industrial Parts* court failed to clarify the standard for determining when two representations are substantially related. For a further discussion of the confusion surrounding what constitutes a substantial relationship, see Comment, *supra* note \*, at 173-74.

The Seventh Circuit has developed a more structured test for determining whether a substantial relationship exists. The courts in that circuit follow a “three level inquiry” which involves (1) reconstructing the facts of the scope of the prior legal representation; (2) determining “whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters”; and (3) determining “whether that information is relevant to the issues raised in the litigation pending against the former client.” *LaSalle Nat’l Bank v. County of Lake*, 703 F.2d 252, 255-56 (7th Cir. 1983) (citing *Novo Terapeutisk Laboratorium v. Baxter Travesol Labs., Inc.*, 607 F.2d 186, 189 (7th Cir. 1979) (en banc); *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 225 (7th Cir. 1978)).

54. The majority of courts that have addressed the issue appear to agree that while the moving party bears the burden of proving the existence of a substantial relationship, the courts will resolve “close questions” in the movant’s favor. See, e.g., *Fleischer v. A.A.P., Inc.*, 163 F. Supp. 548 (S.D.N.Y. 1958), *appeal dismissed*, 264 F.2d 515 (2d Cir.), *cert. denied*, 359 U.S. 1002 (1959). In *Fleischer*, the court held that a motion to disqualify counsel for a conflict of interest should be decided in favor of the challenged counsel “[o]nly where it is clearly discernible that the issues involved in the current case do not relate to matters in which the attorney formerly represented the adverse party . . . .” *Id.* at 553. The court stated that “should the question be close, it should be resolved in favor of the client.” *Id.* See also *Cannon v. United States Acoustics Corp.*, 398 F. Supp. 209, 224 (N.D. Ill. 1975) (burden of proving a substantial relationship is on the moving party but close questions “should be resolved in the movant’s favor”), *aff’d in part and rev’d in part on other grounds*, 532 F.2d 1118 (7th Cir. 1976) (per curiam).

Compare *Realco Servs., Inc. v. Holt*, 479 F. Supp. 867, 872 n.4 (E.D. Pa. 1979) (rejecting notion that doubt should be resolved in favor of disqualification, finding “[i]t is easier to find a ‘doubt’ than to resolve difficult questions of law and ethics”) with *IBM Corp. v. Levin*, 579 F.2d 271, 283 (3d Cir. 1978) (“courts have gone so far as to suggest that doubts as to the existence of an asserted conflict of interest should be resolved in favor of disqualification”) and *United States v. Standard Oil Co.*, 136 F. Supp. 345, 364 (S.D.N.Y. 1955) (attorney should be disqualified if “there is a close question as to whether particular confidences of one former client will be pertinent to the instant case”).

55. A majority of the courts have held that the presumption of disclosed confidences is irrebuttable, and thereby have disqualified the challenged attor-

In *T.C. Theatre*, Judge Weinfeld stated:

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. It will not inquire into their nature and extent . . . .

To compel the client to show . . . the actual confidential matters previously entrusted to the attorney and their possible value to the present client would tear aside the protective cloak drawn about the lawyer-client relationship. For the Court to probe further and sift the confidences in fact revealed would require the disclosure of the very matters intended to be protected by the rule.<sup>56</sup>

Thus, according to the *T.C. Theatre* court, the presumption of disclosed confidences is irrebutable.<sup>57</sup> As Judge Weinfeld indicated, the

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ney once a substantial relationship was established. *See, e.g.,* *Kevlik v. Goldstein*, 724 F.2d 844, 851 (1st Cir. 1984); *Novo Terapeutisk Laboratorium v. Baxter Travenol Labs.*, 607 F.2d 186, 197 (7th Cir. 1979) (en banc); *Arkansas v. Dean Foods Prods. Co.*, 605 F.2d 380, 383 (8th Cir. 1979); *Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 252 (5th Cir. 1977); *Hull v. Celandese Corp.*, 513 F.2d 568 (2d Cir. 1975); *Emle Indus. v. Patentex, Inc.*, 478 F.2d 562, 570 (2d Cir. 1973); *Richardson v. Hamilton Int'l Corp.*, 469 F.2d 1382, 1385 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973); *Chugach Elec. Ass'n v. United States Dist. Court*, 370 F.2d 441, 444 (9th Cir. 1966), *cert. denied*, 398 U.S. 820 (1967); *Motor Mart, Inc. v. Saab Motors, Inc.*, 359 F. Supp. 156, 157-58 (S.D.N.Y. 1973); *Marco v. Dulles*, 169 F. Supp. 622, 629 (S.D.N.Y. 1959).

Some courts, however, have held that the presumption of disclosed confidences is rebuttable in certain circumstances. *Schiessle v. Stephens*, 717 F.2d 417, 420 (7th Cir. 1983); *LaSalle Nat'l Bank v. County of Lake*, 703 F.2d 252, 256 (7th Cir. 1983); *Lemelson v. Synergistics Research Corp.*, 504 F. Supp. 1164, 1167 (S.D.N.Y. 1981) (citing *Government of India v. Cook Indus.*, 569 F.2d 737, 741 (2d Cir. 1978) (Mansfield, J., concurring)); *see also* *Government of India v. Cook Indus.*, 569 F.2d 737, 741 (2d Cir. 1978) (Mansfield, J., concurring).

One other district court in the Second Circuit has followed an approach which is contrary to the established rule that the existence of a substantial relationship requires the disqualification of the challenged attorney. *See Fleischer v. A.A.P., Inc.*, 163 F. Supp. 548 (S.D.N.Y. 1958), *appeal dismissed*, 264 F.2d 515 (2d Cir.), *cert. denied*, 359 U.S. 1002 (1959). In *Fleischer*, the court refused to disqualify the defendant's attorney even though there existed a substantial relationship between a previous representation by the challenged attorney of the moving party and a cause of action involved in the challenged action. 163 F. Supp. at 562. Instead of disqualifying the challenged attorney the court dismissed the cause of action which gave rise to the conflict of interest, concluding that the cause of action was interposed solely for the purpose of disqualifying the counsel of the opposing party. *Id.* at 562-69.

56. 113 F. Supp. at 268-69.

57. *Id.* *See also* *Novo Terapeutisk Laboratorium v. Baxter Travenol Labs.*, 607 F.2d 186, 191 (7th Cir. 1979) (en banc) (*T.C. Theatre* "clearly contemplates an irrebutable presumption"); *Silver Chrysler Plymouth v. Chrysler Motor Corp.*, 518 F.2d 751, 754 (2d Cir. 1975) (presumption of disclosed confidences is irrebutable under *T.C. Theatre*); *Emle Indus. v. Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973) (cites *T.C. Theatre* for the proposition that "it is the court's

court must adopt an irrebuttable presumption in order to protect the former client from being forced to disclose the very confidences he desired to protect when he raised the motion to disqualify his former counsel.<sup>58</sup>

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duty to order the attorney disqualified" once a substantial relationship is proved); Liebman, *supra* note \*, at 1001 ("at least some of Judge Weinfeld's language effectively established a conclusive presumption of knowledge of confidences on the subject of the lawyer's subsequent representation once the 'substantially related' test was met") (footnote omitted); Comment, *supra* note \*, at 174. While Judge Weinfeld's opinion does not state expressly that there is an irrebuttable presumption, his opinion does state that an attorney must be disqualified from undertaking a challenged representation if the moving party successfully establishes a substantial relationship between the previous and current representations. See *T.C. Theatre*, 113 F. Supp. at 268-69. Therefore, it is suggested that Judge Weinfeld's opinion should be read to state either that proof of a substantial relationship is equivalent to proof of a conflict of interest or that proof of a substantial relationship raises an irrebuttable presumption of a conflict of interest.

58. 113 F. Supp. at 269. Judge Weinfeld's reasoning seems to have been premised upon the belief that a former client necessarily would have to reveal the very confidences he disclosed to his former attorney in order to prove that substantially related confidences actually were disclosed. *Id.* This reasoning has been repeated by many courts in discussing the issue since *T.C. Theatre*. See, e.g., *NCK Org. v. Bregman*, 542 F.2d 128, 135 (2d Cir. 1976) (former client may not be able to prove actual disclosure for fear that doing so will result in the disclosure of the very confidences the client desires to protect); *Hull v. Celanese Corp.*, 513 F.2d 568, 570 n.8 (2d Cir. 1975) (a hearing would be self-defeating since it would be necessary to reveal to the challenged firm in some specificity the extent of the movant's disclosures to the challenged attorney); *Realco Servs., Inc. v. Holt*, 479 F. Supp. 867, 872 (E.D. Pa. 1979) ("client's confidences . . . would end up on the public record—and perhaps on the pages of the Federal Supplement); Note, *Attorney's Conflict of Interests: Representation of Interests Adverse to That of a Former Client*, 55 B.U.L. REV. 61, 76 (1975) (court's inquiry into the nature of disclosed confidences would undermine the purpose of disqualification to protect the confidentiality of the attorney-client privilege).

A few courts have suggested the alternative of an *in camera* review of the former client's evidence of his alleged disclosures to the challenged attorney of substantially related confidential information. See, e.g., *United States v. Wilson*, 497 F.2d 602, 606 (8th Cir.) (after conducting *in camera* hearing, court determined that challenged attorney had not received any substantially related confidences of former client), *cert. denied*, 419 U.S. 1069 (1974); *Consolidated Theatres, Inc v. Warner Bros. Circuit Mngmt. Corp.*, 216 F.2d 920, 926 & n.7 (2d Cir. 1954) (acknowledging possibility of *in camera* proceeding, but rejecting its application in complicated cases such as the one at bar). See also *Bricheno v. Thorpe*, 37 Eng. Rep. 864 (1821) ("before thus shutting up the sources of employment, it was incumbent on the Court to see that there was something more than hypothetical mischief to be guarded against"); Note, *Ethical Considerations*, *supra* note \*, at 539 (supporting *in camera* proceeding, because judge is given more flexibility to avoid disqualification where an irrebuttable presumption would be unfair); Note, *Legal Ethics—Attorney Who had Worked on Antitrust Suits for Clients of Firm with Which he was then Associated Disqualified from Prosecuting a Similar Suit Against Them*, 68 HARV. L. REV. 1084 (1955) (supporting use of *in camera* proceeding where disqualification would produce a harsh result, such as where an attorney is prevented from practicing his specialty, especially and where the attorney can prove that the information he received was only of a general character). *But see Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 224

Practically every court has approved of the use of an irrebuttable presumption of disclosed confidences to decide motions to disqualify attorneys from undertaking an adverse subsequent representation.<sup>59</sup> Two decisions by the Seventh Circuit Court of Appeals, a decision by the Second Circuit Court of Appeals, and a district court decision within the Second Circuit, however, appear to reject the irrebuttable presumption in favor of a rebuttable one.<sup>60</sup>

#### a. The Seventh Circuit Decisions

In *LaSalle National Bank v. County of Lake*,<sup>61</sup> the Seventh Circuit acknowledged that an attorney should be permitted an opportunity to rebut the presumption of disclosed confidences. *LaSalle* involved a situation where an attorney, Seidler, left his position as a government attorney and joined the private firm of Rudnick & Wolfe as an associate.<sup>62</sup> A few months after Seidler joined the firm, Rudnick & Wolfe filed suit on behalf of LaSalle National Bank against the County of Lake, Seidler's former employer.<sup>63</sup> After the County moved to have both Seidler

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n.3 (7th Cir.) (irrebuttable presumption should be utilized to avoid unsatisfactory nature of evidence obtained in "reliance on *ex parte* representations made *in camera* by the party seeking disqualification"), *cert. denied*, 439 U.S. 955 (1978).

The courts which have supported *in camera* proceedings overlook the fact that the client may wish to keep his confidences from reaching the judge who is trying the action, as well as from the opposition. See Note, *supra* note 46, at 926. It is suggested that one feasible alternative might be to implement a procedure requiring an *in camera* hearing to be conducted by a judge other than the judge who is trying the action.

59. See, e.g., *Kevlik v. Goldstein*, 724 F.2d 844, 850-51 (1st Cir. 1984) (once the former client proves the existence of a substantial relationship, the challenged attorney must be disqualified for a conflict of interest based on the actual or potential use of privileged information); *Duncan v. Merrill Lynch, Pierce, Fenner & Smith Co.*, 646 F.2d 1020, 1028 (5th Cir. 1981) ("Once the former client proves that the subject matters of the present and prior representations are 'substantially related,' the court will irrebuttably presume that relevant confidential information was disclosed during the former period of representation."); *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 223 (7th Cir. 1978) ("where an attorney represents a party in a matter in which the adverse party is that attorney's former client, the attorney will be disqualified if the subject matter of the two representations are 'substantially related'"); *Silver Chrysler Plymouth v. Chrysler Motor Corp.*, 518 F.2d 751, 754 (2d Cir. 1975) (adopting *T.C. Theatre* approach that satisfaction of the substantial relationship tests results in disqualification without regard to further proof of actual disclosure); *Emle Indus. v. Patentex, Inc.*, 478 F.2d 562, 574 (2d Cir. 1973) (once the movant establishes the existence of a substantial relationship, "we need not inquire whether [the challenged attorney] in fact had access to confidential information").

60. See *Schiessle v. Stephens*, 717 F.2d 417 (7th Cir. 1983); *LaSalle Nat'l Bank v. County of Lake*, 703 F.2d 252 (7th Cir. 1983); *Government of India v. Cook Indus.*, 569 F.2d 737 (2d Cir. 1978); *Lemelson v. Synergistics Research Corp.*, 504 F. Supp. 1164 (S.D.N.Y. 1981).

61. 703 F.2d 252 (7th Cir. 1983).

62. *Id.* at 254.

63. *Id.* at 254-55. Seidler served as Assistant State's Attorney in Lake County from 1976 until January 31, 1981. *Id.* at 253. While Seidler was em-

and the firm disqualified, the district court granted the motion, and the court of appeals affirmed.<sup>64</sup>

The *LaSalle* court began its analysis of the disqualification of Seidler and his firm by focusing upon the substantial relationship test developed in *T.C. Theatre*.<sup>65</sup> In framing its analysis, the court stated,

The question before us in this case . . . is . . . solely whether there is a substantial relationship between the subject matter of the prior and present representation.

. . . If, after evaluating the facts of this case . . . we find that such a substantial relationship did exist, we are entitled to presume that the attorney received confidential information during his prior representation.<sup>66</sup>

The court added, "This presumption, however, is a rebuttable one."<sup>67</sup>

After considering the evidence that Seidler introduced in the district court to rebut the presumption of disclosed confidences, the court

employed by the County of Lake, he reviewed documents relevant to the development of certain property which was the subject of the *LaSalle* litigation. *Id.* at 254. Seidler contended that he never wrote a legal opinion concerning the property, but he admitted that he was exposed to several documents relating to the property. *Id.*

64. *Id.* at 259.

65. *Id.* at 255 (citing *T.C. Theatre*, 113 F. Supp. 265 (S.D.N.Y. 1953)). The court set forth the following "three-level inquiry" for determining whether a substantial relationship exists:

First, the trial judge must make a factual reconstruction of the scope of the prior legal representation. Second, it must be determined whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters. Third, it must be determined whether that information is relevant to the issues raised in the litigation pending against the former client.

*Id.* at 255-56 (citing *Novo Therapeutisk Laboratorium v. Baxter Travenol Labs., Inc.*, 607 F.2d 186, 195 (7th Cir. 1979) (en banc)); *Westinghouse Elec. Co. v. Gulf Oil Corp.*, 588 F.2d 221, 225 (7th Cir.), cert. denied, 439 U.S. 955 (1978)). For a further discussion of the Seventh Circuit's "three-level inquiry" and of the various tests applied by other courts to determine the existence of a substantial relationship, see *supra* note 53.

66. *Id.* at 255-56 (citing *Schloetter v. Railoc, Inc.*, 546 F.2d 706 (7th Cir. 1976)).

67. *Id.* at 256 (citing *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 722 (7th Cir. 1982); *Novo Therapeutisk Laboratorium v. Baxter Travenol Labs.*, 607 F.2d 186, 197 (7th Cir. 1979) (en banc)). The court explained that a strict standard of proof must be applied when determining whether the challenged attorney has rebutted the presumption, stating that "any doubts as to the existence of an asserted conflict of interest must be resolved in favor of disqualification." *Id.* at 257 (citing *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 225 (7th Cir.), cert. denied, 439 U.S. 955 (1978)). Additionally, the court offered three criteria to aid the courts in deciding whether the presumption has been rebutted: 1) the size of the attorney's firm; 2) the attorney's area of specialization; and 3) the attorney's position within the firm. *Id.* (citing *Freeman*, 689 F.2d at 723). The court did not explain how each factor should be figured into the decision.

of appeals concluded that the presumption was not "clearly and persuasively rebutted."<sup>68</sup>

About six months after *LaSalle* was decided, another panel of the Seventh Circuit decided *Schiessle v. Stephens*.<sup>69</sup> *Schiessle* arose from an antitrust suit by the plaintiff, Eleanor Schiessle, against eighteen defendants, including Arthur, Carl, and Paul Swanson.<sup>70</sup> The act relevant to the disqualification question was that King, a partner in the firm representing the Swanson defendants, left his firm to become a partner at the firm representing the plaintiff.<sup>71</sup> After the Swansons threatened to move for disqualification of King's new firm, the firm filed a motion with the district court for a declaration of qualification.<sup>72</sup>

In affirming the district court order disqualifying King's firm from representing Schiessle, the court of appeals found King's previous representation of the Swansons and his current representation of Schiessle to be substantially related.<sup>73</sup> After establishing that the two representations were substantially related, the court stated, "[W]e must determine whether the attorney whose change of employment created the disqualification issue was actually privy to any confidential information his prior firm received from the party now seeking disqualification of his present firm."<sup>74</sup> Thus, the court failed to presume irrebuttably that the Swansons disclosed confidences to King, even though King had actually par-

68. *Id.* at 257.

69. 717 F.2d 417 (7th Cir. 1983). *Schiessle* was decided by Circuit Judges Wood, Coffey, and Eschenbach. *Id.* at 418. *LaSalle* was decided by Circuit Judges Pell and Cudahy and Senior District Judge Bonsall, who was sitting by designation. *LaSalle*, 703 F.2d at 253.

70. 717 F.2d at 418. The action revolved around a plan by Stephens and the Swansons to condemn and redevelop property owned by Schiessle. *Id.*

71. *Id.*

72. *Id.* at 419. The Swansons' counsel threatened to move for the disqualification of Schiessle's counsel unless Schiessle agreed to dismiss the Swansons as defendants. *Id.* Schiessle refused to dismiss, and filed a motion for declaration of qualification as counsel for the plaintiff. *Id.*

In evaluating the evidence which the parties had submitted to the district court, the court of appeals noted that King averred in an affidavit that he had performed "some work on the present action" on behalf of the codefendants. *Id.* The court further recognized that King's affidavit averred that he "never filed either an appearance on behalf of the Swansons or an answer, nor did he conduct any 'detailed investigation into the case.'" *Id.* In addition, the court stated that an affidavit submitted by one of King's former partners

stands uncontradicted in its recital that King, while a partner at [his former firm], was (1) 'partner-in-charge' of representing the [codefendants] in the Schiessle litigation; (2) that King discussed the lawsuit on four occasions with [the codefendants]; and (3) that King had taken part in numerous discussions at [his former firm] regarding the . . . lawsuit.

*Id.* at 420-21.

73. *Id.* at 420. The court concluded: "[T]here is no dispute that the subject matter of the prior and present representations are substantially related—indeed the subject matter is identical." *Id.*

74. *Id.*



ticipated in his former firm's representation of the Swansons. The court's failure to clarify why it did not apply the irrebuttable presumption of disclosed confidences creates the appearance that the court endorses the repudiation of the presumption.<sup>75</sup>

Both *LaSalle* and *Schiessle* relied heavily upon *Novo Therapeutisk Laboratorium v. Baxter Travenol Labs.*<sup>76</sup> and *Freeman v. Chicago Musical Instrument Co.*<sup>77</sup> *Schiessle* also relied upon *Analytica, Inc. v. N.P.D. Research, Inc.*<sup>78</sup> It is suggested, however, that neither *Novo*, *Freeman* or *Analytica* support the propositions for which they are relied upon in *LaSalle* and *Schiessle*.

*Novo*, the first case in the Seventh Circuit Quintet, arose after an attorney left his firm and took with him one of the firm's clients, Baxter Travenol.<sup>79</sup> *Novo Therapeutisk* subsequently retained the attorney's former firm to represent it in a patent infringement action against Baxter Travenol.<sup>80</sup> After the attorney's former firm filed a motion to appear as counsel for *Novo Therapeutisk*, Baxter Travenol filed motions to disqualify the former firm.<sup>81</sup>

Sitting *en banc*, the Seventh Circuit held that the challenged repre-

75. It is possible that the court failed to presume that the Swansons disclosed confidences to King because the minimal work which King performed on behalf of the defendants at his former firm merely was a "peripheral representation," which courts in the Second and Ninth Circuits have recognized as falling short of the traditional "representation" giving rise to a conflict of interest. See, e.g., *Gas-A-Tron v. Union Oil Co.*, 534 F.2d 1322, 1325 (9th Cir. 1976) (per curiam) (former associate in large firm not disqualified where "no substantial relationship existed between the pending litigation and the matters upon which he worked for the client during his prior association"); *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 757 (2d Cir. 1975) (the role of a junior associate at a large law firm "cannot be considered 'representation' within the meaning of *T.C. Theatre Corp.*"). It is suggested, however, that such a conclusion would be contrary to the precedent developed in the Seventh Circuit. See, e.g., *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1318 (7th Cir.) (rejecting any legally significant distinction between "peripheral representation" at a large firm and "representation" at a small firm) (citing *Schloeter v. Railoc, Inc.*, 456 F.2d 706, 710 (7th Cir. 1976)), *cert. denied*, 439 U.S. 955 (1978). For a further discussion of the "peripheral representation" exception, see *infra* notes 178-79 and accompanying text.

76. 607 F.2d 186 (7th Cir. 1979) (*en banc*).

77. 689 F.2d 715 (7th Cir. 1982).

78. 708 F.2d 1263 (7th Cir. 1983).

79. 607 F.2d at 194.

80. *Id.* at 195.

81. *Id.* The issue in *Novo* was whether the court should disqualify *Novo Therapeutisk's* counsel on the ground that Baxter Travenol's attorney might have shared relevant confidences of Baxter Travenol with attorneys in his former firm. See *id.* at 196. The court framed its role as determining "to what extent the confidential information presumably received by [Baxter Travenol's attorney] must be imputed to other members of [his former firm]." *Id.* Thus, the issue was one of vicarious disqualification. For a further discussion of vicarious disqualification, see *infra* notes 131-216 and accompanying text.

sentation was not impermissible.<sup>82</sup> Of the presumption of disclosed confidences, the court stated, "Implicit . . . in the substantial relationship test is a presumption that an attorney who worked on a substantially related matter received confidences in connection therewith."<sup>83</sup> Thus, the *Novo* court agreed that a presumption of disclosed confidences arises upon proof of a substantial relationship. The court did not state expressly, however, whether the presumption of disclosed confidences is irrebuttable.<sup>84</sup> Instead, the court proceeded to discuss the more relevant issue of whether the presumption of *shared* confidences is rebuttable.<sup>85</sup> It is suggested that the court implicitly acknowledged that the presumption of disclosed confidences is irrebuttable, because (1) the two precedents which the court cited in its discussion of the presumption of disclosed confidences both recognize such a conclusion,<sup>86</sup> and (2) the court's latter discussion of the presumption of shared confidences suggests that it is preferable to irrebuttably presume that a client disclosed confidences to his attorney in a substantially related matter in order to "avoid any unseemly inquiry into the actual details of conversation between client and counsel."<sup>87</sup>

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82. *Id.* at 197.

83. *Id.* at 196 (citing *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 225-26 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978)).

84. After finding a substantial relationship between the firm's former representation of Baxter Travenol and the challenged representation of Novo Therapeutisk, the court proceeded to discuss the presumption of shared confidences, leaving open the question of whether the presumption of disclosed confidences is rebuttable. *See id.* at 197. The court did state, however, that if the attorney who represented Baxter Travenol had attempted to represent Novo Therapeutisk, "there is little doubt that a motion by Baxter to disqualify him would be granted." *Id.*

85. *Id.* at 196-97. For a discussion of the *Novo* court's treatment of the presumption of shared confidences, see *infra* notes 151-63 and accompanying text.

86. *See id.* at 196 (citing *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 225-26 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978); *Schloetter v. Railoc, Inc.*, 546 F.2d 706, 710 (7th Cir. 1976)). In *Schloetter*, the court recognized in dictum that the presumption of disclosed confidences is irrebuttable, stating that the court will not inquire into whether client confidences were disclosed to the attorney in the course of a former representation in a substantially related matter. 546 F.2d at 710. The *Westinghouse* court reached a similar conclusion two years later. 588 F.2d at 224.

87. *See* 607 F.2d at 197. The court reasoned as follows:

The more difficult question is . . . whether or not the presumption should be a rebuttable one. There are often good reasons for making the presumption of shared confidences irrebuttable. We generally do so at the first level (the presumption that confidences have been shared by a client in a substantially related matter) in order to avoid any unseemly inquiry into the actual details of conversations between client and counsel. In that situation, and no doubt in others, an irrebuttable presumption may also be required by the spirit of Canon 9 . . . .

*Id.* (citations omitted). Although the court referred to the presumption which generally is irrebuttable as a "first level" presumption of "shared" confidences, it is suggested that the court was actually referring to what this note has termed "the presumption of disclosed confidences." That the court described the first

Like *Novo*, *Freeman*, the second case in the Quintet, also failed to hold that the presumption of disclosed confidences is rebuttable.<sup>88</sup> In *Freeman*, an associate of the law firm representing Chicago Musical Instruments Co. (CMI), was formerly employed by the law firm representing Freeman.<sup>89</sup> Freeman's firm objected to CMI's chosen counsel, claiming that the associate had obtained disclosed confidences during his former association with the firm representing Freeman.<sup>90</sup> Because the proper resolution of the motion to disqualify counsel in *Freeman* involved an issue of vicarious disqualification as opposed to direct disqualification, the *Freeman* court did not discuss the presumption of disclosed confidences.

The Seventh Circuit decided *LaSalle* approximately six months after

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level presumption as "the presumption that confidences have been shared by a client" betrays the fact that the court was referring to the presumption of disclosed confidences and not the presumption of shared confidences, which pertains to disclosures between and among different attorneys within a firm.

The *Novo* court added to its discussion of whether the presumption should be rebuttable, "On the other hand, a rote reliance on irrebuttable presumptions may deny the courts the flexibility needed to reach a just and sensible ruling on ethical matters." *Id.* (citing *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 753 n.3 (2d Cir. 1975)) (quoting *United States v. Standard Oil Co.*, 136 F. Supp. 345, 367 (S.D.N.Y. 1955)). Neither *Silver Chrysler* nor *Standard Oil* involved the presumption of disclosed confidences, but both decisions involved decisions that the presumption of shared confidences should be rebuttable. See *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 754 (2d Cir. 1975) (presumption that an attorney formerly associated with a firm received confidential information transmitted by a client to other attorneys at the firm is rebuttable); *United States v. Standard Oil Corp.*, 136 F. Supp. 345, 362 (S.D.N.Y. 1955) (presumption that one attorney within an organization shared confidences with another attorney is rebuttable and must be decided on an *ad hoc* basis). Thus, insofar as the *Novo* court's discussion of the presumptions of shared and disclosed confidences rejected the further application of an irrebuttable presumption, it is suggested that the court rejected only the further application of an irrebuttable presumption of shared confidences, but that the court did not reject the further application of an irrebuttable presumption of disclosed confidences.

88. See 689 F.2d at 722. *Freeman* involved the question of whether the presumption "that an attorney has knowledge of the confidences and secrets of his [former] firm's clients is rebuttable." *Id.* Thus, *Freeman* did not involve the presumption of disclosed confidences, but turned on the court's application of the presumption of shared confidences. For a discussion of the presumption of shared confidences, see *infra* notes 131-216 and accompanying text.

89. *Id.* at 716-17. *Freeman* was represented by the firm of Dressler, Goldsmith, Shore, Sutker & Milnamow (Dressler), while CMI retained the firm of Hill, Van Santen, Steadman, Chiara & Simpson (Hill). *Id.* at 716. After CMI retained the firm of Fitch, Even, Tabin, Flannery & Welsh (Fitch) to act as cocounsel to the Hill firm, Freeman learned that an associate in the Fitch firm had been an associate at the Dressler firm during the time in which the Dressler firm was under retainer to Freeman. *Id.*

90. *Id.* at 717. CMI subsequently filed a motion requesting a declaration that the firm be allowed to continue its representation of CMI. *Id.*

*Freeman*.<sup>91</sup> Two months after *LaSalle* was decided, another panel of the Seventh Circuit decided *Analytica*.<sup>92</sup> The *Analytica* court upheld the disqualification of an entire firm from representing a client whose interests were adverse to those of a former client of the firm.<sup>93</sup> In so doing, the *Analytica* court held that the presumption of disclosed confidences is irrebuttable.<sup>94</sup> While the *Analytica* court cited *LaSalle* as support for various propositions, the court failed to acknowledge the *LaSalle* court's holding that the presumption of disclosed confidences is rebuttable.<sup>95</sup>

It is suggested that insofar as the *LaSalle* and *Schiessle* courts purport to rest their decisions upon any propositions developed in *Novo* or *Freeman*, the decisions are unsupported by those cases. *Novo* implicitly recognized that the presumption of disclosed confidences is irrebuttable,<sup>96</sup> and *Freeman* contains no discussion whatsoever concerning the presumption of disclosed confidences.<sup>97</sup> It is further suggested that *Analytica* fails to support *Schiessle*, because *Analytica*, like *Novo*, recognizes that the presumption of disclosed confidences is irrebuttable.<sup>98</sup>

91. *LaSalle* was decided on March 29, 1983, while *Freeman* was decided on September 27, 1982.

92. 708 F.2d 1263 (7th Cir. 1983). *Analytica* was decided by Circuit Judges Posner and Coffey and Senior District Judge Campbell. *Id.* at 1265. Circuit Judge Coffey wrote a lengthy dissent to the opinion. *Id.* at 1270-80 (Coffey, J., dissenting). The *Freeman* panel also included Circuit Judges Posner and Coffey, but was joined by Chief Judge Cummings, who wrote the court's opinion. See *Freeman*, 687 F.2d at 716.

93. 708 F.2d at 1265. The case arose when *Analytica* retained the firm of Schwartz & Freeman to represent it in an antitrust suit against NPD. *Id.* Prior to the suit, Richard Fine, a partner in Schwartz & Freeman, had been retained by NPD. *Id.* During the course of his employment by NPD, Fine obtained confidential information about the financial condition, sales trends, and management of NPD. *Id.* at 1267. When Schwartz & Freeman attempted to prosecute the suit for *Analytica*, NPD moved to have the firm disqualified as a result of Fine's prior involvement with NPD. *Id.* at 1266.

94. *Id.* at 1266-68.

95. Of the presumption of disclosed confidences, the court stated:

A lawyer may not represent an adversary of his former client if the subject matter of the two representations is "substantially related," which means: if the lawyer could have obtained confidential information in the first representation that would have been relevant in the second. It is irrelevant whether he actually obtained such information. . . .

. . . . If the "substantial relationship" test applies . . . "it is not appropriate for the court to inquire into whether actual confidences were disclosed."

708 F.2d at 1266-67 (citations omitted). For a further discussion of *Analytica*, see *infra* notes 144-48 and accompanying text.

96. For a discussion of the *Novo* court's implicit recognition that the presumption of disclosed confidences is irrebuttable, see *supra* notes 85-86.

97. For a discussion of *Freeman*, see *supra* notes 87-89 and accompanying text.

98. For a discussion of *Analytica*, see *supra* notes 91-94 and accompanying text.

While *LaSalle* and *Schiessle* are unsupported by either *Novo*, *Freeman*, or *Analytica*, and appear to be inconsistent with the implication of both *Novo* and *Analytica*, there is an interpretation of *LaSalle* and *Schiessle* which is consistent with the discussions of the law in *Novo*, *Freeman*, and *Analytica*. It is suggested that the decisions should be read to support the application of a rebuttable presumption of disclosed confidences only where the qualification of the attorney who actually represented the former client is not at issue.<sup>99</sup> Any other reading of the cases would be contrary to the very precedent upon which the decisions relied.<sup>100</sup>

#### b. The Second Circuit Decisions

Within the Second Circuit, the only support for a rebuttable presumption of disclosed confidences can be found in a concurring opinion by Judge Mansfield in *Government of India v. Cook Industries*<sup>101</sup> and in a

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99. The issue in *LaSalle* and *Schiessle* was not whether the attorney who had switched firms should be disqualified from the challenged representation against his former client. Seidler's personal qualification to represent LaSalle National Bank was never at issue in *LaSalle* as Seidler's new firm had screened Seidler from other members of the firm who were participating in the representation. 703 F.2d at 255. Similarly, in *Schiessle*, King averred in his affidavit that he did not participate in the challenged representation from the time he joined his new firm. 717 F.2d at 419. Thus, the issue in both *LaSalle* and *Schiessle* was whether the presumption of disclosed confidences should be rebuttable to permit other attorneys at the firm of an attorney who switched firms to undertake a representation against a former client of the attorney who switched firms. It is suggested that both *LaSalle* and *Schiessle* represent the proper analysis of a motion to disqualify counsel vicariously as a result of confidences alleged to be possessed by an attorney who switched firms. For a discussion of the holdings of both *LaSalle* and *Schiessle*, see *infra* notes 183-91 and accompanying text.

Another possible explanation for the action taken by the *LaSalle* court lies in the fact that the potential conflict of interest in *LaSalle* arose from Seidler's previous employment by the government. See 703 F.2d at 256. Many courts faced with similar circumstances have recognized a legally significant distinction between cases where the challenged attorney was formerly a government attorney and situations where the attorney formerly worked at another firm. See, e.g., *Greitzer & Locks v. Johns-Manville Corp.*, No. 81-1379 (4th Cir. Mar. 5, 1982) (former Justice Department attorney's new firm permitted to undertake representation which attorney would have been disqualified from undertaking where attorney was screened from rest of firm); *Kesselhaut v. United States*, 555 F.2d 791 (Ct. Cl. 1977) (per curiam) (same; former government attorney); see also King & Pitts, *Suing a Former Client*, CAL. LAW., Oct. 1983, at 22. King & Pitts state, "Screening the attorney for the former client from the existing matter, which will then be handled by another lawyer in the firm, is a mechanism that is often proposed to avoid conflict of interest. Almost invariably the courts reject it. The sole exception involves government attorneys." *Id.* at 23. For a discussion of the difference between situations where a former government attorney is the potential cause for disqualification and situations where disqualification is sought because of information allegedly possessed by an attorney who switched from one private law firm to another, see *infra* notes 198-99 and accompanying text.

100. For a discussion of *Novo*, *Freeman*, and *Analytica*, see *supra* notes 79-94 and accompanying text.

101. 569 F.2d 737 (2d Cir. 1978).

district court opinion in *Lemelson v. Synergistics Research Corp.*<sup>102</sup>

*Government of India* involved a paradigm situation in which the presumption of disclosed confidences applies: an attorney, Meeker, left one law firm, where he represented Cook Industries, and joined another firm, where he was assigned to represent the Government of India in its suit against Cook Industries.<sup>103</sup> In affirming the district court's disqualification of Meeker, the court of appeals focused first upon whether the two representations were substantially related.<sup>104</sup> After concluding that they were, the court focused its inquiry on "whether Meeker's involvement in the prior case was such that he would have had access to relevant privileged information."<sup>105</sup> Upon determining that the record supported a finding that Meeker was directly involved in his firm's representation of Cook Industries, the Second Circuit concluded that the disqualification order was within the district court's discretion.<sup>106</sup> The court of appeals based its decision on the "well established principle" that "a court should not require proof that an attorney actually had access to or received privileged information while representing the client in a prior case."<sup>107</sup> Thus, the *Government of India* court applied the irrebuttable presumption of disclosed confidences once it was convinced that the challenged attorney had previously represented the movant in a substantially related matter.<sup>108</sup>

102. 504 F. Supp. 1164 (S.D.N.Y. 1981).

103. 569 F.2d at 738.

104. *Id.* at 739-40. The court found that Meeker's prior representation of Cook Industries and his current representation of the Government of India were substantially related because the two representations involved the same nexus of information. *Id.* The court stated, "It would be difficult to think of a closer nexus between issues." *Id.* at 739.

105. *Id.* at 740.

106. *Id.* (citing *Hull v. Celanese Corp.*, 513 F.2d 568, 571-72 (2d Cir. 1975); *Emle Indus. v. Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973); *T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265, 269 (S.D.N.Y. 1953)).

107. *Id.*

108. It should be noted that the opinion in *Government of India* does not expressly state that the presumption of disclosed confidences is irrebuttable. Under traditional analysis, the court should have ended its inquiry after determining that "the district court correctly held that the issues in the prior and present cases were substantially related." *Id.* The court went on, however, to determine "whether Meeker's involvement in the prior case was such that he would have had access to relevant privileged information." *Id.* This language would seem to indicate that the court did not consider the presumption of disclosed confidences to be irrebuttable, despite the fact that the court also stated, "[A] court should not require proof that an attorney had access to or received privileged information while representing the client in a prior case." *Id.*

It is suggested that the *Government of India* court did, in fact, apply an irrebuttable presumption of disclosed confidences. It is further suggested that the above quoted language, referring to the further determination which a court must make, referred to the determination of whether the challenged attorney actually represented the party seeking disqualification or was merely peripherally involved in the party's prior representation.

*Lemelson* lends further support for the proposition that *Government of India*

In a brief concurring opinion to *Government of India*, Judge Mansfield agreed that the district court properly disqualified the challenged attorney.<sup>109</sup> Judge Mansfield, however, added:

I am reluctant to endorse the district court's unqualified statement to the effect that once a substantial relationship is shown between the subject matters of the two representations and that the lawyer's personal role in the former representation was more than peripheral, the presumption that the attorney had access to confidential information in the prior relationship is "irrebuttable" . . . .<sup>110</sup>

Judge Mansfield relied upon two prior decisions by the Second Circuit and a district court decision within the circuit to support the position that the presumption of disclosed confidences is rebuttable.<sup>111</sup> Quoting the Second Circuit's statement from *Silver Chrysler Plymouth v. Chrysler Motor Co.*,<sup>112</sup> Judge Mansfield stated, "[W]hile this Circuit has recognized that an inference may arise that an attorney formerly associated with a firm himself received confidential information transmitted by a client to the firm, that inference is a rebuttable one."<sup>113</sup>

Three years later, in *Lemelson* the Southern District of New York adopted Judge Mansfield's rebuttable presumption of disclosed confi-

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applied an irrebuttable presumption of disclosed confidences. See 504 F. Supp. at 1167. *Lemelson* cited only to Judge Mansfield's concurring opinion in *Government of India* as support for the proposition that the presumption of disclosed confidences is rebuttable. *Id.* It is suggested that the *Lemelson* court would have cited to the court's opinion in *Government of India* if the *Lemelson* court believed that *Government of India* supported such a proposition. As *Lemelson* failed to cite to the court's opinion in *Government of India*, it is suggested that the *Lemelson* court believed that *Government of India* did not repudiate the use of the irrebuttable presumption of disclosed confidences.

Additionally, in *Novo*, the Seventh Circuit discussed *Government of India* in its discussion of whether the presumption of shared confidences should be rebuttable. *Novo*, 607 F.2d at 191-92. Like *Lemelson*, however, the *Novo* court discussed only Judge Mansfield's concurring opinion, and did not cite the opinion of the court as supporting the proposition that the presumption of disclosed confidences is rebuttable. See *id.*

If the courts should accept that *Government of India* is consistent with the continued application of an irrebuttable presumption of disclosed confidences, then future courts and attorneys within the Second Circuit will have to find support in either Judge Mansfield's concurrence or *Lemelson* for rejecting the irrebuttable presumption.

109. 569 F.2d at 740 (Mansfield, J., concurring).

110. *Id.* at 741 (Mansfield, J., concurring).

111. *Id.* (citing *Silver Chrysler Plymouth v. Chrysler Motor Corp.*, 518 F.2d 751, 754 (2d Cir. 1975); *Laskey Bros., Inc. v. Warner Bros., Inc.*, 224 F.2d 824, 827 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956); *United States v. Standard Oil Co.*, 136 F. Supp. 345, 364 (S.D.N.Y. 1955)).

112. 518 F.2d 751 (2d Cir. 1975). For a further discussion of *Silver Chrysler*, see *infra* notes 78-79.

113. 569 F.2d at 741 (quoting *Silver Chrysler*, 518 F.2d at 754) (citations omitted).

dences.<sup>114</sup> *Lemelson* involved an action for breach of contract, fraud, breach of fiduciary duty and restraint of trade.<sup>115</sup> *Lemelson* owned a patent for an invention which was marketed by Synergistics.<sup>116</sup> During the course of Synergistics' marketing of *Lemelson's* invention, the challenged attorney represented both *Lemelson* and Synergistics in various patent infringement suits against other parties.<sup>117</sup> Subsequently, Synergistics retained the challenged attorney to defend it in *Lemelson's* suit, and *Lemelson* moved to disqualify the attorney on the ground that the attorney had access to confidential information relevant to the litigation.<sup>118</sup>

The *Lemelson* court began its analysis of the disqualification motion by invoking the substantial relationship test of *T.C. Theatre*.<sup>119</sup> The court acknowledged, "It may be argued that when, as here, the attorney was personally involved in, indeed in control of, the prior representation, there is an irrebuttable presumption of receipt of confidential information."<sup>120</sup> The court concluded, however, that the "better view" is to permit the attorney to rebut the presumption.<sup>121</sup> The district court gave no reason for its preference and cited as authority only Judge Mansfield's concurring opinion from *Government of India*.<sup>122</sup> The *Lemelson* court never applied the presumption of disclosed confidences, however, because it ultimately determined that there was no substantial relationship between the attorney's representation of *Lemelson* and the challenged representation of Synergistics.<sup>123</sup>

It is suggested that Judge Mansfield erred in applying and interpreting the relevant precedent when he questioned the validity of applying an irrebuttable presumption. The cases Judge Mansfield relied upon reject only the irrebuttable presumption of shared confidences for deciding motions for vicarious disqualification.<sup>124</sup> They do not recognize

114. 504 F. Supp. at 1167 (citing *Government of India*, 569 F.2d at 741 (Mansfield, J., concurring)).

115. *Id.* at 1165.

116. *Id.*

117. *Id.* at 1166.

118. *Id.*

119. *Id.* (citing *T.C. Theatre*, 113 F. Supp. 265 (S.D.N.Y. 1953)).

120. *Id.* (citing *Government of India v. Cook Indus.*, 422 F. Supp. 1057, 1059-60 (S.D.N.Y. 1976), *aff'd*, 569 F.2d 737 (2d Cir. 1978)).

121. *Id.* at 1167. After examining the relevant law in the area of attorney disqualification for a conflict of interest, the court stated that, "the better view [is] that the court has latitude to permit the attorney to rebut [the] presumption." *Id.* (citing *Government of India v. Cook Indus.*, 569 F.2d 737, 741 (2d Cir. 1978) (Mansfield, J., concurring)).

122. *See id.* at 1167-69.

123. *See id.* The court found that the "information is not 'substantially' related to the issues in the present case." *Id.* at 1168.

124. For a brief discussion of the cases upon which Judge Mansfield relied, see *infra* notes 166-75 and accompanying text (*Laskey Bros.*) and notes 178-79 (*Silver Chrysler and Standard Oil*).



that the presumption of disclosed confidences is rebuttable.<sup>125</sup> Thus reliance upon Judge Mansfield's concurring opinion should be avoided because the analysis is unsupported. Consequently, as *Lemelson* relies solely upon Judge Mansfield's concurring opinion, it is suggested that any reliance upon *Lemelson* should be avoided as well.<sup>126</sup> Moreover, the language in *Lemelson* supporting a rebuttable presumption of disclosed confidences is dicta.

### c. The Outlook for the Presumption of Disclosed Confidences

The decisions discussed in the previous sections indicate a tendency on the part of some courts to resist disqualifying attorneys by applying an irrebuttable presumption of disclosed confidences. As a lack of uni-

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125. See *Laskey Bros.*, 224 F.2d 824, 827; *Standard Oil*, 136 F. Supp. 345, 354. In *Laskey Bros.*, the court found the presumption of *shared* confidences to be rebuttable where a former partner in a firm was challenged on the basis of representations conducted by another attorney at his former firm. 224 F.2d at 827. The court never addressed the issue of whether the presumption of disclosed confidences is rebuttable. For a discussion of the presumption of shared confidences, see *supra* notes 131-91 and accompanying text.

The *Standard Oil* court also recognized that the presumption of disclosed confidences is irrebuttable where a substantial relationship exists between "the subject matter of the [challenged representation] and the matters in which the attorney represented his former client." 136 F. Supp. at 354. The court in *Standard Oil* ultimately denied the motion for disqualification not because the challenged attorney rebutted the presumption of disclosed confidences, but because the movant failed to establish the existence of such a substantial relationship. *Id.* at 357, 365; see also Annot., 56 A.L.R. FED. 189, § 5 (1980) (court will not inquire whether confidential information was actually divulged prior to representation). The *Standard Oil* court found that the work performed by the challenged attorney during his former employment was unrelated to the instant controversy. 136 F. Supp. at 365. The court concluded that "[a]ny other ruling would delete all meaning from the word 'substantial.'" *Id.* at 357 (footnote omitted). For a further discussion of *Standard Oil*, see *infra* note 179.

In addition, the challenged attorney in *Standard Oil* was a former government attorney—a factor which gives rise to a host of other exceptions to the substantial relationship test that are not applicable in cases where an attorney has switched from one firm to another. For a discussion of the exceptions to the substantial relationship test raised by the situation of the former government attorney, see *infra* notes 198-99 and accompanying text.

See also *Novo*, 607 F.2d at 192 (panel opinion). In *Novo*, Senior District Judge Grant wrote: "We believe Judge Mansfield has taken language from *Chrysler* and *Laskey* out of context." *Id.* (footnote omitted). Judge Grant added, "We do not find that *Laskey* or *United States v. Standard Oil* detract from the proposition that once a substantial relationship is found, it will be irrebuttably presumed that the attorney had access to confidential information." *Id.* (citations omitted).

126. It should be recalled that the *Lemelson* court found that there was no substantial relationship between the attorney's prior representation of *Lemelson* and the challenged representation of *Synergistics* in its action against *Lemelson*. See 504 F. Supp. at 1168. As there was no substantial relationship, there was no need to apply the presumption of disclosed confidences. Thus, the discussion of the presumption was unnecessary for the proper resolution of the motion before the court.

formity in dealing with motions for disqualification will lead only to uncertainty, the courts should adopt one of two possible positions: (1) they must abandon their occasional use of a rebuttable presumption of disclosed confidences and adhere to the irrebuttable presumption as the proper means of deciding all questions of disqualification where an attorney undertakes to represent a party in an action against the attorney's former client; or (2) they must abandon completely the irrebuttable presumption of disclosed confidences and consistently apply the rebuttable presumption.

It is suggested that the courts should abandon the rebuttable presumption of disclosed confidences and continue to adhere to the irrebuttable presumption. This suggestion is supported by both the majority of the reported decisions<sup>127</sup> and the policies underlying both the Code and Model Rules.<sup>128</sup> While it is generally recognized that the continued adherence to an irrebuttable presumption of disclosed confidences often will work a hardship upon the challenged attorney and his current client,<sup>129</sup> a continued adherence to the irrebuttable presumption is necessary to advance the important policies underlying Canon 4 and Model Rule 1.9. In addition, the hardship to both the current client and the attorney will not be so great if the attorney is able to determine in advance of litigation whether the courts will permit his representation of the client, because the attorney can choose to forego any questionable representation.<sup>130</sup>

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127. For a partial list of cases supporting the application of an irrebuttable presumption of disclosed confidences, see *supra* note 59.

128. For a discussion of the policies underlying the Code and Model Rules, see *supra* notes 35-41 and accompanying text.

129. See, e.g., Comment, *supra* note \*, at 175-76. The commentator argues that an irrebuttable presumption of disclosed confidences "can result in an infringement of the rights of the current client and the attorney." *Id.* at 175. The author includes the following among the drawbacks of the continued application of an irrebuttable presumption: loss to the client of an opportunity to be represented by the attorney of his choice; delay and added expense to the client in finding a new attorney; and reputational damage and monetary loss to the disqualified attorney. *Id.* According to the author, these drawbacks are especially disconcerting where the attorney did not actually receive any confidential information, because "he has not only done nothing unethical but could do nothing unethical even if he wanted." *Id.* The author concludes: "Allowing the attorney to show that no confidential information was received in the former representation would serve the public interest by allowing the attorney to foil some of the disqualification motions made solely for tactical reasons." *Id.* at 176. See also Note, *supra* note 46, at 928. The commentator explains the danger of the irrebuttable presumption as follows:

A formulation of the attorney's ethical obligation which allows a former client to disqualify an attorney who has never received any confidential information useful in the present suit may unnecessarily restrict other parties from access to the legal talent most familiar with the facts of their case. Such a formulation may also unreasonably restrict access to attorneys specializing in technical areas of law.

*Id.*

130. For a discussion of this concept, see *supra* notes 19-20.

B. *Vicarious Disqualification of Challenged Attorneys*

Disqualification for a conflict of interest is not limited to direct disqualification of the attorney who undertook the previous representation. Other attorneys associated with that attorney potentially are subject to vicarious disqualification, without regard to whether they actually participated in the previous representation.<sup>131</sup>

As a general rule, where one attorney at a firm would be disqualified from undertaking a challenged representation as a result of the presumption of disclosed confidences, the courts will apply a presumption of shared confidences to vicariously disqualify other attorneys in the firm.<sup>132</sup> As the presumption of disclosed confidences imputes to an at-

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131. *See, e.g.*, *Trone v. Smith*, 621 F.2d 994, 999 (9th Cir. 1980) (once a substantial relationship is established, "the firm as a whole is disqualified whether or not its other members were actually exposed to the information"); *Kaufman*, *supra* note \*, at 662 ("Even if an attorney has not received any information from a client and had no access to files dealing with the client's affairs, he may nevertheless be disqualified if another member of the firm received confidential information or had access to it."). *See also* *Liebman*, *supra* note \*, at 1000 ("principle that a lawyer can be disqualified from representing a client in a matter adverse to the interests of a present or former client of one of his present or former partners or associates is known as 'vicarious disqualification'") (footnote omitted).

132. *See, e.g.*, *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1266 (7th Cir. 1983) (adverse subsequent representation by a firm in substantially related matters must result in disqualification even if "different people in the firm handled the two matters and scrupulously avoided discussing them"); *Trone v. Smith*, 621 F.2d 994, 999 (9th Cir. 1980) ("Once the attorney is found to be disqualified, both the attorney and the attorney's firm are disqualified from suing the former client."); *American Can Co. v. Citrus Feed Co.*, 436 F.2d 1125, 1128 (5th Cir. 1971) (all members of firm barred from participating in case from which one partner is disqualified) (citing *Laskey Bros. v. Warner Bros. Pictures*, 224 F.2d 824, 826 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956)); *see also* *United States v. Kitchen*, 592 F.2d 900, 904 (5th Cir.) (criminal action) ("given the presumed interplay among lawyers who practice together, [disqualification applies to] the entire firm as well as all employees thereof"), *cert. denied*, 444 U.S. 843 (1979); *Laskey Bros.*, 224 F.2d 824, 832 (Ryan, J., dissenting) ("Partners in a law firm do not dwell in cubicles; they all must observe and respect the confidence and trust a client has reposed in any one of them . . .").

A conflict of interest can arise as a result of present or past representations by partners, associates, and occasionally clerks or cocounsel. The conflict might even arise from a former representation of an adverse party by a client of a challenged firm. *See, e.g.*, *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225, 235 (2d Cir. 1977) ("we have never believed that labels alone—partner, clerk, co-counsel—should control our decisions"); *NCK Org. v. Bregman*, 542 F.2d 128 (2d Cir. 1976) (counsel disqualified after consulting with disqualified counsel); *American Roller Co. v. Budinger*, 513 F.2d 982 (3d Cir. 1975) (summer associate); *Hull v. Celanese Corp.*, 513 F.2d 568 (2d Cir. 1975) (attorney as a client); *American Can Co. v. Citrus Feed Co.*, 436 F.2d 1125, 1129 (5th Cir. 1971) (disqualification extends to employees of disqualified attorney); *Laskey Bros.*, 224 F.2d at 827 ("degree of association to effect disqualification need not necessarily be that of a partner"); *Standard Oil Co.*, 136 F. Supp. at 360 (disqualification extends to salaried law clerk). *But cf.* *American Can Co. v. Citrus Feed Co.*, 436 F.2d 1125, 1129 (5th Cir. 1971) (presumption not applicable to dis-

torney confidences of his former client, the presumption of shared confidences imputes to all attorneys in a firm the confidences possessed by any individual attorney in the firm.<sup>133</sup>

The basis for the courts' presumption that members of a firm will share the confidences of their clients rests in the courts' perception that clients often select a law firm over an individual attorney because the attorneys in a firm often call upon each other for expertise in particular fields and for opinions concerning proposed courses of action.<sup>134</sup> Additionally, clients' files are generally kept in places which are accessible by all attorneys,<sup>135</sup> and some firms circulate memoranda throughout the firm in order to generate ideas from the other attorneys in the firm.<sup>136</sup>

qualify cocounsel from one firm when relevant confidences are possessed by cocounsel at another firm).

See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D) (1979) ("If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1983) ("Imputed Disqualification: General Rule"). For a further discussion of the Code and Model Rules, see *infra* notes 138-40 & 142 (Code) and notes 141-42, 153, 179 & 199 (Model Rules) and accompanying text.

133. See Kaufman, *supra* note \*, at 662. Judge Kaufman explains the presumption as follows:

This rule is based on a realistic recognition of the fact that lawyers will generally discuss their cases with other lawyers in the firm. It recognizes that the interests of protecting and maintaining the vital free flow of information between attorney and client require that the knowledge of one attorney in an office be imputed to all.

*Id.* For a partial list of cases applying the presumption of shared confidences, see *supra* note 132. See also Comment, *supra* note 11, at 682 n.24.

134. See *Arkansas v. Dean Foods Prods.*, 605 F.2d 380, 385 (8th Cir. 1979). In *Dean Foods*, the court explained:

Clients who retain, are billed by, and pay a law firm, can reasonably expect, and often their problems require, that confidences disclosed to one lawyer in the firm will be shared with others in the firm. Indeed, the ability to bring various fields of expertise to bear on a client's problem often serves as a justification for practice as a firm and the very reason for the client's decision to retain the firm.

*Id.* See also *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 717 (7th Cir. 1982) (finding "it was the practice of the firm to circulate and discuss among the members of the law firm correspondence, opinions, memoranda, etc. generating from the firm's cases") (discussing the affidavit of Talivaldis Cepuritis, counsel for Freeman); Comment, *supra* note 11, at 682 (the rule proceeds upon the assumption that attorneys within a firm share confidences amongst each other); *Unchanging Rules*, *supra* note \*, at 1060 (rule accounts for difficulties of "discovering and proving actual breaches of confidence within the close-knit and often informal structure of a law-firm").

135. See, e.g., *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 717 (7th Cir. 1982) (files were stored by firm in cabinets outside the challenged attorney's office); Liebman, *supra* note \*, at 997 (attorneys often have access to confidential files "located in the firm or elsewhere").

136. See, e.g., *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 717 (7th Cir. 1982) (it was the practice of the firm of the challenged attorney "to circulate and discuss among the members of the law firm correspondence, opin-

Vicarious disqualification is necessary to prevent the possibility that confidential information might be used against the client by an attorney with whom the client's former attorney shared the client's confidences.<sup>137</sup>

In the past, the courts have employed the presumption of shared confidences to enforce the command of DR 5-105(D) of the Code.<sup>138</sup> This Disciplinary Rule directs: "If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."<sup>139</sup> While the courts generally agree that DR 5-105(D) controls questions of vicarious disqualification for a conflict of interest, they have carved exceptions to the rule in order to permit representations which technically should be prohibited under the rule.<sup>140</sup> The Model Rules, through rule 1.10, adopt

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ions, memoranda, etc. generated from the firm's cases") (discussing affidavit of Talivadis Capuritus, counsel for Freeman).

137. See, e.g., *Arkansas v. Dean Foods Prods.*, 605 F.2d 380, 387 (8th Cir. 1979) (one member of a firm who actually possesses confidential information might "inadvertently direct his staff to proceed along lines dictated or influenced by that information") (footnote omitted); Liebman, *supra* note \*, at 997 (because an attorney may not use a client's confidences to the disadvantage of the client, "there is a serious conflict of interest when the lawyer's new position requires that he file suit against one of his former clients") (footnote omitted); Comment, *supra* note \*, at 177-78 (vicarious disqualification prevents a lawyer from "circumventing the confidentiality requirement simply by passing the [former client's] information on to an affiliated attorney") (footnote omitted). See also MODEL RULES OF PROFESSIONAL CONDUCT DR 5-11 legal background (Alternative Draft/Code of Professional Responsibility Format, May 30, 1981) ("The basic purpose of the rule of imputed disqualification is to prohibit a lawyer from circumventing professional standards through partners, associates and other employees.").

138. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D) (1983). See also Lacovara, *Restricting the Private Law Practice of Former Government Lawyers*, 20 ARIZ. L. REV. 369, 379 (1978) (DR 5-105(D) functions to impute disqualification to all attorneys in a firm whenever an individual attorney within the firm is required to withdraw from employment under any disciplinary rule); Sutton, *supra* note \*, at 515-16 ("many courts have, in effect, converted DR 5-105 into a procedural rule used to disqualify lawyers in 'conflict of interest' situations"); Comment, *supra* note 11, at 682 (DR 5-105(D) encompasses the traditional rule that the disqualification of an individual lawyer will disqualify all lawyers affiliated with him).

139. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR5-105(D) (1983).

140. See, e.g., *Schiessle*, 717 F.2d 417 (7th Cir. 1983) (representation permitted where an entire firm would otherwise be disqualified under DR5-105 because the attorney in the firm, who was in a position to receive confidences of the opposing party while he was with another firm was not involved in the challenged representation and had been effectively screened from other attorneys in the firm who were involved in the challenged action); *LaSalle*, 703 F.2d 252 (7th Cir. 1983) (same; attorney who subjected firm to potential disqualification was a former government attorney); *Novo*, 607 F.2d 186 (7th Cir. 1979) (en banc) (attorneys at a firm who would otherwise be precluded from undertaking a challenged representation, permitted to do so when the attorney who subjected them to potential disqualification under DR5-105 was no longer with the firm);

the judicially created exceptions to DR 5-105(D) and provide detailed guidelines for determining when members of a firm can represent a client whose interests are adverse to those of a client of another present or former member of the firm.<sup>141</sup>

*Silver Chrysler Plymouth, Inc. v. Chrysler Motor Corp.*, 518 F.2d 751 (2d Cir. 1975) (permitting representation which technically violated DR5-105 where attorney who subjected firm to potential disqualification was only "peripherally" involved in prior representation); *Laskey Bros., Inc. v. Warner Bros. Pictures, Inc.*, 224 F.2d 824 (2d Cir. 1955) (attorney who would otherwise be precluded from undertaking a challenged representation by virtue of his partnership with attorney who previously represented the adverse party, permitted to represent party whose interests were adverse to former client of attorney's partner where partnership was dissolved and the party came to the attorney through channels independent of the former partnership); cf. *Freeman*, 689 F.2d 715 (7th Cir. 1982) (permitting a challenged firm to rebut the presumption that a new attorney in the firm obtained confidences of an adverse party while at his former firm). In *Silver Chrysler*, the district court noted:

[A]n irrebuttable broad presumption would forever bar any participation in any suits against any interests ever represented by a previous firm by all partners and associates of a large firm—even students working for one summer. The size and influence of modern law firms and the numbers of huge national and international corporate interests they represent militate against such a harsh result.

*Silver Chrysler*, 370 F. Supp. 581, 588 (E.D.N.Y. 1973), *aff'd*, 518 F.2d 751 (2d Cir. 1975). See also MODEL RULES OF PROFESSIONAL CONDUCT DR 5-11 legal background (Alternative Draft/Code of Professional Responsibility Format, May 30, 1981). The drafters of the Model Rules explain that many cases have

fashioned a rebuttable presumption that a lawyer formerly associated with a firm had received confidential information transmitted by a client to another lawyer in the firm. A similar approach was taken with respect to the lawyer's former associates, who were presumed to have received confidential information from the lawyer during their association. The per se rule applied to ongoing associations has been rejected in situations of former association because it would unnecessarily restrict individual access to "technically trained attorneys in specialized areas," and would seriously jeopardize the career development and mobility of lawyers associated with large law firms.

*Id.* (citations omitted).

141. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1983). The rule provides:

**Rule 1.10 Imputed Disqualification: General Rule**

(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 by rules 1.7, 1.8(c), 1.9 or 2.2.

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by rules 1.6 and 1.9(b) that is material to the matter.

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:

(1) the matter is the same or substantially related to that in

The following sections of this note examine the various situations underlying motions for vicarious disqualification. The situations are distinguished as they are in the Model Rules to demonstrate the differences in how the courts should approach the varying situations.

1. *Situations Involving Two Attorneys in the Same Firm at the Time of Both the Previous Representation and the Adverse Subsequent Representation*

The most basic situation in which vicarious disqualification is appropriate is when attorney A, who represented the former client, and attorney B, who undertakes to represent a client whose interests are adverse to the interests of A's former client, are both members of the same firm at the times of both the previous representation of the former client by A and the challenged adverse subsequent representation by B. Both the Code and Model Rules prohibit attorney B from undertaking the adverse subsequent representation under such circumstances.<sup>142</sup> In such a situation, the court should vicariously disqualify attorney B by applying an irrebuttable presumption of shared confidences.<sup>143</sup>

The basic situation discussed above was the background for *Analytica, Inc. v. NPD Research, Inc.*<sup>144</sup> In that case, an attorney, Fine, had performed services for NPD in connection with a deal to transfer stock to NPD's executive vice president and manager.<sup>145</sup> A few years later,

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- which the formerly associated lawyer represented the client; and
- (2) any lawyer remaining in the firm has information protected by rules 1.6 and 1.9(b) that is material to the matter.

*Id.*

142. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(C) (1979); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10(a) (1983).

143. See, e.g., *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221 (7th Cir. 1978). See also MODEL RULES OF PROFESSIONAL CONDUCT DR 5-11 legal background (Alternative Draft/Code of Professional Responsibility Format, May 30, 1981) ("while lawyers continue in an association with one another, courts apply a per se rule and prohibit representation by any member of the firm where a single lawyer could not represent both clients"); Comment, *supra* note \*, at 178 (generally courts will presume irrebuttably that attorneys affiliated within a law firm share with each other the confidential information of their clients). Cf. *W.E. Bassett Co. v. H.C. Hook Co.*, 201 F. Supp. 821 (D. Conn. 1961) (new partner in firm prohibited, "ipso facto," from undertaking representation of client whose interests were adverse to those of a former client of another present partner in the firm), *aff'd* 302 F.2d 268 (2d Cir. 1962) (per curiam). In *Westinghouse*, the court disqualified Westinghouse's codefendant's counsel (the Bigbee firm) because members of the firm had previously represented the plaintiff, Gulf Oil, in substantially related matters. *Id.* at 223. While the court did not state whether any of the attorneys undertaking the challenged representation and the attorneys who previously represented Gulf Oil had been members of the firm throughout both representations, the court did note that nine of the Bigbee firm's twelve attorneys participated in the Gulf Oil representation—including one of the firm's name partners. *Id.*

144. 708 F.2d 1263 (7th Cir. 1983).

145. *Id.* at 1265. NPD had employed Fine in 1975 to structure a bonus

NPD's vice president resigned from the corporation and formed Analytica.<sup>146</sup> NPD's former vice president subsequently retained Fine's firm to represent Analytica in an antitrust action against NPD.<sup>147</sup>

In reviewing the district court's disqualification of Analytica's counsel, the Seventh Circuit applied an irrebuttable presumption of shared confidences to affirm the district court's order:

[A] lawyer may not represent an adversary of his former client if the subject matter of the two representations is "substantially related," which means: if a lawyer could have obtained confidential information in the first representation that would have been relevant in the second. It is irrelevant . . . whether—if the lawyer is a firm rather than an individual practitioner—different people in the firm handled the two matters and scrupulously avoided discussing them.<sup>148</sup>

At least one court has gone so far as to declare that attorneys in a firm are prohibited from undertaking a representation of a client whose interests are adverse to those of a former client of any other present attorney in the firm, without regard to whether the attorney undertaking the challenged representation was with the firm at the time of the previous representation. In *W.E. Bassett v. H.C. Cook Co.*,<sup>149</sup> the district court held that a member of a firm will be disqualified "ipso facto" from undertaking a representation of a client whose interests are adverse to those of a client of another "present partner" of the firm.<sup>150</sup>

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stock transaction for the benefit of NPD's executive vice-president, Malec. *Id.* In order for Fine to value the stock to be transferred, it was necessary for NPD to disclose to Fine information about its "financial condition, sales trends, and management." *Id.*

146. *Id.* Malec left NPD in 1977, two years after Fine had been employed by NPD to structure the stock transfer. *Id.* Malec and his wife, who also had been employed by NPD, subsequently formed Analytica to compete with NPD in the market research business. *Id.*

147. *Id.* NPD retained the firm of Schwartz & Freeman to file a complaint with the FTC, against NPD charging that NPD was engaged in "anticompetitive behavior that was preventing Analytica from establishing itself in the market." *Id.*

148. *Id.* at 1266 (citing *Duncan v. Merrill Lynch, Pierce, Fenner & Smith*, 646 F.2d 1020, 1028 (5th Cir. 1981); *Trone v. Smith*, 621 F.2d 994, 998 (9th Cir. 1980); *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 223-25 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978); *Schloetter v. Railoc, Inc.*, 646 F.2d 706, 710 (7th Cir. 1976); *Canon v. United States Acoustics Corp.*, 532 F.2d 1118, 1119 (7th Cir. 1976) (per curiam); *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386 (2d Cir. 1976); *Emle Indus. v. Patentex*, 478 F.2d 562, 570-71 (2d Cir. 1973)).

149. 201 F. Supp. 821 (D. Conn. 1962), *aff'd*, 302 F.2d 268 (2d Cir. 1962) (per curiam).

150. *Id.* at 824-25. The motion to disqualify counsel arose in *Bassett* after Bassett's attorney, Cunningham, became a partner in a firm which previously represented Cook in earlier litigation between Bassett and Cook. *Id.* at 821-23. The prior representation of Cook was undertaken by Dunham, a name partner



2. *Situations Where an Attorney Has Terminated His Association with a Firm and the Firm Subsequently Undertakes to Represent a Client in an Action Against a Client Who the Attorney Represented While He was Still with the Firm*

Only one court has had the opportunity to decide a motion to disqualify counsel in this setting. In *Novo Terapeutisk Laboratorium v. Baxter Travenol Laboratories*,<sup>151</sup> the Seventh Circuit sitting *en banc* held that the presumption of shared confidences is rebuttable where the member of the firm who undertook the previous representation is no longer with the firm.<sup>152</sup> The Model Rules support this position as well.<sup>153</sup>

In *Novo*, an attorney left his firm and took with him one of the firm's clients, Baxter Travenol.<sup>154</sup> Novo Terapeutisk subsequently retained the attorney's former firm to represent it in an action against Baxter Travenol.<sup>155</sup> After the attorney's former firm filed a motion to appear as counsel for Novo Terapeutisk, Baxter Travenol filed motions to disqualify its attorney's former firm.<sup>156</sup>

After the district court denied Baxter Travenol's motion, the Seventh Circuit reversed the district court and disqualified the firm.<sup>157</sup> The court of appeals recognized that "[t]he question of whether [the] presumption [of shared confidences] is rebuttable was never clearly an-

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in the firm. *Id.* at 822. The court disqualified the entire firm from representing Bassett even though Dunham advised Cook of the representation by Cunningham, returned all files pertaining to the firm's representation of Cook, and isolated Cunningham from the other members of the firm. *Id.* at 822-23. In addition, while the Cook Company did not expressly consent to Cunningham's representation of Bassett, the company withheld its objection to the representation for more than three years after Dunham informed the company of the representation. *Id.* at 823. For a further discussion of *Bassett*, see *Unchanging Rules*, *supra* note \*, at 1061-62.

151. 607 F.2d 186 (7th Cir. 1979) (*en banc*). For a further discussion of *Novo*, see *supra* notes 79-86 and accompanying text.

152. *Id.* at 197.

153. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10(c) (1983). Rule 1.10(c) provides:

When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:

- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
- (2) any lawyer remaining in the firm has information protected by rules 1.6 and 1.9(b) that is material to the matter.

*Id.*

154. 607 F.2d at 194. The attorney, Cook, was formerly a member of the Chicago firm which represented Baxter Travenol. *Id.* Cook was the attorney in charge of the Baxter Travenol account and when he left the firm, he took the account with him. *Id.*

155. *Id.* at 195.

156. *Id.*

157. *See id.* at 193 (panel opinion).

swered by this court."<sup>158</sup> The court avoided settling the question, however, by resting its decision on Canon 9's broad prohibition against undertaking a representation which creates the appearance of impropriety.<sup>159</sup> Under Canon 9, the court stated, "actual receipt of confidential information by other members of the [attorney's former] firm is irrelevant."<sup>160</sup> In a dissent, Chief Judge Fairchild argued that the court should have affirmed the district court's denial of disqualification because Novo Terapeutisk's attorneys rebutted the presumption of shared confidences.<sup>161</sup> On rehearing *en banc*, the Seventh Circuit held that the presumption of shared confidences is rebuttable under certain circumstances,<sup>162</sup> and that the firm undertaking the representation of Novo

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158. *Id.* at 192 (panel opinion). The court explained that the question of whether the presumption of shared confidences was rebuttable had arisen in a previous case, but that the court avoided the issue by affirming the district court's grant of disqualification by applying Canon 9's prohibition against undertaking a representation which raises the appearance of impropriety. *Id.* (citing *Schloetter v. Railoc, Inc.*, 546 F.2d 706, 710-11 (7th Cir. 1976)). See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY CANON 9 (1979).

Three years before the Seventh Circuit decided *Novo*, the court was faced with an analogous appeal in *Schloetter*. See 546 F.2d 706. In *Schloetter*, however, the situation was more complicated because there was a factual dispute over whether the attorney who had previously represented the movant had actually left the firm. *Id.* at 710-11. Without deciding the factual issue, the court reserved decision on whether the presumption of shared confidences is rebuttable. *Id.* at 711. Instead, the court held that it was not crucial to the case to determine whether the presumption is rebuttable because the firm of the departed attorney failed to present sufficient evidence to rebut such a presumption. *Id.* The court ultimately rested its decision on the ground that the challenged firm must be disqualified upon the basis of Canon 9's prohibition against undertaking a representation which creates the appearance of impropriety. *Id.* at 712.

159. 607 F.2d at 192.

160. *Id.* The court added, however:

[W]e wish to retreat slightly from the appearance that we have encouraged inflexible irrebuttable presumptions that could possibly lead to unreasonable results under unforeseen circumstances. These presumptions are designed to promote the Code of Professional Responsibility, yet all courts should keep in mind a reasonable balance between a client's right to his own freely chosen counsel and the need to maintain the highest ethical standards. In the case at bar, we believe that the proper balance has been maintained by our decision.

*Id.* at 193 (citations omitted).

161. *Id.* at 194 (Fairchild, C.J., dissenting). Chief Judge Fairchild argued that the facts surrounding the motion to disqualify Novo Terapeutisk's counsel called for the court to apply a rebuttable presumption of shared confidences. *Id.* He stated: "Here, where the party seeking disqualification is in a position to know exactly what confidences were shared and what conflicts there may be and yet fails to allege, even in general terms, that any were shared or exist, it is appropriate to consider the presumption a rebuttable one." *Id.* Applying his interpretation of the presumption to the facts of the case, the Chief Judge concluded: "On the record before us [the presumption of shared confidences] has clearly been rebutted. I would not deny Novo the counsel of its choice and would affirm the decision of the district court." *Id.*

162. *Id.* at 197 (en banc). The court split five to three. Writing for the

Terapeutisk had "clearly and effectively rebutted" the presumption.<sup>163</sup>

3. *Situations Where an Attorney Leaves a Firm and Joins Another Firm Which Represents an Adversary to a Client of the Attorney's Former Firm*

a. Applying the Presumption of Shared Confidences to the Attorney Who Switched Firms

Where an attorney who switched firms participated in the representation of a client, who is now the adverse party in litigation involving a current client of the attorney's new firm, the courts employ the irrebuttable presumption of disclosed confidences to disqualify the attorney who switched firms from participating in the litigation against his former client.<sup>164</sup> There is authority for employing a rebuttable presumption of shared confidences, however, where the attorney who switched firms did not participate in the representation of the adverse party at his former firm.<sup>165</sup>

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majority, Chief Judge Fairchild, the author of the dissent in the panel decision, explained:

The circumstances of this case demonstrate that the presumption that Cook shared confidences with his associates at the Hume firm need not be irrebuttable. . . . Although the client, Baxter, would be entitled to the benefit of the presumption that Cook [shared the client's confidences with other members of the Hume firm], and to the resolution of any doubts in Baxter's favor, we do not find it necessary to exclude from consideration evidence clearly showing otherwise.

*Id.* at 197 (citations omitted).

163. *Id.* The court based its conclusion on the fact that Baxter's own attorney was in the best position to know exactly what confidences of Baxter's he might have shared with the members of his former firm, but that the attorney failed to allege, "even in general terms, that he shared confidences received in connection with [a substantially related] matter . . . ." *Id.* While the court found the presumption of shared confidences was rebutted in the present action, the court declined to decide what quality or quantity of proof is required in general to rebut the presumption. *See id.*

164. For a discussion of the presumption of disclosed confidences, see *supra* notes 54-130 and accompanying text.

165. *See, e.g.,* Schiessle v. Stephens, 717 F.2d 417, 420 (7th Cir. 1983) (after a substantial relationship is established, the court "must next ascertain whether the presumption of shared confidences with respect to the prior representation has been rebutted") (footnote omitted); *Silver Chrysler Plymouth v. Chrysler Motor Corp.*, 518 F.2d 751, 754 (2d Cir. 1975) ("while . . . an inference may arise that an attorney formerly associated with a firm himself received confidential information transmitted by a client to the firm, that inference is a rebuttable one") (citing *Laskey Bros. v. Warner Bros. Pictures, Inc.*, 224 F.2d 824, 827 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956); *United States v. Standard Oil Co.*, 136 F. Supp. 345, 364 (S.D.N.Y. 1955)). *See also* MODEL RULES OF PROFESSIONAL CONDUCT DR 5-11 legal background (Alternative Draft/Code of Professional Responsibility Format, May 30, 1981) ("where a lawyer can show that during the prior association he did not receive confidential information relating to the former client, neither the lawyer nor the second firm in which he is associated is disqualified from undertaking representation adverse to the first firm's client in the same or a substantially related matter") (citing *Gas-A-Tron v. Union Oil Co.*, 534 F.2d 1322 (9th Cir.), *cert. denied*, 429 U.S. 861 (1976); *Silver Chrysler Plym-*

The notion that the presumption of shared confidences is rebuttable by an attorney after he leaves the firm at which other attorneys are presumed to have shared relevant client confidences with him was first established in *Laskey Brothers, Inc. v. Warner Brothers Pictures, Inc.*<sup>166</sup> In *Laskey*, an attorney, Malkan, had formerly been a partner with another attorney, Isacson, who had obtained confidential information about Warner Brothers while employed by his former law firm.<sup>167</sup> Laskey Brothers initially retained the firm of Malkan & Isacson to represent it in an antitrust action against Warner Brothers.<sup>168</sup> After the Malkan & Isacson partnership was dissolved, Laskey Brothers retained Malkan and his new partner, Ellner, to continue the representation.<sup>169</sup> Austin Theatre also retained the new firm, Malkan & Ellner, to represent them in an action against Warner Brothers.<sup>170</sup> Warner Brothers subsequently sought to disqualify Malkan & Ellner from representing Laskey Brothers or Austin Theatre because of Malkan's former partnership with Isacson.<sup>171</sup> The district court disqualified Malkan & Ellner from representing Laskey Brothers because the case had originally come to the firm of Malkan & Isacson.<sup>172</sup> The court did not disqualify Malkan & Ellner from

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outh v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975); *Laskey Bros., Inc. v. Warner Bros. Pictures, Inc.*, 224 F.2d 824 (2d Cir. 1955)).

It should be noted that if the attorney who switched firms successfully rebuts the presumption of shared confidences with regard to his former firm, then there is no need for the court to examine whether the attorneys at his new firm should be disqualified, because the attorney who switched firms could not share information with them which he does not possess. See *Arkansas v. Dean Food Prods.*, 605 F.2d 380, 387 (8th Cir. 1979) (the challenged firm can not be disqualified when the challenged attorney is exonerated because the attorney "[can] not impart knowledge he did not have"); *Gas-A-Tron v. Union Oil Co.*, 534 F.2d 1322, 1325 (9th Cir. 1976) (disqualification of other members of a challenged attorney's firm "vanishes with [the challenged attorney's] nondisqualification").

166. 224 F.2d 824 (2d Cir. 1955). For other discussions of *Laskey*, see Lieberman, *supra* note \*, at 1005-07; Note, *supra* note 10, at 997-98; Note, *New Directions*, *supra* note \*, at 135-36.

167. 224 F.2d at 825. The court noted that, in independent proceedings, Isacson "has been found to have obtained confidential information about the defendants in the course of his former employment . . ." *Id.*

168. *Id.* at 826.

169. *Id.* After Laskey Brothers retained Malkan & Ellner who brought suit in the western district of Pennsylvania, the new counsel instituted a new suit in the southern district of New York. *Id.* The two suits did not differ in any material respect. *Id.*

170. *Id.* at 825. The court noted that the Austin retainer "had come to [Malkan & Ellner] by channels completely apart from Malkan's former association with Isacson." *Id.*

171. *Id.*

172. *Id.* On appeal, the Second Circuit Court of Appeals affirmed the disqualification of Malkan & Ellner, stating, "Once a partner is thus vicariously disqualified for a particular case, the subsequent dissolution of the partnership cannot cure his ineligibility to act as counsel in that case." *Id.* at 826-27. Under the court's analysis, because Malkan would have been disqualified from representing Laskey Brothers when the case initially came to the firm of Malkan &

representing Austin Theatre, however, because Malkan had rebutted the presumption that Isacson shared Warner Brothers' confidences with him.<sup>173</sup>

On appeal, the Second Circuit held that the district court was correct in permitting Malkan to rebut the presumption that Isacson shared with him the Warner Brothers confidences which Isacson possessed.<sup>174</sup> The court stated, "Once the partnership is dissolved . . . the inference from access to receipt of information, in a new case having no relationship to the old partnership . . . should . . . become rebuttable legally, lest the chain of disqualification become endless."<sup>175</sup>

In the more recent decision of *Freeman v. Chicago Musical Instrument Co.*,<sup>176</sup> the Seventh Circuit remanded the case for a determination of whether an attorney who switched firms had rebutted the presumption that he shared in the secrets and confidences of a client of his former firm.<sup>177</sup>

In addition to allowing rebuttal of the presumption of shared confidences, some courts have developed and employed a "peripheral repre-

Isacson, Malkan was forever barred from representing Laskey Brothers in litigation against Warner Brothers. *Id.*

173. *Id.* at 827. On appeal, the Second Circuit Court of Appeals noted that Malkan had testified at a hearing before the trial court that he had not received any confidences from Isacson. The court also noted that the trial judge "obviously believed him." *Id.*

174. *Id.* Though Warner Brothers introduced evidence to prove that Malkan had knowledge of confidential information, the court found the evidence insufficient to "overcome the favorable effect of Malkan's testimony and demeanor as appraised by the trial judge." *Id.*

175. *Id.* *Accord* *American Can Co. v. Citrus Feed Co.*, 436 F.2d 1125, 1129 (5th Cir. 1971) (the presumption of shared confidences must become rebuttable when an attorney leaves a firm where he would have been vicariously disqualified, otherwise "imputation and consequent disqualification could continue *ad infinitum*").

*See also* *Harmar Drive-In Theatre, Inc. v. Warner Bros., Inc.*, 239 F.2d 555 (2d Cir. 1957). In *Harmar*, Warner Brothers again moved to disqualify Malkan & Ellner from representing a plaintiff against it in an antitrust action. *Id.* at 556. The court reaffirmed its decision in *Laskey*, holding that in subsequent actions, other than those from which Malkan had already been vicariously disqualified by virtue of his prior association with Isacson, there was a rebuttable presumption that Isacson shared Warner Brothers' confidences with Malkan. *Id.* at 556-57. The court did not address the question of whether Ellner could rebut the presumption of shared confidences if Malkan was disqualified, because the partnership of Malkan & Ellner had been dissolved and the question was moot. *Id.* at 557. It is suggested that in light of *Schiessle* and *LaSalle*, the latter presumption would be rebuttable if the same case were to arise today. For a discussion of *Schiessle* and *LaSalle* which supports this suggestion, see *infra* notes 185-91 and accompanying text.

176. 689 F.2d 715 (7th Cir. 1982). For a discussion of *Freeman*, see *supra* notes 87-89 and accompanying text.

177. *See id.* at 723. The court stated, "[I]f an attorney can clearly and effectively show that he had no knowledge of the confidences and secrets of the client, disqualification is unnecessary and a court order of such might reasonably be regarded as an abuse of discretion."

sentation" exception to avoid disqualifying an attorney who switches firms and subsequently becomes involved in litigation against a client of his former firm.<sup>178</sup> Under the exception, a challenged attorney can avoid disqualification by proving that he did not perform any services at his former firm which could be considered to be a representation of the party seeking disqualification.<sup>179</sup>

b. Applying the Presumption of Shared Confidences to the Attorneys in the New Firm of the Attorney Who Switched Firms

If the attorney who switched firms is unable to rebut the presumption that attorneys at his former firm shared relevant client confidences with him, or if he has been disqualified as a result of the court's application of an irrebuttable presumption of disclosed confidences, then the courts will apply a presumption of shared confidences to impute to the attorneys in his new firm any confidences that he is presumed to possess.<sup>180</sup>

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178. See *Gas-A-Tron v. Union Oil Co.*, 534 F.2d 1322 (9th Cir.), cert. denied, 429 U.S. 861 (1976); *Silver Chrysler Plymouth, Inc., v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975); *United States v. Standard Oil Co.*, 136 F. Supp. 345 (S.D.N.Y. 1955).

179. See *Silver Chrysler Plymouth, Inc., v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975). In *Silver Chrysler*, the court reasoned as follows: there is reason to differentiate for disqualification purposes between lawyers who become heavily involved in the facts of a particular matter and those who enter briefly on the periphery for a limited and specified purpose relating solely to legal questions. In large firms at least, the former are normally the more seasoned lawyers and the latter the more junior. . . . Under the latter circumstances the attorney's role cannot be considered "representation" within the meaning of *T.C. Theatre Corp.* and *Emie* so as to require disqualification. . . . To apply the remedy when there is no realistic chance that confidences were disclosed would go far beyond the purpose of those decisions.

*Id.* at 756-57. In the alternative, the court recognized that, even if the presumption of shared confidences were to apply in his situation, the challenged attorney had rebutted the presumption that he had obtained confidences from his former firm. *Id.* at 757.

See also *Gas-A-Tron v. Union Oil Co.*, 534 F.2d 1322 (9th Cir.), cert. denied, 429 U.S. 861 (1976). In *Gas-A-Tron*, the court relied upon *Silver Chrysler* to reverse the district court's grant of a motion to disqualify an attorney by virtue of his former association with a law firm which represented the opposing party. The court stated, "Here, as in [*Silver Chrysler*], the associate had not actually obtained any confidential information . . . that would be relevant to the pending litigation, and had not worked on matters that were 'substantially related' to the pending litigation." *Id.* at 1325 (footnote omitted).

180. See, e.g., *Schiessle*, 717 F.2d at 421; *LaSalle*, 703 F.2d at 257. It is suggested that the court's analysis of whether the members of the new firm should be disqualified by virtue of the presumption of shared confidences should vary according to the reason for the disqualification of the attorney who switched firms.

If the attorney who switched firms did not represent the adverse party while he was at his former firm, and he is disqualified as a result of his inability to rebut the presumption of shared confidences, then it is suggested that the

While the Model Rules prohibit all attorneys in a firm from undertaking a representation where the new attorney in the firm actually possessed confidences of an adverse party,<sup>181</sup> *LaSalle National Bank v. County of Lake*<sup>182</sup> and *Schiessle v. Stephens*<sup>183</sup> support giving the attorneys at the disqualified attorney's new firm an opportunity to rebut the presumption that the new attorney shared the confidences which he possessed with the attorneys in the new firm.<sup>184</sup>

In both *LaSalle* and *Schiessle*, the Seventh Circuit was faced with situations where the attorney who switched firms actually had participated in the representation of the adverse party while he still was with his former firm.<sup>185</sup> Neither attorney, however, was involved in the challenged representation.<sup>186</sup> In both cases, after establishing that a substantial re-

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court's analysis of whether the attorney's new firm should be disqualified should take into account only whether the new firm has rebutted the presumption that the attorney has shared the confidences with his new firm. This suggestion is based upon the proposition that it would be a waste of judicial resources to make two separate inquiries as to the extent of the attorney's possession of confidences when the initial inquiry which resulted in the attorney's disqualification is sufficient.

If, however, the attorney who switched firms did represent the adverse party while at his former firm, and was disqualified as a result of the court's application of an irrebuttable presumption of disclosed confidences, then the court should undertake a more thorough analysis when determining whether the attorney's new firm should be disqualified. Under this more thorough analysis, if the court concludes that the attorney who switched firms does not actually possess relevant confidences of his former client, but was only presumed to possess such confidences, then the court should permit his new firm to continue the challenged representation. If the court concludes that the disqualified attorney actually did possess relevant confidences of the adverse party, then the court should inquire further to determine whether the attorneys at his new firm have rebutted the presumption that he shared those confidences with them. See *Schiessle*, 717 F.2d at 421; *LaSalle*, 703 F.2d at 257.

181. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1983). For the text of rule 1.10, see *supra* note 141.

182. 703 F.2d 252 (7th Cir. 1983).

183. 711 F.2d 417 (7th Cir. 1983).

184. See *Schiessle*, 717 F.2d at 421; *LaSalle*, 703 F.2d at 257.

185. *Schiessle*, 717 F.2d at 419-21; *LaSalle*, 703 F.2d at 253-54. In *Schiessle*, the court quoted from the affidavits of both King, the attorney who switched firms, and one of his former partners. *Schiessle*, 717 F.2d at 419, 420-21. King's own affidavit stated that he had performed some work on behalf of the movant prior to switching firms. *Id.* at 419. In addition, King's former partner averred that (1) "King was the . . . 'partner in charge' of representing the [movants]"; (2) King had conversations with the movants concerning the lawsuit on four separate occasions; and (3) King had "numerous conferences" with the movants and other attorneys. *Id.* at 419-21 (quoting the affidavit of William Goldberg, former partner to King).

In *LaSalle*, the court explained that Seidler, the attorney who switched firms, had "general supervisory responsibility with respect to all civil cases handled by the State's Attorney's office," and that Seidler had reviewed the relevant documents prepared for writing the agreement which was the subject of the challenged representation. *LaSalle*, 703 F.2d at 253-54.

186. *Schiessle*, 717 F.2d at 419; *LaSalle*, 703 F.2d at 255. In *Schiessle*, the

relationship existed between the previous representation of the movant and the current representation,<sup>187</sup> the court employed a rebuttable presumption that the attorney who had switched firms possessed confidences of his former firm's client.<sup>188</sup> Upon determining that the attorney who switched firms had not rebutted the presumption that he possessed relevant confidences of his former firm's client,<sup>189</sup> each court went on to determine whether the attorney's new firm had rebutted the presumption that the attorney who switched firms had shared with the attorneys in his new firm the confidence which he was presumed to possess.<sup>190</sup> Both the *LaSalle* and the *Schiessle* courts concluded that the attorney's new firm failed to rebut the presumption of shared

court noted that King had averred in an affidavit, "Since the time I joined [the challenged firm] I have . . . not worked on the Schiessle case. . . ." *Schiessle*, 717 F.2d at 419. This claim was never contested. Similarly, the *LaSalle* court noted that "Seidler has submitted a sworn affidavit stating that he has not disclosed to his law firm or any of its personnel any information about [his previous representation of the opposing party] relevant to the present litigation," and that "Seidler has been screened from all involvement in the litigation since the motion to disqualify was filed." *LaSalle*, 703 F.2d at 255. While the *LaSalle* court never expressly stated that Seidler was not involved in the challenged representation, such a conclusion can be inferred from the fact that Seidler never disclosed to other attorneys in the firm any information concerning his previous representation. Assuming that Seidler's averrment was truthful, it is difficult to imagine that Seidler could have participated in the representation without disclosing such information to his co-workers at the firm.

187. *Schiessle*, 717 F.2d at 420 ("there is no dispute that the subject matter of the prior and present representations are substantially related—indeed the subject matter is identical"); *LaSalle*, 703 F.2d at 257 ("the subjects of [the] past and present representation were substantially related").

188. *Schiessle*, 717 F.2d at 420; *LaSalle*, 703 F.2d at 256. The *Schiessle* court analyzed the issue as follows:

We must determine whether the attorney whose change of employment created the disqualification issue was actually privy to any confidential information his prior law firm received from the party now seeking disqualification of his present firm. The evidence presented to rebut this presumption must "clearly and effectively" demonstrate that the attorney in question had no knowledge of the information, confidences and/or secrets related by the client in the prior representation.

*Schiessle*, 717 F.2d at 420 (citing *Freeman*, 689 F.2d at 723).

The *LaSalle* court applied a similar analysis: "If, after evaluating the facts . . . we find that such a substantial relationship did exist, we are entitled to presume that the attorney received confidential information during his prior representation. This presumption, however, is a rebuttable one." *LaSalle*, 703 F.2d at 256 (citing *Freeman*, 689 F.2d at 722; *Novo*, 607 F.2d at 1197; *Schloetter v. Railoc, Inc.*, 546 F.2d 706 (7th Cir. 1976)).

189. *Schiessle*, 717 F.2d at 421; *LaSalle*, 703 F.2d at 257.

190. *Schiessle*, 717 F.2d at 421; *LaSalle*, 703 F.2d at 257. The *Schiessle* court stated that the proper question became "whether the knowledge of the 'confidences and secrets' of the [movants] which [the disqualified attorney] brought with him has been passed on to or is likely to be passed on to the members of [the disqualified attorney's] firm." *Schiessle*, 717 F.2d at 421. The *LaSalle* court reasoned similarly: "Having found that [the attorney who switched firms] was properly disqualified . . . we must now address whether this disqualification should be extended to [his] entire law firm . . ." *LaSalle*, 703 F.2d at 257.



confidences.<sup>191</sup>

### c. Screening

In determining whether the attorneys in the new firm of the attorney who switched firms had rebutted the presumption of shared confidences, both the *Schiessle* and the *LaSalle* courts examined the record for evidence of "institutional mechanisms" which would have insulated the

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191. *Schiessle*, 717 F.2d at 421; *LaSalle*, 703 F.2d at 259. Both courts focussed on the fact that the firms had not employed adequate "institutional mechanisms" to screen the disqualified attorney from infecting the firm. *Schiessle*, 717 F.2d at 421; *LaSalle*, 703 F.2d at 259. For a further discussion of "screening", see *infra* notes 192-216 and accompanying text.

See also *Canadian Gulf Lines v. Triton Int'l Carriers, Ltd.*, 434 F. Supp. 691 (D. Conn. 1976). *Canadian Gulf Lines* involved a situation similar to those of *LaSalle* and *Schiessle* in that an attorney who previously had represented one party terminated his relationship with the party and the attorney's new partner subsequently undertook to represent another party in an action against his partner's former client. See *id.* at 692. In deciding the former client's motion to disqualify his former attorney's new partner, the court found a substantial relationship existed between the matters involved in the client's previous representation by his attorney and the current representation. *Id.* at 694-95. The court held, however, that the client's former attorney "rebutted the inference that he 'received' confidential information in the sense of having cognitively processed and retained [substantially related] information . . ." *Id.* at 694-95. In reaching its conclusion, the *Canadian Gulf Lines* court relied upon *Laskey* and *Silver Chrysler*. *Id.* at 694 (citing *Silver Chrysler Plymouth, Inc. v. Chrysler Motor Corp.*, 518 F.2d 817 (2d Cir. 1975); *Laskey Bros., Inc. v. Warner Bros. Pictures, Inc.*, 224 F.2d 817 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956)). It is suggested that the *Canadian Gulf Lines* court misinterpreted the cases upon which it relied in reaching its decision. The cited cases involved situations where the representation was permitted after the challenged attorneys proved to the courts that attorneys in their former firms had never *shared* relevant confidential information with them. See *Silver Chrysler*, 518 F.2d at 756; *Laskey*, 224 F.2d at 827. In *Canadian Gulf Lines*, however, the challenged attorney was a current partner to the attorney who previously represented the opposing party, and the court undertook to determine whether the challenged attorney's partner actually had obtained confidences *directly* from his former client. *Id.* at 694. For a discussion of the holdings of *Laskey* and *Silver Chrysler*, see *supra* notes 166-75 (*Laskey*) & notes 178-79 (*Silver Chrysler*) and accompanying text.

Although *Canadian Gulf Lines* misapplied the decisions upon which it relied, the result which the court reached in that case is consistent with the subsequent decisions of the Seventh Circuit in *Schiessle* and *LaSalle* because the attorney who formerly represented the opposing party in *Canadian Gulf Lines* was not involved in the challenged representation. See 434 F. Supp. at 692. While the result reached in *Canadian Gulf Lines* is consistent with *Schiessle* and *LaSalle*, the rationale of *Canadian Gulf Lines* is not consistent with the subsequent decisions. No court, aside from the *Canadian Gulf Lines* court, has recognized that the presumption of disclosed confidences does not apply where an attorney actually represented a client, but where information disclosed by the client was not "cognitively processed and retained" by the attorney. It is suggested that this rationale is erroneous and should not be followed by courts in the future.

It should be noted that the *Canadian Gulf Lines* court ultimately disqualified the challenged attorney by invoking the admonition against the appearance of impropriety found in Canon 9. *Id.* at 695.

attorney who switched firms from sharing confidences with other attorneys in the new firm.<sup>192</sup> Both courts ultimately determined that the institutional mechanisms which the firm had employed were insufficient to insulate the firm from obtaining the confidences possessed by the attorney who joined the firm.<sup>193</sup>

In its discussion of whether the institutional mechanisms employed by Siedler's firm were sufficient to insulate the firm from disqualification, the *LaSalle* court reviewed the decisions of various courts which have approved the use of screening.<sup>194</sup> The *LaSalle* court found that

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192. See *Schiessle*, 717 F.2d at 421; *LaSalle* 703 F.2d at 257. The *LaSalle* court isolated the issue as follows:

The question arises here whether th[e] presumption [that the attorney who switched firms has shared confidences in his possession with other members of his new firm] may be effectively rebutted by establishing that the "infected" attorney was "screened," or insulated, from all participation in and information about a case, thus avoiding disqualification of an entire law firm based on the prior employment of one member.

708 F.2d at 257. The court failed to state whether proof of screening, absent any other evidence to rebut the presumption of shared confidences, would be sufficient rebuttal, as the court found that the new firm of the attorney who switched firms had not employed adequate screening. See *id.* The court did state, however, that "timely screening arrangements are essential to the avoidance of firm disqualification." *Id.* at 259 n.3 (emphasis supplied by court).

The court's holding only expressly states that adequate screening is a necessary condition to rebutting the presumption of shared confidences. *Id.* It is suggested that the court's opinion implicitly recognizes that proof of screening is a sufficient condition as well. The cases and commentaries which the court discussed in its examination of the issue all support such a proposition. See *Grietzler & Locks v. Johns-Mansville Corp.*, No. 81-1379 (4th Cir. Mar. 5, 1982) (disqualification of firm unnecessary where adequate screening was undertaken by firm); *Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980) (en banc) (screening sufficient to remove potential "taint to trial process") (dicta), *vacated on other grounds*, 449 U.S. 1106 (1981); *Kesselhaut v. United States*, 555 F.2d 791 (Ct. Cl. 1977) (per curiam) (entire firm need not be disqualified where screening procedures insure separation of attorney in possession of relevant confidences from rest of firm). See also *LaSalle*, 703 F.2d at 258 (citing Liebman, *supra* note \*; Comment, *supra* note 8; Comment, *The Future of the Chinese Wall Defense to Vicarious Disqualification of a Former Government Attorney's Law Firm*, 38 WASH. & LEE L. REV. 151 (1981); Note, *supra* note \*. It is suggested that if the *LaSalle* court disagreed with the views supported by the cases and commentaries which it discussed, the court would have so noted its disagreement in its discussion. For a further discussion of the *LaSalle* court's analysis of the issue, see *infra* notes 194-99 and accompanying text.

193. *Schiessle*, 717 F.2d at 421; *LaSalle*, 703 F.2d at 259. The *Schiessle* court found that there was no evidence whatsoever tending to establish that the attorney's new firm attempted to screen the attorney from the other members of the firm. *Schiessle*, 717 F.2d at 421. The *LaSalle* court held that the screening employed was insufficient because the firm did not establish the screening until after the County of Lake filed the disqualification motion. *LaSalle*, 703 F.2d at 259.

194. 703 F.2d at 257-59. The *LaSalle* court briefly examined cases from the Fourth and Second Circuits and from the Court of Claims. *Id.* at 258-59 (citing *Grietzler & Locks v. Johns-Mansville Corp.*, No. 81-1379 (4th Cir. Mar. 5, 1982);

other courts only have approved of screening to rebut the presumption of shared confidences where the screening included the following:

1. procedures whereby the infected attorney is prevented from discussing the case or obtaining information from or relating information to attorneys in the firm who are involved in the challenged representation;<sup>195</sup>
2. procedures whereby the infected attorney is denied any financial benefit from the challenged representation;<sup>196</sup> and
3. procedures ensuring that the screen is activated before the challenged representation is commenced.<sup>197</sup>

While the *LaSalle* court did not state it to be a requirement, it is significant that in *LaSalle* and in every case which the court discussed, the attorney who was screened from the rest of the firm was a former government attorney.<sup>198</sup> In addition, the Model Rules advocate screen-

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*Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980) (en banc), *vacated on other grounds*, 449 U.S. 1106 (1981); *Kesselhaut v. United States*, 555 F.2d 791 (Ct. Cl. 1977) (per curiam). The court also noted that the use of screening has been advocated by the American Bar Association and the Illinois State Bar Association as well as by numerous scholars. 703 F.2d at 258 (citing ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975); Ill. St. Bar Ass'n, Professional Ethics Op. 811 (1982); Ill. St. Bar Ass'n, Professional Ethics Op. 762 (1982)).

195. 703 F.2d at 257-59 (citing *Armstrong v. McAlpin*, 625 F.2d 433, 442-43 (2d Cir. 1980) (en banc) (former SEC attorney was denied access to relevant files, discussion of the suit was prohibited in the attorney's presence, and no members of the firm were permitted to show the attorney any documents relating to the case), *vacated on other grounds*, 449 U.S. 1106 (1981); *Kesselhaut v. United States*, 555 F.2d 791, 793 (Ct. Cl. 1977) (per curiam) (members of firm were forbidden to discuss case with former government attorney and were instructed to prevent any documents from reaching him; files were kept in a locked file cabinet and keys were issued to members of firm only when a need to see the files was demonstrated)). *See also* *Central Milk Producers Coop. v. Sentry Food Stores, Inc.*, 573 F.2d 988, 991 (8th Cir. 1978) (the former government attorney was "not allow[ed] to work on any . . . related matter; he [could] not discuss the case with anyone employed by [the firm]; he [could] not answer any inquiries from any litigants in the . . . cases; and all documents and correspondence [we]re screened to avoid inadvertent violation of these screening procedures").

196. 703 F.2d at 257-59 (citing *Greitzer & Locks v. Johns-Manville Corp.*, No. 81-1379, slip op. at 7 (4th Cir. Mar. 5, 1982) (former government attorney derived no share in fees from representation); *Kesselhaut v. United States*, 555 F.2d 791, 793 (Ct. Cl. 1977) (per curiam) (attorney was paid a straight salary and did not receive a share of the firm's earnings)).

197. 703 F.2d at 257-59 (citing *Greitzer & Locks v. Johns-Manville Corp.*, No. 81-1379, slip op. (4th Cir. Mar. 5, 1982) (screening approved where firm began to segregate former government attorney when attorney joined firm)).

198. *LaSalle*, 703 F.2d at 253 (attorney was formerly Assistant State's Attorney in Lake County) (citing *Greitzer & Locks v. Johns-Manville Corp.*, No. 81-1379, slip op. at 7 (4th Cir. Mar. 5, 1982) (former Justice Department attorney's new firm permitted to undertake representation which attorney would be disqualified from undertaking where attorney was screened from rest of firm); *Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980) (en banc) (due to effective screening, former SEC attorney's firm permitted to undertake representation

ing in former government attorney situations, but they do not provide for screening in situations where an attorney switches from one private firm to another.<sup>199</sup>

*Schiessle*, decided about six months after *LaSalle*, was the first case decided to support expressly the extension of screening to situations involving attorneys who switch from one private firm to another.<sup>200</sup> Although the *Schiessle* court did disqualify the tainted attorney's firm, the court examined the record for evidence proving that the attorney had been screened.<sup>201</sup> Because the *Schiessle* court examined the record for proof of screening, it is suggested that the court implicitly acknowledged that a firm could rebut the presumption of shared confidences by properly screening an attorney who possesses relevant client confidences obtained from his former firm. In addition, it should be noted that the *Schiessle* court quoted dicta from *Analytica*, which supports the conclusion that adequate screening is sufficient to rebut the presumption of shared confidences where the attorney who subjects the firm to potential vicari-

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which involved matters which were both adverse and substantially related to matters over which the former SEC attorney had substantial responsibility while employed by the SEC), *vacated on other grounds*, 449 U.S. 1106 (1981); *Kesselhaut v. United States*, 555 F.2d 791 (Ct. Cl. 1977) (per curiam) (same; former government employee). See also *King & Pitts*, *supra* note 98, at 23 ("Screening the attorney for the former client from the existing matter, which will then be handled by another lawyer in the firm, is a mechanism that is often proposed to avoid conflict of interest. Almost invariably the courts rejected it. The sole exception involves government attorneys."). For discussions of how screening protects the firm of a former government attorney from vicarious disqualification, see generally Liebman, *supra* note \*; Comment, *supra* note 11; Comment, *Adverse Interests*, *supra* note 8; Note, *Ethical Problems*, *supra* note \*; Comment *Future of the Chinese Wall Defense*, 38 WASH. & LEE L. REV. 151 (1981); Ill. St. Bar Ass'n, Professional Ethics Op. 762 (1982); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975). See also *Central Milk Producers Coop. v. Sentry Food Stores, Inc.*, 573 F.2d 988, 993 (8th Cir. 1978) (district court did not abuse its discretion in refusing to disqualify the firm of a former government attorney who possessed privileged confidential information about the moving party where 1) the screening initially had been approved by the movant; 2) there was no allegation of actual impropriety; and 3) the district court "found that disqualification would not be in the best interest of justice").

199. Compare MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1983) ("Imputed Disqualification: General Rule") with *id.* Rule 1.11 ("Successive Government and Private Employment"). See also MODEL RULES OF PROFESSIONAL CONDUCT DR 5-11 legal background (Alternative Draft/Code of Professional Responsibility Format, May 30, 1981). The drafters noted that DR 5-11 "does not provide for screening as a mechanism to avert disqualification absent a waiver by the affected client. . . . Absent their consent, clients need not rely on assurances that screening will adequately safeguard confidential information." *Id.*

200. See *Schiessle*, 717 F.2d at 421. The court opined that "the presumption of shared confidences could be rebutted by demonstrating that 'specific institutional mechanisms' . . . had been implemented to effectively insulate against any flow of confidential information from the 'infected' attorney to any other member of his present firm." *Id.* (citing *LaSalle*, 703 F.2d at 259).

201. *Id.*

ous disqualification comes from another private firm.<sup>202</sup>

Another case which indirectly supports the extension of screening to insulate the firm of an attorney who switches from one private firm to another while in possession of confidences of the clients of his former firm is *Armstrong v. McAlpin*.<sup>203</sup> The case arose when a former SEC attor-

202. *Id.* at 420 n.2. Footnote two contained the court's approach to the role of screening when an attorney changes firms:

There is an exception for the case where a member or associate of a law firm (or government legal department) changes jobs, and later he or his new firm is retained by an adversary of a client of his former firm. In such a case, even if there is a substantial relationship between the two matters, the lawyer can avoid disqualification by showing that effective measures were taken to prevent confidences from being received by whichever lawyers in the new firm are handling the new matter.

*Id.* (quoting *Analytica*, 708 F.2d at 1267 (citations omitted)).

While the approval of screening found in *Analytica* and *Schiessle* is desirable, it is suggested that *Analytica* is unsupported by any of the cases upon which it relied to develop the proposition. See generally *Novo*, 607 F.2d 186 (7th Cir. 1979) (en banc); *Freeman*, 689 F.2d 715 (7th Cir. 1982); *LaSalle*, 703 F.2d 252 (7th Cir. 1983). In *Novo*, the challenged attorneys never directly represented the moving party, but the representation had been undertaken by a former partner in the firm who had not shared any of the party's confidences. *Novo*, 607 F.2d at 197 (en banc). In *Freeman*, the court never reached the question of whether the challenged attorney's entire firm must be disqualified, because the court remanded the action to the district court for a determination of whether the challenged attorney personally possessed any confidences of the moving party. *Freeman*, 689 F.2d at 722-23. Finally, the *LaSalle* court dealt with a motion to disqualify the firm of a former government attorney, a situation which most courts distinguish from other situations. For further discussion of *Novo*, *Freeman*, *Analytica*, *LaSalle*, and *Schiessle*, see *supra* notes 61-99, 144-48, 151-62, 176-77 & 183-91 and accompanying text.

203. 625 F.2d 433 (2d Cir. 1980) (en banc), *vacated*, 449 U.S. 1106 (1981). The appeal in *Armstrong* was instituted after the district court denied McAlpin's motion to disqualify Armstrong's counsel. *Id.* at 435. The district judge found that the challenged representation "did not threaten the integrity of the trial, and that [the moving party] had suffered no prejudice as a result of the representation." *Id.* at 437 (citing *Armstrong v. McAlpin*, 461 F. Supp. 622 (S.D.N.Y. 1978)). On appeal, a panel of the Second Circuit Court of Appeals reversed the district court's decision. *Id.* See also *Armstrong*, 606 F.2d 28 (2d Cir. 1979). The court of appeals then determined, en banc, that the panel lacked jurisdiction to hear the appeal. *Id.* at 440. Despite the lack of jurisdiction, the court went on to decide the merits of the appeal in order to provide guidance to district courts and to avoid waste of judicial resources. *Id.* at 441-42 (citing *In re Multi-Piece Rim Liability Litig.*, 612 F.2d 377, 379 (8th Cir. 1980) (en banc) (denial of disqualification is not immediately appealable, but reaching the merits of the appeal because all prior cases in the circuit held contrary), *vacated and appeal dismissed sub nom.* *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981); *Melamed v. ITT Continental Baking Co.*, 592 F.2d 290, 295 (6th Cir. 1970)). The United States Supreme Court vacated *Armstrong* without opinion after disapproving of the decision in a footnote to *Firestone*. See *Firestone*, 449 U.S. at 379-80 n.15; *Armstrong*, 449 U.S. 1106 (1981) (vacating the decision of the Second Circuit).

Although the Supreme Court vacated *Armstrong*, the decision still retains value in that it informs district courts within the Second Circuit of how the courts of appeals would rule today if a similar case were to come before the

ney, Altman, joined a private firm which was retained as cocounsel for Armstrong in a suit against McAlpin.<sup>204</sup> In the course of his employment with the SEC, Altman had participated in the investigation and prosecution of McAlpin in the very matters which gave rise to the suit by Armstrong.<sup>205</sup> Two years after Armstrong commenced the action against McAlpin, the defendant moved for disqualification of Altman's firm, asserting that Altman's former government employment and his participation in the SEC's investigation of McAlpin gave rise to a conflict of interest.<sup>206</sup>

In determining whether the representation of Armstrong by Altman's firm was proper, the Second Circuit relied upon *Board of Education v. Nyquist*,<sup>207</sup> a Second Circuit decision announced in the previous year.<sup>208</sup> In *Nyquist*, the court held that "unless an attorney's conduct tends to 'taint the underlying trial' . . . courts should be quite hesitant to disqualify an attorney."<sup>209</sup> The *Armstrong* court found that permitting

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court through proper channels. For a discussion of the proper channels for bringing an appeal from a district court order granting or denying disqualification, see *supra* note 28.

While the Supreme Court vacated *Armstrong* without opinion, it is suggested that the Supreme Court's vacating of the decision should be interpreted as a rejection of the case solely because the court of appeals lacked jurisdiction; the Court did not consider the merits of *Armstrong*. Cf. *Firestone*, 449 U.S. at 379-80 n.15 (rejecting the notion that a federal court of appeals may agree to decide the merits of a case over which the court lacks jurisdiction). For a thorough discussion of *Armstrong*, see Note, *supra* note 198. For a discussion of the jurisdiction of the federal courts of appeals to hear interlocutory appeals of district court rulings on motions to disqualify counsel on the grounds of a conflict of interest, see *supra* notes 22-23.

204. 625 F.2d at 435. Armstrong was appointed as receiver for the Capital Growth Companies, a conglomeration from which McAlpin and other defendants were accused of embezzling millions of dollars. *Id.* Armstrong initially retained as his counsel a New York firm in which he was a partner. *Id.* Two years later, however, Armstrong's firm learned of a potential conflict of interest which might result from the possibility that another client of the firm might be joined as a codefendant with McAlpin. *Id.* Because McAlpin had fled to Costa Rica, counsel had to be retained which had familiarity with Costa Rican law. *Id.* Additionally, because McAlpin had fled with practically all of the companies' funds, Armstrong was left with minimal capital for retaining counsel. *Id.* at 435 & n.2. Armstrong selected the firm of Gordon, Hurwitz, Butowski, Baker, Weitzen & Shalov (Altman's firm). *Id.* at 436.

205. *Id.* at 435. The SEC obtained a default judgement against McAlpin after he fled to Costa Rica to avoid prosecution by the SEC. *Id.* As receiver for the Capital Growth Companies, Armstrong was responsible for initiating suit against McAlpin in both the United States and Costa Rica in order to recover the money which the district court had adjudged McAlpin to be liable. *Id.*

206. *Id.* at 436-37.

207. 590 F.2d 1241 (2d Cir. 1979).

208. 625 F.2d at 444-46 (citing *Nyquist*, 590 F.2d 1241 (2d Cir. 1979)).

209. 590 F.2d at 1246 (citing *W.T. Grant Co. v. Haines*, 531 F.2d 671, 678 (2d Cir. 1976)). The *Nyquist* court identified two classes of cases where an attorney's conduct could taint the underlying trial:

(1) where an attorney's conflict of interests . . . undermines the court's

Altman's firm to remain as counsel for Armstrong would not taint the underlying trial because 1) Altman had been effectively screened from the firm in regard to the representation,<sup>210</sup> and 2) all records possessed by the SEC concerning McAlpin had been turned over to Armstrong.<sup>211</sup>

In its preliminary discussion, the *Armstrong* court accepted the premise that a strict rule of disqualification of former government attorneys and their firms "may ultimately affect adversely the quality of the services of government attorneys."<sup>212</sup> The court noted that "screening"

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confidence in the vigor of the attorney's representation of his client, [and] . . . (2) where the attorney is at least potentially in a position to use privileged information concerning the other side through prior representation . . . thus giving his present client an unfair advantage.

*Id.* (citations omitted).

210. 625 F.2d at 445. The court found that Altman had been "entirely screened from all participation in the case, to the satisfaction of the district court and the SEC." *Id.* (footnote omitted). The screening used in *Armstrong* included the following: 1) the former government attorney was excluded from participation in the challenged action; 2) the attorney was denied access to relevant files; 3) the attorney derived no remuneration from funds obtained by the firm in connection with the challenged representation; 4) other members of the firm were prohibited from discussing the representation with the attorney; and 5) the attorney was prevented from imparting any information concerning the litigation to other members of the firm. *Id.* at 442 (citing *Armstrong v. McAlpin*, 461 F. Supp. 622, 624-25 (S.D.N.Y. 1978)).

211. 625 F.2d at 445. The court found that Altman's firm was not in a position to obtain any confidential information possessed by Altman that was not already possessed by Armstrong, because the SEC had turned over to Armstrong all records relating to McAlpin. *Id.* It is suggested that this conclusion, although factually correct, is contrary to the established precedent in the field of attorney disqualification. For a discussion of cases holding that the privilege of confidential information is not destroyed by the subsequent disclosure of the privileged information to other parties, see *supra* note 35. *But see* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1983) (information can be used if it later becomes public knowledge).

212. 625 F.2d at 443. The court stated that a strict rule of disqualification could "hamper the government's efforts to hire qualified attorneys . . . [for] fear that government service will transform them into legal 'Typhoid Marys,' shunned by prospective private employers because hiring them may result in the disqualification of an entire firm in a possibly wide range of cases." *Id.* (footnote omitted). The court's conclusion was supported by amicus briefs prepared by the United States, the Securities and Exchange Commission, the Interstate Commerce Commission, the Federal Maritime Commission and twenty-six former government attorneys, including two former Attorneys General and two former Solicitors General of the United States. *Id.* The court also noted the contention of the amici that "those already employed by the government may be unwilling to assume positions of greater responsibility within the government that might serve to heighten their undesirability to future private employers." *Id.*

*See also* *United States v. Standard Oil*, 136 F. Supp. 345, 362-63 (S.D.N.Y. 1955). The *Standard Oil* court said that the former government attorney's duty of fidelity "must be given a practical scope." The court found such a view to be necessary because

[i]f service with the government will tend to sterilize an attorney in too large an area of law for too long a time, or will prevent him from engaging in practice of the very specialty for which the government sought

might be an acceptable solution to such an undesirable result.<sup>213</sup> The court continued its analysis, however, and ultimately rested its decision on the broader grounds that such motions should be decided by a "restrained approach," which required that a representation be permitted unless the moving party could prove that the representation would taint the integrity of the trial process.<sup>214</sup> Because the court found that the representation of Armstrong by Altman's firm did not taint the trial process, the court reversed the panel determination that the firm should be disqualified.<sup>215</sup> Thus, while the *Armstrong* court had an opportunity to rest its decision on the narrow ground that the policies peculiar to government service require screening to be permitted to insulate a former government attorney's firm from disqualification, the court chose to rest its holding on broader grounds which would be applicable to situations where the attorney had switched from one private firm to another.

It is suggested that future courts should follow the lead of *Schiessle*

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his service—and if that sterilization will spread to the firm with which he becomes associated—the sacrifices of entering government service will be too great for most men to make.

*Id.*

The *Standard Oil* court also explained that strict rules of disqualification will make it difficult for clients "to obtain counsel, particularly in those specialties and suits dealing with government." *Id.* (footnote omitted). For other discussions of the special considerations favoring the application of a lenient standard for deciding disqualification motions when former government attorneys are the subject of the motion, see *Central Milk Producers Coop. v. Sentry Food Stores, Inc.*, 573 F.2d 988, 991 (8th Cir. 1978); Kaufman, *supra* note \*, at 657-58; Lacovara, *supra* note 138, at 374-93 (discusses both federal statutes prohibiting former government attorneys from undertaking adverse subsequent representations and the Code of Professional Responsibility); Comment, *supra* note 8, at 209-10; Comment, *supra* note 11, at 692-704. One commentator argues that the general policies requiring the application of an irrebuttable presumption of disclosed confidences are overridden by "the strong public policy favoring job mobility of ex-government attorneys. . . ." *Id.* at 701.

213. 625 F.2d at 442-43 ("the proper screening of Altman rather than disqualification of [his] firm is the solution to the present dispute") (quoting *Armstrong v. McAlpin*, 461 F. Supp. 622, 626 (S.D.N.Y. 1978)). The court also noted that a formal opinion of the American Bar Association supports the use of screening in situations involving former government attorneys. *Id.* at 443 (citing ABA Comm. on Ethics and Professional Responsibility, Formal Op. No. 342 (1975)).

214. 625 F.2d at 444-46 (citing *Board of Educ. v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979)). While the *Armstrong* court spoke at length about the policies underlying the consideration of a motion to disqualify the firm of a former government attorney on the ground that the former government attorney would be disqualified if he undertook the challenged representation, the court ultimately rested its decision on other grounds:

We do not believe that it is necessary or appropriate for this court to enter fully into the fray. . . . Indeed, the current uncertainty over what is "ethical" underscores for us the wisdom, when considering such issues, of adopting a restrained approach that focuses primarily on preserving the integrity of the trial process.

*Id.* at 444 (citation and footnote omitted).

215. *Id.* at 445-46.



and *Armstrong* when considering whether a firm should be disqualified vicariously as a result of an attorney who joined the firm while in the possession of relevant confidences of clients from his former firm.<sup>216</sup>

### III. CONCLUSION

The law of attorney disqualification for a conflict of interest is very complicated, but an organization can be found within the body of law which makes it possible to predict with some measure of accuracy how the courts will decide a given motion. While such a prediction is possible, it must take into account the potential for misconstruction by the courts of both the correct rules of decision and of the complicated factual distinctions underlying the motion.

It is suggested that the courts will adhere closely to the following standards:

1. An irrebuttable presumption of disclosed confidences applies where an attorney undertakes to represent a client in an action where a former client of that attorney is an adverse party, and where there is a substantial relationship between the prior representation of the former client and the current representation.<sup>217</sup>
2. An irrebuttable presumption of shared confidences applies where the challenged attorney has never represented the moving party, but is a member of the firm in which another attorney previously represented the moving party, and the attorney who undertook the previous representation is still an attorney with the firm.<sup>218</sup>
3. In any other situation the presumption of shared confi-

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216. Cf. Comment, *supra* note 8, at 212 ("effective isolation of the disqualified attorney should prove a sufficient safeguard" against disclosure of protected confidences); Comment, *supra* note 11, at 682 (while the rejection of screening may have been necessary in "days when law firms were smaller and practice less specialized," continued rejection of such procedures is unwarranted); *id.* at 680 (comparison of screening within law firms and within financial institutions indicates that screening is "sufficiently effective to rebut the presumption that all members of a law firm share in a client's confidences"); *Unchanging Rules*, *supra* note \*, at 1067 (rejection of screening in private attorney situation creates a "substantial hardship" upon young associates who cannot be integrated within a firm).

217. It is submitted that the irrebuttable presumption of disclosed confidences developed by *T.C. Theatre* and its progeny reveal that an individual attorney can not defend against a disqualification motion other than to attempt to prove that no "substantial relationship" exists between the attorney's previous representation of the moving party and the challenged representation. For a discussion of the presumption of disclosed confidences, see *supra* notes 54-130 and accompanying text. For a discussion of the confusion existing among the courts as to what facts establish a substantial relationship, see *supra* note 52.

218. For a discussion of the situation where the presumption of shared confidences is irrebuttable, see *supra* notes 142-50 and accompanying text.

dences is rebuttable.<sup>219</sup>

In situations where the disqualified attorney has switched from one firm to another, there is some uncertainty as to whether the court will permit the other members of the attorney's firm to rebut the presumption of shared confidences by proof of screening.<sup>220</sup> The current trend, however, appears to be in favor of screening.<sup>221</sup>

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219. For a discussion of the situations where the presumption of shared confidences is rebuttable, see *supra* notes 151-216 and accompanying text.

220. For a discussion of the uncertainty that exists over permitting a firm to use screening to escape disqualification where the attorney screened is not a former government attorney, see *supra* notes 192-216 and accompanying text.

221. For a discussion of the decisions indicating that the courts should accept proof of screening as rebuttal to the presumption of shared confidences, see *supra* notes 200-216 and accompanying text.

