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In Defense of a Double Standard in the Rules of Ethics: A Critical Reevaluation of the Chinese Wall and Vicarious Disqualification

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IN DEFENSE OF A DOUBLE STANDARD IN THE RULES OF ETHICS: A CRITICAL REEVALUATION OF THE CHINESE WALL AND VICARIOUS DISQUALIFICATION*

> *[T]he advocate is bound in honor, as well as duty, to disclose to the client at the time of the retainer, every circumstance of his own connection with the parties or prior relation to the controversy, which can or may influence his determination in the selection of him for the office. . . . No man can be supposed to be indifferent to the knowledge of facts, which work directly on his interests, or bear on the freedom of his choice of counsel.*[1]

> *[I]t should be recognized that today many lawyers practice in firms, that many to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputed disqualification were defined with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.*[2]

The "Chinese wall," or reliance upon internal devices for protecting client confidences, as a defense against vicarious disqualification of law firms presents a curious double standard. At present, the defense is available only where a government attorney

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1. G. SHARSWOOD, PROFESSIONAL ETHICS 45-46 (1854).
2. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 comment (1983).

joins a private firm after leaving public service; where a private attorney moves from firm to firm, no Chinese wall defense to firm disqualification is available. The arbiters of the ethics of the legal profession, the bar and the courts, have recognized the defense to protect former government employees and their law firm employers from disqualification because of potential conflicts of interest.[3]

Firms may enter into representation involving matters in which one of the firm's current partners or associates participated as a public servant. In doing so, firms may protect against the violation of client confidences by building a Chinese wall. Where a private attorney changes firms and encounters a similar conflict of interest in successive representation, he and his firm must obtain the former client's consent to continue the representation or risk disqualification.[4] Only recently have some courts suggested that a Chinese wall might provide an acceptable defense to such disqualification—termed "vicarious" or "imputed" disqualification—of the firm.[5] A more receptive attitude toward the Chinese wall for the private attorney raises questions about the process and justifications for changes in ethical standards in the legal profession and leaves law firms unsure of the risks that they face in hiring new attorneys and in accepting new clients.

Examination of the ethical standard for vicarious disqualification of law firms,[6] and the exception for the properly screened

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3. Kesselhaut v. United States, 555 F.2d 791 (Ct. Cl. 1977); *see also* ABA Comm. on Professional Ethics and Grievances, Formal Op. 342 (1975) [hereinafter Formal Opinion 342], *reprinted in* 62 A.B.A. J. 517 (1976); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11 (1983).

4. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10(d) (1983).

5. *See, e.g.*, E.Z. Paintr Corp. v. Padco, Inc., 746 F.2d 1459 (Fed. Cir. 1984) (rejecting the Chinese wall defense because the wall was not properly in place); Schiessle v. Stephens, 717 F.2d 417, 421 (7th Cir. 1983) (holding that special institutional mechanisms must be in place to avoid even inadvertent sharing of confidences) (citing LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252 (7th Cir. 1983)). The disqualification is vicarious because it affects the firm solely because of the association of the individual attorney.

6. Each emendation of the legal profession's ethical standards has considered a variety of conflicts of interest in the attorney-client relationship. One common concern has been the attorney who faces a former client as an adversary in a civil matter related to the former representation. The *Model Code of Professional Responsibility* (the *Code*), originally adopted in 1969, only indirectly addressed such a conflict. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1980) (addressing confidentiality); *id.* Canon 9 (discussing appearance of impropriety); *id.* DR 5-105 (warning against impairment of independent professional judgment); *id.* DR 9-101(B) (referring to former public employee); *id.* EC 4-5 (exhorting against use of information to the disadvantage of the client); *id.* EC 4-6 (urging preservation of confidences after termination of employment); *id.* EC 9-3 (offering example of former public employee and matter of substantial responsi-

employee,[7] reveals the interdependence of the organized bar and the courts in formulating the code of ethical conduct for the profession. Although the standards that courts apply will vary,[8] those adopted by the American Bar Association (ABA) generally serve as a guide.[9] Yet the bar and the courts have separate roles in defining and modifying the standards.[10]

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bility). The consequence or risk of such a conflict lies in potential disqualification for the individual attorney or the imputed or vicarious disqualification of the firm.

7. The firm builds a Chinese wall to isolate an attorney who may contaminate its representation of a new client because of his former involvement with the client's adversary. Today, most firms routinely have in place at least minimum screening devices, hardly analogous to the Great Wall of China, to prevent a number of potential conflicts. *See* Keane, *Microcomputers Can Resolve Conflicts of Interest*, Legal Times, June 10, 1985, at 13, col. 1 (discussing the basic requirements for a computerized screening system).

The conflict of interest at issue is inherent in successive, not concurrent, representation. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983); Temple, *Subsequent Representation and the Model Rules of Professional Conduct: An Evaluation of Rules 1.9 and 1.10*, 1984 ARIZ. ST. L.J. 161 (detailing the distinction); Note, *The Chinese Wall Defense to Law-Firm Disqualification*, 128 U. PA. L. REV. 677 (1980); *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244 (1981) [hereinafter *Developments in the Law*] (explaining the distinction). *Cf.* Lowenthal, *Successive Representation by Criminal Lawyers*, 93 YALE L.J. 1 (1983) (discussing subsequent representation in criminal matters); *In re* Corn Derivatives Antitrust Litig., 748 F.2d 157 (3d Cir. 1984) (raising similar conflicts growing out of class actions), *cert. denied*, 472 U.S. 1008 (1985).

Discussion here is limited to conflicts of interest of private attorneys in successive representation in civil actions.

8. *See* Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268, 270-71 (2d Cir. 1975); *see also* O'Dea, *The Lawyer-Client Relationship Reconsidered: Methods for Avoiding Conflicts of Interest, Malpractice Liability and Disqualification*, 48 GEO. WASH. L. REV. 693, 696-97 (1980) (footnotes omitted):

> [N]o general federal law governs the conduct of attorneys. . . . Some federal district courts have adopted the American Bar Association Code of Professional Responsibility (the Code or CPR) by local rule; others have relied upon their inherent power to control the conduct of lawyers appearing before them. . . . An additional factor complicating ethical decisions by attorneys is the numerous revisions the CPR has undergone over the years. Because of these changes, the version of the Code found authoritative by some courts may differ significantly in critical provisions from the Code adhered to by others.

9. O'Dea, *supra* note 8, at 696-97; *see also* Nix v. Whiteside, 106 S. Ct. 988, 994 (1986) ("Prevailing norms of practice as reflected in American Bar Association Standards and the like, . . . are guides to determining what is reasonable, but they are only guides." (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984))).

10. In considering a motion to disqualify, the federal District Court for the Southern District of New York raised an important distinction between the role of the courts and the role served by a code of professional responsibility:

> While the CPR is a source by which the courts may be guided, it is not the final word on disqualification. Courts are not policemen of the legal profession; that is a matter for the disciplinary arm of the bar. Disqualification is granted to protect the integrity of the proceedings, not to monitor the ethics of attorneys' conduct. As the Second Circuit has noted,

In the *Model Rules of Professional Conduct* (the *Model Rules*), the ABA adopted a straightforward, black letter rule on vicarious disqualification;[11] the comment, however, left open possible exceptions.[12] Thus, the standard for vicarious disqualification is ambiguous. Law firms have challenged the disqualification rule;[13] numerous commentators have criticized it.[14] Nevertheless, the relatively recent ratification of the *Model Rules*[15] and the ongoing state-by-state consideration of the rules suggest that abolition or even revision of the imputed disqualification rule is unlikely.

The courts remain equivocal, suggesting the possibility of a new standard but remaining reluctant to adopt one. Rather than

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> . . . The Code nevertheless will continue to provide guidance for the courts in determining whether a case would be tainted by the participation of an attorney or firm.

USFL v. NFL, 605 F. Supp. 1448, 1463 n.31 (S.D.N.Y. 1985) (citing Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980), *vacated on other grounds*, 449 U.S. 1106 (1981)).

11. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1983):

> (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 [Confidentiality of Information] and 1.9(b) [matters substantially related] 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 which the formerly associated lawyer represented the client; and
>
> (2) any lawyer remaining in the firm has [confidential] information . . .

12.

> The Comment to Rule 1.10 indicates the firm intention of its draftsmen that a pragmatic approach is necessary to the question of vicarious disqualification. The comment also extends the analysis of Rule 1.10 to disqualified lawyers in law firms generally, not only former government attorneys. . . . The rigid formalism underlying Canon 9's injunction against an "appearance of impropriety" is strongly rejected in favor of a new philosophy of pragmatism which balances the expectations of confidentiality of a former client against the importance of allowing a client the representation of his choice and promoting the mobility of attorneys.

Nemours Found. v. Gilbane, Aetna, Fed. Ins. Co., 632 F. Supp. 418, 425 (D. Del. 1986).

13. The courts have expressed distaste for the use of the motion to disqualify as a litigation tactic by the former client. *See* Dalrymple v. National Bank & Trust Co., 615 F. Supp. 979, 985 (W.D. Mich. 1985) (admonishing the courts to "be sensitive to tactical considerations which may impel a party to seek disqualification of a particularly competent or formidable opponent"); *see also infra* note 154 and accompanying text. On the other hand, the courts appear to be similarly unsympathetic to the firm that appeals disqualification without having had any precautions in place.

14. *See* LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252, 258 (7th Cir. 1983).

15. *See infra* note 39.

adopting a single standard for an acceptable Chinese wall, some courts have taken a case-by-case approach.[16] Most seem to be taking one of two approaches: exploring the acceptability of a further exception to imputed disqualification, or scrutinizing proposed minimum standards for the Chinese wall that will make the exception possible.

This Note suggests that no change is warranted at the present time; courts should not adopt the Chinese wall defense to vicarious disqualification of private firms. The Chinese wall should, however, continue to operate as an internal device for protection of confidentiality. As such, it encourages firms to avoid disqualification by obtaining client consent to successive representation. Neither the historical record of the work of the Commission on the Evaluation of Professional Standards (the Kutak Commission),[17] the empirical evidence currently available, nor the pragmatic arguments offered by many commentators justify an exception to, or modification of, the standard of imputed disqualification. Part I examines the historical development of the rule of vicarious disqualification, explaining the underlying rationale for the rule, the position of those who favor the rule as adopted in the *Model Rules,* and how the rule evolved with an exception for attorneys leaving government service. Part II discusses the status of the Chinese wall as a defense to vicarious disqualification, reviewing recent challenges to the present rule. Finally, Part III assesses the prospects for, and wisdom of, a change in the standard given the position that the courts have taken, the process of change within the ABA, and the practical problems of providing adequate guarantees against such conflicts of interest.

I. DEVELOPMENT OF THE RULE OF VICARIOUS DISQUALIFICATION

The modern codes of professional responsibility for the legal profession originated in written codes of the nineteenth century.[18] Since the 1908 adoption of the *Canons of Professional*

16. *See infra* notes 61-64 & 111-20 and accompanying text. Yet the courts have been remarkably consistent in suggesting criteria for a well-built wall.

17. The ABA established the Kutak Commission, with Robert J. Kutak serving as chairman, to review the *Code*; the result was the *Model Rules of Professional Conduct* (the *Model Rules*). *See infra* note 39.

18. The forerunners of the contemporary codes of legal ethics in the United States were Hoffman's Fifty Resolutions in Regard to Professional Deportment (1836), *reprinted in* H. DRINKER, LEGAL ETHICS 338 (1955), and ALABAMA STATE BAR ASS'N, CODE OF ETHICS (1887, 1899), *reprinted in* H. DRINKER, *supra*, at 352. These first systematic

Ethics (the *Canons*), the ABA has regularly amended and revised the written standards.[19] The *Model Rules* followed only thirteen years after the adoption of the *Model Code of Professional Responsibility* (the *Code*). One reasonable explanation for this shift was the changing nature of legal practice in the 1970's.[20] Firms became larger and more specialized.[21] Discussion and revision of the standard regarding vicarious disqualification, in particular, reveal the profession's sensitivity to changing conditions of practice. This Part examines the evolving vicarious disqualification standard as reflected in the formulation of the *Model Rules.*

A. The Process of Change

Since adoption of the *Canons,* the first national code of ethics, in 1908, the ABA has recognized changed perceptions of the ethical responsibilities of the legal profession through amendment of the *Canons* and the adoption of the *Code* and *Model Rules.*[22] The process of revision involves extended discussion and negotiation.[23] The formal mechanism incorporates modifications originating in opinions of the ABA and state bar associations, and in state-adopted standards. Judicial opinions also influence and modify the ethical standards.[24]

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formulations for the American legal profession became the model for the *Canons of Professional Ethics* (the *Canons*), the first national code of professional responsibility, adopted in 1908. The original *Canons* consisted of 32 aspirational statements, with 15 more added over the next 29 years.

19. The ABA replaced the *Canons* with the *Model Code of Professional Responsibility* to rectify important omissions from the *Canons,* to make practical sanctions for violations more feasible, and to edit and modernize the standards. *See Preface* to MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980).

20. The ABA proceeded to revise and eventually adopt the *Model Rules* in place of the *Code* after the Kutak Commission, charged with the revision, "concluded that piecemeal amendment of the Model Code would not sufficiently clarify the profession's ethical responsibilities in light of changed conditions." Meserve, *Chairman's Introduction* to MODEL RULES OF PROFESSIONAL CONDUCT (1983).

21. *See Developments in the Law, supra* note 7, at 1355, 1366; *see also* Note, *Unchanging Rules in Changing Times: The Canons of Ethics and Intra-Firm Conflicts of Interest,* 73 YALE L.J. 1058, 1068 (1964).

22. *See supra* notes 17-20.

23. *See* Meserve, *supra* note 20.

24. One commentator questions the need for formal rules where "civil and criminal law, the market, and the desire for good standing in one's community would remain," and points to the resourcefulness of the common law: "The Code, for example, said little useful about successive conflicts of interest, yet courts readily proceeded to define them and to fashion appropriate disqualification remedies." Gillers, *What We Talked About*

The principles of loyalty to the client and protection of client confidences underlie the ethical standards regarding conflicts of interest in successive representation and vicarious disqualification.[25] By imposing a threat of disqualification, the bar added an incentive to avoid the temptation or accidental risk of violating a client's confidences. The risk extended to the firm as well because of the presumption that lawyers associated together had access to shared confidences.[26] The presumption shifted the burden of proof from the law firm seeking disqualification to the firm facing disqualification.[27]

Concerns regarding confidentiality and conflict of interest have permeated every revision of the ethical standards of the legal profession. One of the earliest statements of professional ethics in America described the lawyer's obligation to inform his client of potential conflicts with former clients.[28] The *Canons*, as originally drafted, warned against subsequent conflicting representation, stressing the values of loyalty to the client and confidentiality.[29] A 1937 amendment to the *Canons* related the conflict to the protection of confidences. The obligation to protect confidentiality outlasts employment and might even require the lawyer to refrain from undertaking conflicting employment.[30] The emphasis on confidentiality was at least partially related to

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When We Talked About Ethics: A Critical View of the Model Rules, 46 OHIO ST. L.J. 243, 244 (1985) (footnote omitted).

25. *See* Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909 (1980) (discussing the principles of loyalty and confidentiality, their place in the hierarchy of ethical values, and their impact on the lawyer's duty of candor to the court and fairness to others); *see also* Emle Indus. v. Patentex, Inc., 478 F.2d 562, 570-71 (2d Cir. 1973) (stressing the value of the client's right to speak freely to chosen counsel and the importance of avoiding even the appearance of impropriety). *But see* Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 754 (2d Cir. 1975) (fulfilling the duty of absolute fidelity to the client's confidences does not require a blanket approach).

26. Note, *supra* note 7, at 682.

27. *Id.*

28. G. SHARSWOOD, *supra* note 1, at 45-46.

29. CANONS OF PROFESSIONAL ETHICS Canon 6 (1908): "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."

30.

> It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment . . . [and he should not] accept employment which involves or may involve the disclosure or use of these confidences . . . to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

CANONS OF PROFESSIONAL ETHICS Canon 37 (1952) (as amended Sept. 30, 1937).

the notion of loyalty to the client.[31] Other rationales for confidentiality have included protecting the integrity of the legal profession[32] and encouraging clients to come forward with information.[33]

The *Code* adopted language similar to the original *Canons*, emphasizing the protection of confidentiality[34] while voicing concerns regarding the exercise of independent professional judgment[35] and the appearance of impropriety.[36] The *Code*, however, made no specific reference to representation of a former client. At the time the ABA discarded the *Code* and adopted the *Model Rules*, the ethical standards of the profession called for lawyers and firms to avoid the appearance of impropriety by refraining from successive representation of clients in substantially related matters.[37] The *Code* continues in force in most states as the review process for the new rules gradually gets underway.[38] States may choose to keep the familiar *Code*, reject particular sections of the *Model Rules*—amending or retaining their old standard—or adopt the new standard.

The *Model Rules*[39] bring together, and attempt to deal expressly with, the issues of conflict of interest in successive representation,[40] imputed disqualification,[41] and the screening, or Chinese wall, defense.[42] A close look at the development of the

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31. Patterson, *supra* note 25, at 941.

32. Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 721 (7th Cir. 1982).

33. Note, *Disqualification of Attorneys for Representing Interests Adverse to Former Clients*, 64 YALE L.J. 917, 921 (1955).

34. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4, EC 4-5, EC 4-6 (1980).

35. *Id.* Canon 5, DR 5-105.

36. *Id.* Canon 9.

37. *See infra* notes 51-52 and accompanying text.

38. *See infra* notes 131-38 and accompanying text.

39. In 1977, the ABA Board of Governors created the Kutak Commission to consider revisions in the *Code*. After a preliminary review, the Commission assumed the task of reformulating the *Code*. Armstrong, *The Kutak Commission Report: Retrospect and Prospect*, 11 CAP. U.L. REV. 475, 486-89 (1982). The ABA House of Delegates adopted the *Model Rules of Professional Conduct* on August 2, 1983, after "[s]ix years of debate and often heated controversy" that "ended on a comparatively harmonious note." 52 U.S.L.W. 2077 (Aug. 9, 1983).

40. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1983): "A lawyer who has formerly represented a client in a matter shall not thereafter . . . represent another person in the same or a substantially related matter . . . ."

41. *Id.* Rule 1.10(b); *see supra* note 11.

42. *Id.* Rule 1.11(b): "A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from participation . . . ."

final rules through the records of the Kutak Commission reveals a shift away from strict imputation of disqualification.[43]

B. The Disqualification Package

The Kutak Commission shared the concerns of earlier ethicists for confidentiality and loyalty to the client's interests.[44] The Commission began its work with a flexible approach, focusing on principles to guide the lawyer in a variety of circumstances.[45]

As the Commission articulated the standards relating to conflicts of interest involving a former client, members reiterated the value of loyalty to the client. Commission members also raised the competing interest involved in enabling the client to have "the fullest choice of legal counsel reasonably possible."[46] Furthermore, pragmatic concerns argued against a strict disqualification rule, particularly for the government attorney.[47] The government attorney, who had broad exposure to a variety of issues and clients in a highly specialized area, and often had access to sensitive government information, faced severe limitations on his ability to shift to and work productively in the private sector. Consequently, a strict disqualification rule was a strong disincentive to government service.[48]

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43. The Commission's four-year effort provided detailed records of the changes that were made as well as the rationale and the sources for those changes. Although not the most controversial matter to come before the Kutak Commission, vicarious disqualification was a continuing concern. The records of the Commission, including files and bound journals, collected by Geoffrey C. Hazard, Jr., reporter for the Commission, are on file at the American Bar Foundation in Chicago, Illinois.

The Commission records are collected in bound volumes and vertical files, both arranged chronologically. The bound volumes are cited herein as published works of the Kutak Commission. Sections within those bound volumes are cited as articles. Materials from the vertical files are cited as unpublished works [hereinafter Commission Papers]. Copies of the Kutak Commission bound volume and vertical file materials cited in this Note are on file with the *Journal of Law Reform*.

44. Kutak Comm'n, *Preliminary Working Draft*, at 29-33, 70, in FEB. 24-25, 1978 JOURNAL.

45. "The problems arising from these various situations cannot be resolved by a multitude of rules. They can be dealt with only in . . . terms of principles which the lawyer must apply in good faith to the particular situation." *Id.* at 29-30.

46. Kutak Comm'n, *First Precirculation Draft, Aug. 2, 1979*, at 7.1-3, in JUNE 1979 JOURNAL.

47. The Commission believed that "the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association." *Id.*

48. *See infra* notes 89-92 and accompanying text.

The Commission's efforts to reconcile these issues resulted in the development of Model Rules 1.9, 1.10, and 1.11. The formulation of each of these rules reflects some ambivalence among the members of the Commission. That ambivalence is, in turn, evident in the Commission's deference to case law, its efforts to moderate each of the standards, and its attention to the consent provision in each standard.

1. Conflict of interest: the "substantially related" standard— The Commission's first draft of Model Rule 1.9—"Conflict of Interest: Former Client"—established the general outline of the rule but differed markedly from the final version.[49] A key omission was the established standard for the relationship between the subject matter of the former and the present representation—that they be substantially related.[50]

Fundamental to the law of conflict of interest in successive representation and vicarious disqualification cases is the substantial relation test established in *T.C. Theatre Corp. v. Warner Bros. Pictures*.[51] Although the court declined to inquire into the nature and extent of the actual representation, it found

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49. The first draft read:

> REPRESENTATION ADVERSE TO A FORMER CLIENT
>
> (a) A LAWYER WHO HAS REPRESENTED A CLIENT IN A MATTER SHALL NOT THEN REPRESENT ANOTHER PERSON IN THAT MATTER IF THE POSITION OF THE LATTER PERSON IS ADVERSE TO THAT OF THE FORMER CLIENT IN ANY MATERIAL RESPECT.
>
> . . . .
>
> (d) UPON ADEQUATE DISCLOSURE, THE DISQUALIFICATION PROVIDED IN SUBSECTION (a) MAY BE WAIVED BY THE FORMER CLIENT . . . .

Kutak Comm'n, *Working Papers, Dec. 15, 1978*, at 1-37, in OCT. 1978 JOURNAL.

The discussion in this Note is limited to those changes related to the nature of the lawyer's conflict of interest. Additional sections of the first draft considered the arbitrator and the judge; a discussion of these roles is beyond the scope of this Note.

50. Memorandum re: Draft Rules of Professional Conduct dated 1/25/79 from Thomas Morgan to ABA Committee on Evaluation of Ethical Standards at 4, *reprinted in* Kutak Comm'n, FEB. 1979 JOURNAL (referring to draft rule 1.11 and citing T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265 (S.D.N.Y. 1953), for its holding that the matters must be substantially related); ABA Section of Corp., Banking & Business Law, Comments of Committee on Counsel Responsibility and Liability on December 1979 Draft, *reprinted in* Kutak Comm'n, FEB. 1979 JOURNAL (stating that, as drafted, the rule was less restrictive of lawyers than the then-existing rule prohibiting representation in matters substantially related).

51. 113 F. Supp. 265 (S.D.N.Y. 1953). The court stressed the lawyer's duty of absolute loyalty to the clients' interests and the duty to maintain the confidences of a client, thus encouraging clients to make known all the facts related to their case. *Id.* at 268-69; *see also* Note, *supra* note 7, at 681; *Developments in the Law, supra* note 7, at 1318 (describing the test as a prophylactic one). Another concern was the indirect violation of confidences—that the court's inquiry into the lawyer's knowledge not reveal the confidences that are being protected. Note, *supra* note 7, at 682.

the matters to be substantially related where one could reasonably conclude that in the former representation the attorney might have acquired information regarding the subject of the subsequent representation.[52]

The Second and the Seventh Circuits have provided the most detailed analyses of the substantial relationship standard.[53] Other courts have applied the tests expounded by these two circuits and have, somewhat reluctantly, disqualified law firms.[54]

Courts have taken two complementary approaches to the standard delineated by the Second Circuit.[55] The first test of substantial relation,[56] which builds upon *T.C. Theatre*, requires that the relationship between the prior and present representation not only be patently clear, but also be identical or essentially the same.[57] More recently, a federal district court held that a finding of substantial relation requires "virtual congruence" of issues.[58]

The second approach asks whether an attorney is "at least potentially in a position to use privileged information concerning the other side through prior representation" and whether the representation threatens to taint the trial.[59] Although the Sec-

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52. 113 F. Supp. at 269. Some courts have interpreted the substantial relationship test to require an irrebuttable presumption that the individual attorney has acquired privileged information and must be disqualified, assuming that a substantial relationship exists. *E.g.*, Hallmark Cards, Inc. v. Hallmark Dodge, Inc., 616 F. Supp. 516 (W.D. Mo. 1985). Other courts have found the presumption rebuttable. E.Z. Paintr Corp. v. Padco, Inc., 746 F.2d 1459, 1461 (Fed. Cir. 1984); Schiessle v. Stephens, 717 F.2d 417, 418, 420 (7th Cir. 1983); Haagen-Dazs Co. v. Perche No! Gelato, Inc., 639 F. Supp. 282, 286 (N.D. Cal. 1986).

53. *See infra* notes 55-65 and accompanying text.

54. *See, e.g.*, Paul E. Iacono Structural Eng'r, Inc. v. Humphrey, 722 F.2d 435, 438 (9th Cir.), *cert. denied*, 464 U.S. 851 (1983); Trone v. Smith, 621 F.2d 994, 998 (9th Cir. 1980); *Haagen-Dazs*, 639 F. Supp. at 285-86. *But see* Whatcott v. Smith, 774 F.2d 1032, 1035 (10th Cir. 1985) (rejecting the imputation of knowledge to the firm in a second round of litigation aimed at disqualifying opposing counsel). For a related case, see Smith v. Whatcott, 757 F.2d 1098 (10th Cir. 1985).

55. Sorting out the positions remains a challenge because of the Supreme Court's rulings on interlocutory appeal. Armstrong v. McAlpin, 625 F.2d 433, 440 (2d Cir. 1981), overruled Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975), but the decision in *Armstrong* was vacated on the interlocutory appeal issues, 449 U.S. 1106 (1981). *See infra* notes 104-06 and accompanying text.

56. *Silver Chrysler*, 518 F.2d at 756. The panel considered upon whom the standard was to be imposed, distinguishing those who were heavily involved in the first attorney-client situation from those who "enter briefly on the periphery for a limited and specific purpose relating solely to legal questions." *Id.*

57. Government of India v. Cook Indus., 569 F.2d 737, 740 (2d Cir. 1978).

58. USFL v. NFL, 605 F. Supp. 1448, 1457 (S.D.N.Y. 1985). The law firm had represented the USFL in a series of early, organizing inquiries. In the earlier representation, the firm had avoided a conflict of interest due to simultaneous representation—the firm also represented the NFL commissioner—by obtaining the consent of both parties.

59. Board of Educ. v. Nyquist, 590 F.2d 1241, 1247 (2d Cir. 1979).

ond Circuit has subsequently reaffirmed this approach, it noted that the appearance of impropriety alone is an insufficient basis for disqualification.[60]

The Seventh Circuit has outlined a three-step approach and has more consistently found a rebuttable presumption of imputed knowledge at every level of communication—client to attorney, attorney to former and to present firm—than have the other circuits.[61] The first step asks whether there is a substantial relationship between the prior and present representation.[62] The court will then determine whether the presumption of shared confidences and the imputation of knowledge to other members of the prior firm have been rebutted. Finally, the court looks at the present representation; if the presumption of shared confidences is not rebutted, disqualification would follow.[63] Recent decisions not only make clear that the presumption may be rebutted, but also endorse the concept of the Chinese wall as one way to rebut the presumption—with "objective and verifiable evidence presented to the trial court and . . . made on a case-by-case basis."[64]

The decisions—particularly the approach of the Second Circuit—may pose an alternative to the Chinese wall defense and, accordingly, a way for the courts to avoid the abrupt change in policy represented by the Chinese wall. Such an approach would emphasize the circumstances of the representation. Judicial inquiry into the efficacy of a particular Chinese wall, on the other hand, would emphasize and perhaps create incentives for protection of client confidences.[65]

Despite some new approaches to conflicts-of-interest analyses, the substantial relationship test has remained a basic element of the analysis. The Kutak Commission recognized the error in its

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60. *Id.* at 1247. District court panels in the Second Circuit have expanded upon this view. *See USFL*, 605 F. Supp. at 1465-68; Yaretsky v. Blum, 525 F. Supp. 24, 30 (S.D.N.Y. 1981).

61. Schiessle v. Stephens, 717 F.2d 417, 420 (7th Cir. 1983); LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252, 255-56 (7th Cir. 1983); Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, 607 F.2d 186, 190-92 (7th Cir. 1979); Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 223-25 (7th Cir. 1978); *see also* Talley, *Toward Chinese Walls: The Seventh Circuit Debates Rebuttable Presumptions in Vicarious Disqualification Cases*, 11 S. ILL. U.L.J. 59 (1986).

62. The standard is not as strict as the one that the Second Circuit has imposed because it does not require either the virtual congruence of issues or the tainting of the trial.

63. *Schiessle*, 717 F.2d at 420.

64. *Id.* at 421.

65. *See infra* notes 146-47 and accompanying text.

omission and, in its next draft, restored the substantial relationship test.[66]

2. Conflict of interest: balancing interests and obtaining consent— The other changes that the Commission made in redrafting Model Rule 1.9 indicated a desire to balance the interests of attorneys and clients. The final rule assured that the client would be well-informed about potential conflicts of interest; the attorney who informed his client and obtained consent would be able to enter into or continue a new representation.

The Commission revised the draft rule entitled "Conflict of Interest: Former Client" to prohibit using, to the disadvantage of the former client, information that was acquired in the course of the previous representation.[67] Subsequent changes in this provision balanced the interests of attorneys and clients. The January 1979 draft excluded from the prohibition information that has become the subject of general knowledge.[68] The final rule shifted the scope of the protected information from that "acquired in service to the client" to that "relating to the representation."[69]

Clause (a) of draft rule 1.9 contained a consent provision, permitting an exception to disqualification where "the former client consents after consultation."[70] The members of the Commission considered several standards for disclosure as a condition of consent. The first—"adequate disclosure"[71]—was a distinct contrast to the "full disclosure" standard contained in a related provision of the *Code*.[72] Subsequently, the drafters cast the exception in

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66. Kutak Comm'n, *Working Papers, Jan. 1979*, at 1.11-1, in DEC. 1978 JOURNAL. The Commission clearly deferred to case law in writing this standard. The reporter noted that the Commission questioned whether the standard of Rule 1.10(a) (final Rule 1.9(a)) was "adequately restrictive," but found it sufficient that "the substantial relationship test set forth in this Rule was a direct derivative of case pronouncements on the issue." Kutak Comm'n, OCT. 1980 JOURNAL 22.

67. This prohibition had appeared in the first working paper. *Compare* Kutak Comm'n, *Working Papers, Dec. 15, 1978, supra* note 49, at 1-37 *with* Kutak Comm'n, *Working Papers, Jan. 1979, supra* note 66, at 1.11-1.

68. This change, preserved in the final rule and reversing, in part, Canon 37, relaxed the absolute inviolability of the client's confidences. For a critique of the change, see Kaufman, *A Critical First Look at the Model Rules of Professional Conduct*, 66 A.B.A. J. 1074, 1079 (1980).

69. *Compare* Kutak Comm'n, *Working Papers, Jan. 1979, supra* note 66, at 1.11-1 ("information acquired in service to the client") *with* Kutak Comm'n, SEPT. 1980 DISCUSSION DRAFT 44 ("information gained in or relating to representation") *and* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(b) (1983).

70. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(a) (1983).

71. Kutak Comm'n, SEPT. 1980 DISCUSSION DRAFT 44.

72. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-5 (1980).

terms of the client's consent "upon disclosure."[73] The final modifications, changing "disclosure" to "consultation,"[74] and without the modifiers "adequate" or "full," suggest greater flexibility for the lawyer. The comment to the rule also included the client's authority to waive disqualification.[75]

3. Vicarious disqualification— In writing the *Model Rules*, the Commission was at first unsure about the appropriate standard for imputation of disqualification from the individual lawyer to the firm where a conflict of interest in successive representation exists. Although the concept of vicarious disqualification was familiar in case law,[76] it appeared neither in the 1908 *Canons* nor in any of the amendments.[77] The *Code*, as adopted in 1969, provided in Disciplinary Rule (DR) 5-105 for an imputation of disqualification "if the interests of another client may impair the independent professional judgment of the lawyer."[78] A 1974 amendment extended the imputation to "withdrawal from employment under a Disciplinary Rule."[79]

The first working paper of the Commission opposed automatic imputation of disqualification to the firm solely because of the disqualification of a lawyer who had a prior attorney-client relationship with an opposing party.[80] The Commission expressed concern for the government attorney moving into private prac-

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73. Kutak Comm'n, PROPOSED FINAL DRAFT, MAY 1981 Rule 1.9.

74. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 and Terminology (1983) (defining "consultation" as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question").

75. *See id.* Rule 1.9 comment (balancing the interests of the client). *But see* Gillers, *supra* note 24, at 245 (footnotes omitted):

> The lawyers who approved the Rules looked after their own. They have given us an astonishingly parochial, self-aggrandizing document, which favors lawyers over clients, other persons, and the administration of justice in almost every line, paragraph, and provision that permits significant choice. It is internally inconsistent to the bar's benefit.

76. *See* Note, *supra* note 33, at 919.

77. The ABA Committee on Professional Ethics and Grievances stated the concept succinctly in 1931: "The relations of partners in a law firm are so close that the firm, and all the members thereof, are barred from accepting any employment that any one member of the firm is prohibited from taking." ABA Comm. on Professional Ethics and Grievances, Formal Op. 33 (1931), *reprinted in* 17 A.B.A. J. 469 (1931).

78. AMERICAN BAR FOUND., ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 225, 246-51 (1979) (discussing changes in DR 5-105). The rule encompassed withdrawal from employment where the interests of another client might impair professional judgment.

79. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D). Disciplinary Rule 5-105(D) (1980) (as amended Mar. 1974) of the *Code* thus encompassed withdrawal because of the "appearance of impropriety," and, in particular, withdrawal from private employment where a lawyer had substantial responsibility as a public employee. *Id.* DR 5-105(D), Canon 9, DR 9-101(B); *see* Note, *Conflicts of Interest and the Former Government Attorney*, 65 GEO. L.J. 1025, 1045-46 (1977).

80. Kutak Comm'n, *Preliminary Working Draft*, *supra* note 44, at 31.

tice and stated, "The standard is a narrow one, which does not preclude disqualification in appropriate cases."[81]

Commission members ultimately decided to prohibit "knowing" representation.[82] The final rule more clearly distinguished the firm with which a lawyer subject to disqualification becomes associated—which "may not knowingly represent a person in the same or a substantially related matter"—from the firm he has left—which "is not prohibited" from thereafter representing a person unless the matter is substantially related or a lawyer remaining in the firm has confidential information.[83] The rule suggests, and the comment makes clear, that different standards

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In 1975, the Legal Ethics Committee of the District of Columbia Bar proposed an absolute imputation of disqualification; the proposal encountered opposition almost immediately. *See infra* note 99. Late in 1977, as the debate continued in the District of Columbia, the Kutak Commission initiated its work.

81. *Id.* At least one commentator asked the Commission for greater clarity in this section and suggested that the standard proposed was a relaxation of current case law. Memorandum from Elizabeth Bartholet to the ABA Commission on the Evaluation of Professional Standards (Dec. 1, 1978), in Commission Papers, *supra* note 43.

The second draft provided a nearly complete outline of the final rule, addressing conflicting representation by lawyers associated in a firm and lawyers who leave a firm, as well as their subsequent colleagues, but omitting reference to the former firm. Kutak Comm'n, *First Precirculation Draft*, *supra* note 46, at 7.1-1. The Commission expressed its discomfort with vicarious disqualification of lawyers moving between firms:

> When lawyers have been associated but then dissolve their association, however, the problem is more complicated. The fiction that the firm is the same as a single lawyer no longer has realistic application. . . . First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having the fullest choice of legal counsel reasonably possible. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association.

Id. at 7.1-2 to -3; *cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 comment (1983) (expressing further concern regarding curtailment of opportunity). The Commission later included the "lawyer remaining in the firm." Kutak Comm'n, PROPOSED FINAL DRAFT, MAY 1981, at 95.

The drafted rule embodied a prohibition on representation that involved a "significant risk of disclosing confidences or making improper use of information," or "assuming significant participation or responsibility for asserting a position adverse to a client for whom the lawyer had previously assumed significant participation or responsibility in the same or a substantially related matter." Kutak Comm'n, *First Precirculation Draft*, *supra* note 46, at 7.1-1.

82. Proposed Final Draft as Revised Through June 30, 1982, in Commission Papers, *supra* note 43; *see* MODEL RULES OF PROFESSIONAL CONDUCT Terminology (1983) (defining "knowingly" as "actual knowledge of the fact in question," but stipulating that "knowledge may be inferred from circumstances").

83. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10; *cf.* ABA Office of Policy Admin., Results of 1983 Midyear Meeting on Amendments to the Proposed Model Rules of Professional Conduct, in Commission Papers, *supra* note 43 (including in draft submitted to ABA Rule 1.10(a) as adopted, and combining the rules on termination and association with a new firm).

should be applied to the lawyer, the former firm, and the present firm.[84]

One way to avoid the imputation of disqualification is to permit the screening of a lawyer who is subject to disqualification. Several commentators proposed the screening defense for private firms,[85] but the Commission never seriously considered the suggestion. An early draft suggested some support by listing "[r]elevant factors in determining the likelihood of actual access to client confidences."[86] The comment to Model Rule 1.10 only hints at the use of the Chinese wall as a remedy to avoid disqualification where a conflict of interest exists.[87]

4. The public servant exception— From the outset, the Commission intended to give special attention to the government attorney.[88] Shortly after beginning deliberations, members decided to reserve a separate section for issues related to conflicts of interest of the government attorney.[89] The members recognized the public interest in protecting the confidences that a government attorney might hold. Accordingly, the Commission wished to avoid potential abuses of government power and, at the same time, to protect government confidences.[90] The Commission also wanted to avoid restrictions on a successful private career, following government employment, that would dissuade highly qualified candidates from public service.[91]

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84. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 comment (1983).

85. Digest of Comments on Final Draft, comment number 50 (1982), in Commission Papers, *supra* note 43 (suggesting that the "Comment recognizes propriety of screening mechanisms and they should therefore be referred to in the Rule"); *id.* comment number 77 (advocating a screening provision "particularly because of the large number of lawyers employed by corporate law departments").

86. Kutak Comm'n, *First Precirculation Draft*, *supra* note 46, at 7.1-5 (listing the lawyer's professional experience, the division of responsibility, and the organizational structure of the firm).

87. Letter from Geoffrey C. Hazard, Jr. to Frances W. Hamermesh (Nov. 18, 1985) (describing the reference to the Chinese wall in the comments to rule 1.10 as "elliptical") (copy on file with U. MICH. J.L. REF.).

88. Kutak Comm'n, *Preliminary Working Draft*, *supra* note 44, at 70.

89. Originally, the term "persons," as used in Rule 1.9, for example, was to encompass the government agency. Kutak Comm'n, *Working Papers, Dec. 15, 1978*, *supra* note 49, at 1-37. The Commission reorganized its draft documents to pull together issues related to the government attorney. Memorandum from Geoffrey C. Hazard, Jr. to Administrative Law Section Ad Hoc Committee on Rule 1.11 (Apr. 21, 1983), in Commission Papers, *supra* note 43.

90. "The risk exists that power or discretion vested in public authority might be used for the special benefit of a private client." Kutak Comm'n, *Discussion Draft, Jan. 1980*, at 41, in OCT. 1979 JOURNAL.

91. *See* Kesselhaut v. United States, 555 F.2d 791, 793 (Ct. Cl. 1977) (describing the risk that the former government attorney could take on the status of a "Typhoid Mary"); Formal Opinion 342, *supra* note 3, *reprinted in* 62 A.B.A. J. 517 (1976); Cutler,

To balance the strong public policy favoring the removal of disincentives to government service[92] and concerns about the misuse of government authority,[93] the Commission adopted a vicarious disqualification rule with an exception for screening:

> (a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that [former government] lawyer is associated may knowingly undertake or continue representation in such a matter unless . . . the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom . . . .
>
> (b) . . . A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened . . . .[94]

Thus, the screening provision in the *Model Rules* is an exception created to ameliorate the harsh effects of imputed disqualification for the attorney who leaves or enters[95] government service.

A 1975 opinion of the ABA Committee on Professional Ethics and Grievances, which cautioned against imposing too strict a standard of disqualification on former government lawyers, was the source of the screening provision.[96] Again, the concerns were limitations on the individual's employment options and the availability of able lawyers for government service.[97] In 1969, the ABA had adopted the *Code* with a narrow vicarious disqualifica-

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New Rule Goes Too Far, 63 A.B.A. J. 725 (1977). *But see* Freedman, *For a New Rule*, 63 A.B.A. J. 724 (1977).

92. *See Kesselhaut*, 555 F.2d at 793.

93. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11 comment (1983).

94. *Id.* Rule 1.11(a)-(b).

95. *Id.* Rule 1.11(c).

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> There are, however, weighty policy considerations in support of the view that a special disciplinary rule relating only to former government lawyers should not broadly limit the lawyer's employment after he leaves government service. . . . [T]he ability of government to recruit young professionals and competent lawyers should not be interfered with by imposition of harsh restraints upon future practice nor should too great a sacrifice be demanded of the lawyers willing to enter government service . . . .

Formal Opinion 342, *supra* note 3, *reprinted in* 62 A.B.A. J. at 518 (footnotes omitted).

97. *Id.*

tion standard in DR 5-105.[98] There was no mention of a screening defense. A 1974 amendment to DR 5-105 extended the disqualification, and a strong response to the implications of this amendment provided the impetus for ABA Formal Opinion 342, which acknowledged circumstances under which screening was desirable as a defense against disqualification.[99]

From 1978 until completion of the final draft of the *Model Rules*, the Commission struggled with the issue of separate treatment for the government attorney.[100] The September 1980 draft introduced a specific screening provision. The expanded

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98. *See* ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 78, at 246-51 (annotating DR 5-105).

99. The opinion acknowledges two circumstances where screening would be necessary:

> [1] [W]e construe D.R. 5-105(D) to be inapplicable to other government lawyers associated with a particular government lawyer who is himself disqualified. . . . Although vicarious disqualification of a government department is not necessary or wise, the individual lawyer should be screened from any direct or indirect participation in the matter . . . . [2] So long as the individual [former government] lawyer is held to be disqualified and is screened from any direct or indirect participation in the matter, the problem of his switching sides is not present . . . .

Formal Opinion 342, *supra* note 3, *reprinted in* 62 A.B.A. J. at 521.

The debate over vicarious disqualification had special interest for the District of Columbia Bar Association. As the result of an inquiry to, and an opinion from, its Legal Ethics Committee, the D.C. bar undertook consideration of the matter at great length. Memorandum for the Board of Governors from William H. Allen, Chairman, Legal Ethics Committee, District of Columbia Bar (July 3, 1978), in Commission Papers, *supra* note 43. *Compare* Freedman, *supra* note 91 (arguing against the use of a screening-waiver provision to cure disqualification) *with* Cutler, *supra* note 91 (supporting screening for the government attorney).

In 1982, the District of Columbia Court of Appeals resolved the issue with its "Revolving Door" order stating that the imputation of disqualification would not apply if the lawyer, disqualified from a matter "in which he participated personally and substantially as a public officer or employee," is "screened from any form of participation in the matter or representation as the case may be, and from sharing in any fees resulting therefrom." ("Revolving Door"), 445 A.2d 615, 617 (D.C. 1982) (per curiam) (adopting a screening and notification provision, and rejecting a requirement of waiver and the submission of affidavits).

See also Aronson, *Conflict of Interest*, 52 WASH. L. REV. 807 (1977); Fordham, *There Are Substantial Limitations on Representation of Clients in Litigation Which Are Not Obvious in the Code of Professional Responsibility*, 33 BUS. LAW. 1193, 1194-95 (1978); Note, *supra* note 79, at 1045-46.

The Kutak Commission recognized that the new section on the government lawyer "[has] roots . . . in the District of Columbia Bar's proposal and expressions of concerns of the Justice Department related thereto. . . . [T]he Commission's rule . . . must contemplate broad nat'l application to lawyers situated in state and local governments." Kutak Comm'n, *Journal, Dec. 14-16, 1979*, at 17, in DEC. 1979 JOURNAL.

100. Kutak Comm'n, *Preliminary Working Draft*, *supra* note 44, at 70 (discussing the obligation to maintain confidences); Kutak Comm'n, *Unofficial Precirculation Draft*, at 77, in TENTATIVE DRAFT #3, SEPT. 1979 (penciled-in comment noting: "take out government—deal separately").

comment to the provision indicated that the Commission's major concern was not to create disincentives to government service.[101] The historical development of the screening provision and the language of the rule, supported by the records of the Kutak Commission, demonstrate the intent to permit screening as an exception to vicarious disqualification exclusively for the government attorney.[102]

II. CRITICAL ASSESSMENT OF THE WALL

Despite the rather strict provisions favoring vicarious disqualification that existed in the ethical standards, the bar has consistently exerted pressure for the Chinese wall defense. Judicial decisions suggest several ways in which courts have responded to this pressure against disqualification, short of ruling on the Chinese wall itself. This Part focuses briefly on the efforts of the courts and then on the standards suggested for the Chinese wall defense.

A. A Shifting Standard

Courts have continued to apply the substantial relationship test and to examine presumptions of shared confidences in prior and present representations. In recent years, the courts have considered the appealability of motions for disqualification.

1. Imputing shared confidences— In reviewing conflicts of interest related to successive representation, courts have found that the lawyer-client relationship creates a presumption—most often an irrebuttable presumption—of shared confidences.[103] The presumption exists to protect and encourage client confidences. When a lawyer shifts to another firm that becomes involved in the same matter, there is the risk of violating a client's confidences. Considering the implications of such mobility,

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101. "The provisions on screening . . . and waiver . . . are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service." Kutak Comm'n, SEPT. 1980 DISCUSSION DRAFT 48.

102. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(a)(1), (b) (1983); Kesselhaut v. United States, 555 F.2d 791, 793 (Ct. Cl. 1977).

103. Smith v. Whatcott, 757 F.2d 1098, 1100 (10th Cir. 1985); *see also* Peterson, *Commentary, Rebuttable Presumptions and Intra-Firm Screening: The New Seventh Circuit Approach to Vicarious Disqualification of Litigation Counsel*, 59 NOTRE DAME L. REV. 399 (1984).

courts have differed in their willingness to impute that shared confidence to the firm that he has left or to his new firm.[104] Where they have presumed a sharing of confidences, courts have split on whether such a presumption is rebuttable.[105] Nevertheless, courts seem increasingly willing to find these presumptions rebuttable.[106]

2. *Interlocutory appeal*— Although the Supreme Court has never considered, on the merits, a case on disqualification of counsel for conflict of interest, the Court has, in recent years, addressed the appealability of disqualification questions.[107] In its most recent case,[108] the Court refused to find that the risk of delay, the vindication of an attorney's reputation, or the use of a disqualification motion to harass an attorney were sufficient justifications for interlocutory appeal.[109] With the rejection of an interlocutory appeal for disqualification motions in civil actions, a clear or predictable standard for disqualification becomes more important.

B. The Chinese Wall

After a court acknowledges that the presumption of shared or imputed sharing of confidences is rebuttable, the attorney or firm defending against disqualification must demonstrate the ef-

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104. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11 comment (1983); *see also* Note, *supra* note 7, at 682.

105. Note, *supra* note 7, at 682 & n.24; *see supra* notes 53-54 and accompanying text.

106. *See* Schiessle v. Stephens, 717 F.2d 417, 418 (7th Cir. 1983); LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252, 257 (7th Cir. 1983); Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, 607 F.2d 186, 192 (7th Cir. 1979); Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 225 (7th Cir. 1978); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 754 (2d Cir. 1975); *see also* Liebman, *The Changing Law of Disqualification: The Role of Presumption and Policy*, 73 NW. U.L. REV. 996 (1979); Peterson, *supra* note 103; Talley, *supra* note 61; Note, *Towards a More Balanced Balancing: A Chronological Approach to Attorney Disqualification for Prior Representation*, 1985 U. ILL. L. REV. 219; Note, *supra* note 7. *But see* Hallmark Cards, Inc. v. Hallmark Dodge, Inc, 616 F. Supp. 516, 519 & n.1 (W.D. Mo. 1985) (describing the presumption as "irrefutable").

107. *See, e.g.*, Richardson-Merrell, Inc. v. Koller, 105 S. Ct. 2757 (1985) (holding that orders disqualifying counsel in civil cases are not subject to immediate appeal); Flanagan v. United States, 465 U.S. 259 (1984) (granting of pretrial motion to disqualify counsel in a criminal prosecution is not immediately appealable); Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980) (holding that there is no interlocutory appeal of a denial of a pretrial motion to disqualify counsel in a civil case), *vacated on other grounds*, 449 U.S. 1106 (1981); Note, Richardson-Merrell, Inc. v. Koller: *The Final Decision on the Immediate Appealability of Interlocutory Orders Disqualifying Counsel*, 1986 DET. C.L. REV. 613.

108. *Richardson-Merrell*, 105 S. Ct. 2757.

109. *Id.* at 2765-66.

fective construction of a Chinese wall. Although several of the federal circuits have endorsed the concept of a Chinese wall,[110] few have accepted a particular design. They appear reluctant to accept any wall as a sufficient guarantee against a conflict of interest. At the same time, however, in cases involving former government attorneys, the courts have begun to evaluate the standards of construction for a proper Chinese wall. These cases, which have found or described a wall that is sufficient to isolate the contaminating former government attorney, suggest the essential elements of any Chinese wall.[111] The primary considerations are isolation of attorney-client communications—past and future, verbal and written—the firm's experience and organizational structure, the system of rewards within the firm, and the size of the firm.[112]

Court decisions have suggested that adequate protections would consider the size of the law firm, the area of specialization of the attorney, and the attorney's position in the firm.[113] Screening measures focusing on the individual attorney would guarantee that the attorney (1) was excluded from participation in the action, (2) had no access to relevant files, (3) derived no remuneration from the funds gained in prosecuting the action, (4) was not allowed to view documents related to the litigation, and (5) was not permitted to listen in on others' discussions of the matter.[114]

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110. The Seventh Circuit, in particular, has affirmed the concept of the wall but has adopted a case-by-case approach to analysis of the conflict of interest and the remedy. *See supra* notes 61-64 and accompanying text.

111. Note, *supra* note 7, at 712-15; *see also* Note, *supra* note 106, at 241. Standards may also be gleaned from opinions of the ABA and from federal statutes and regulations. *See, e.g.*, 18 U.S.C. § 207 (1982); 31 C.F.R. § 10.26 (1986) (Treasury); 17 C.F.R. § 200.735-8 (1986) (Securities and Exchange Commission); 46 C.F.R. § 502.32 (1986) (Federal Maritime Commission).

112. Considerations include: (1) discussions between firm members and the screened lawyer regarding the former representation that are relevant to the new matter, (2) usual patterns of communication within the firm, (3) the firm's competence in the area involved without the screened attorney or before he joined the firm, (4) communication within the firm regarding potential conflicts, and (5) elimination of any pecuniary interest of the screened attorney. Committee on Professional and Judicial Ethics, Op. 889, 31 REC. A.B. CITY N.Y. 552, 570-71 (1976), *reprinted in* ABA, Disciplinary Workshop, June 9-11, 1977, Boston, Mass. (Tab 5). Courts at all levels have considered the requirements for the Chinese wall. *See* Manning v. Fort Deposit Bank, 619 F. Supp. 1327, 1329 (W.D. Tenn. 1985), *appeal dismissed*, 798 F.2d 470 (6th Cir. 1986); Weglarz v. Bruck, 128 Ill. App. 3d 1, 5, 470 N.E.2d 21, 25 (1984); *see also* Armstrong v. McAlpin, 625 F.2d 433, 442 (2d Cir. 1980), *vacated*, 449 U.S. 1106 (1981).

113. Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 723 (7th Cir. 1982); *see also Manning*, 619 F. Supp. at 1329; *Developments in the Law*, *supra* note 7, at 1367.

114. *Armstrong*, 625 F.2d at 442.

The Court of Claims considered the efficacy of screening measures and upheld screening practices in two cases as sufficient to defeat a motion for disqualification.[115] In *Sierra Vista Hospital v. United States,*[116] the court acceded to protections against access to files, prohibitions on consultation with the disqualified attorney, and physical separation from files, including eventual transfer of the case to a different office of the firm.[117] In *Kesselhaut v. United States,*[118] the court was not willing to disqualify where the firm acted promptly, and the individual attorney refrained from offering advice or information, never looked at the files involved, and received a straight salary with no share of the profits.[119]

Assessing the efficacy of the Chinese wall thus requires an evaluation of the firm's ability to isolate the individual attorney and to identify matters of potential conflict.[120] To date, some courts have been willing to accept criteria such as those suggested in *Sierra Vista* and *Kesselhaut.* These cases, however, have involved former government employees. The underlying policy is that the court will not disqualify the firm if visible and effective measures are in place to avert a conflict.

Whether the courts would apply the same standards when a firm attempts to screen a private attorney, rather than a former government attorney, is uncertain. The Seventh Circuit has come the closest to approving such an application, suggesting that "the presumption of shared confidences could be rebutted by demonstrating that 'specific institutional mechanisms,' (e.g. 'Chinese Walls,') had been implemented."[121] Nevertheless, that court has not as yet upheld any institutional mechanisms that it has examined. The Chinese wall remains unavailable as a defense to the private attorney.

III. WITHSTANDING PRESSURE FOR A CHANGE IN THE STANDARD

Conflict of interest in successive representation has traditionally been an ethical concern of the legal profession, and the pro-

115. Sierra Vista Hosp. v. United States, 639 F.2d 749 (Ct. Cl. 1981); Kesselhaut v. United States, 555 F.2d 791 (Ct. Cl. 1977).

116. 639 F.2d 749.

117. *Id.* at 751-52.

118. 555 F.2d 791.

119. *Id.* at 792-93.

120. For an extensive discussion of the factors in each category and a suggested form for screening, see O'Dea, *supra* note 8.

121. Schiessle v. Stephens, 717 F.2d 417, 421 (7th Cir. 1983).

fession has accepted the imputation of disqualification to the firm where an individual attorney would be disqualified. Permitting a Chinese wall defense on a motion for disqualification would mean abolishing or relaxing the imputation of disqualification. As more firms put Chinese walls into place to protect clients and prevent conflicts of interest, such security devices should be increasingly effective in enabling firms to acquire consent and avoid disqualification. The Chinese wall exists to protect the former client's confidences. When a party, in good faith, believes that protection is inadequate, he withholds consent; if necessary, he moves to disqualify his adversary's counsel. Permitting his opponent to use the Chinese wall defense would impair the client's or former client's right to consent—an important element in the attorney-client relationship.

At present, the Chinese wall is not an adequate defense to a formal motion to disqualify a firm. At least three factors justify denying the defense. First, the legal profession has not yet fully considered the implications—in terms of either ethical standards or litigation strategies—of permitting the Chinese wall defense. Second, no one has evaluated the efficacy of particular methods of isolation. Finally, neither lawyers nor academicians have debated the pragmatic advantages of professional flexibility and mobility against the absolute protection due a client's confidences. This Part analyzes the lack of progress in these dimensions—consensus, empirical evidence, and policy—in explaining why no change in the standard is warranted at the present time.

A. Lack of Full and Open Discussion

While developing a vicarious disqualification rule, the legal profession has had little open discussion of the Chinese wall defense to a motion for disqualification. Analysis of the drafting of the *Model Rules* demonstrates that the bar has not yet adequately considered the implications of a relaxation of vicarious disqualification.[122] The state-by-state consideration and adoption of the rules provides some indication of support for the rule of vicarious disqualification but says nothing about support for the Chinese wall defense.[123] Lastly, no empirical evidence is

122. See Kutak Comm'n, *First Precirculation Draft*, *supra* note 46, at 7.1-2 to -5, for a discussion of the dilemmas in dealing with vicarious disqualification. Much of this discussion was incorporated into the comment to Rule 1.10.

123. *See infra* notes 131-38 and accompanying text.

available to demonstrate the efficacy of a wall in the context of today's large law firms.[124]

1. Failure to consider the private attorney— The Kutak Commission members understood the rationale for the vicarious disqualification rule and arguments for and against the Chinese wall defense. They limited their discussions to the desirability of an exception for the government attorney[125] and did not examine whether to permit the Chinese wall defense for the private attorney. The implications of the defense for the private attorney differ significantly from those related to the government attorney's use of the defense.[126] The fact that the Commission developed a limited Chinese wall defense for the former government attorney does not justify extension of the defense to the private attorney. More discussion is required before allowing the private attorney to take refuge in the defense.

The record of the Kutak Commission from 1979 through 1983 shows a gradual evolution from a strict to a somewhat more relaxed standard of vicarious disqualification. The Commission incorporated the imputation of disqualification into its draft, made separate provision for the imputation of disqualification to the former government attorney, and then recognized screening to soften the harsh effects of the rule.[127] The Commission's records, including responses to their drafts, reveal that pressure for relaxation of the standard came from those most concerned with the problems of the public servant,[128] not from a general

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124. *See infra* notes 139-49 and accompanying text.

125. *See supra* notes 83-98 and accompanying text.

126. In May 1980, Attorney General Benjamin Civiletti "vigorously" opposed a sweeping vicarious disqualification rule. He stressed the government's need to attract experienced and well-qualified people for positions of responsibility as well as capable young attorneys:

> This movement into and out of government is not accidental. It is the result of a deliberate policy choice by the Congress and responsible Executive Branch officials—a policy choice reflected and affirmed in the determinations made by the Congress and the Executive Branch regarding the conflict of interest and ethical restrictions that should be imposed on persons who enter and leave government employment. Arriving at the appropriate ethical restrictions has required a careful balancing of the need to protect the integrity of government processes and the competing need to preserve the government's ability to attract and utilize the services of highly qualified lawyers.

Civiletti, Commencement Ceremony, Tulane Univ. School of Law (May 10, 1980), in Commission Papers, *supra* note 43; *see also Developments in the Law*, *supra* note 7, at 1439-40.

127. *See supra* notes 100-02 and accompanying text.

128. The Commission Papers, *supra* note 43, contain correspondence between the Commission—in particular its Chairman, Robert Kutak, and Recorder, Geoffrey C. Hazard, Jr.—and members of the Administrative Law and the Public Utility Law Sections of the ABA, dated from June 22, 1982 through May 18, 1983.

clamoring of private attorneys. Those interested in the issue controlled the discussion; therefore, Commission members gave little consideration to applying the exception to the private attorney.[129]

Commission members did not systematically review reasonable exceptions to vicarious disqualification. Rather, they considered the narrow question of whether, for policy reasons, there should be this single exception. They did not discuss the sufficiency of screening.

2. *State adoption of the* Model Rules— The process of state adoption of the ABA *Model Rules* is a critical measure of the acceptability of any of its provisions.[130] Since the ABA adoption in 1983, over half of the states have assigned committees on ethics the task of reviewing the rules and making recommendations for revision of state professional responsibility codes. A survey of the actions to date suggests that the states have found the rules on conflict of interest in successive representation, vicarious disqualification, and the screening exception for the government employee palatable.[131] Thus far, twenty states and the United States Claims Court[132] have adopted the *Model Rules*. Although almost all have amended the rules, only New Jersey and New Hampshire have amended Rules 1.9, 1.10, or 1.11; New Hampshire made minor changes.[133] New Jersey, the first state to adopt

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129. Responses to Discussion Draft of Model Rules of Professional Conduct (1980), comments of Andrew Kaufman (I-32) (suggesting a detailed screening rule without consent), Thomas Morgan (I-43) (urging separate consideration for the private and government attorneys), and Michael N. Sohn (I-60) and Fritz R. Kahn (I-30) (both endorsing the solution of Formal Opinion 342), in Commission Papers, *supra* note 43. *But see* Kutak Comm'n, Public Hearings, comments of Richard Levine, DEC. 1979 JOURNAL (suggesting the same criteria should apply to disqualification of both private and government attorneys).

130. The Supreme Court has endorsed the role of the states in determining, at least in criminal proceedings, the ethical standards that will govern. Nix v. Whiteside, 106 S. Ct. 988, 1006 (1986) (Blackmun, J., concurring).

131. [1 & 2 Current Reports] Law. Man. on Prof. Conduct (ABA/BNA) *passim*.

132. The Claims Court was the first to adopt the *Model Rules*, [1 Current Reports] Law. Man. on Prof. Conduct (ABA/BNA) 240 (May 30, 1984); the 20 states are: New Jersey, *id.* at 334 (July 25, 1984); Arizona, *id.* at 445 (Oct. 3, 1984); Montana, *id.* at 855 (July 10, 1985); Minnesota, *id.* at 882 (July 24, 1985); Missouri, *id.* at 924 (Aug. 21, 1985); Delaware, *id.* at 961 (Sept. 18, 1985); Washington, *id.* at 962 (Sept. 18, 1985); North Carolina, *id.* at 1026 (Oct. 30, 1985); Arkansas, *id.* at 1126 (Jan. 8, 1986); New Hampshire, *id.* at 1142 (Jan. 22, 1986); Nevada, [2 Current Reports] Law. Man. on Prof. Conduct (ABA/BNA) 14 (Feb. 5, 1986); Maryland, *id.* at 142 (Apr. 30, 1986); New Mexico, *id.* at 245 (July 9, 1986); Florida, *id.* at 261 (July 23, 1986); Connecticut, *id.* at 261 (July 23, 1986); Idaho, *id.* at 401 (Oct. 29, 1986); Indiana, *id.* at 494 (Jan. 7, 1987); Wyoming, *id.* at 510 (Jan. 21, 1987); Louisiana, [3 Current Reports] Law. Man. on Prof. Conduct (ABA/BNA) 13 (Feb. 4, 1987); and Mississippi, *id.* at 53 (Mar. 4, 1987).

133. *See* [2 Current Reports] Law. Man. on Prof. Conduct (ABA/BNA) 14 (Feb. 5, 1986).

the *Model Rules*, strengthened the protection for clients and adopted more restrictive provisions in these three rules.[134]

At least sixteen other states have considered or are considering new codes of ethics. New York,[135] Oregon,[136] and Illinois[137] rejected revision along the lines of the *Model Rules*, although Illinois did, and Oregon may, adopt some of the revisions of the Kutak Commission, including the provisions on conflict of interest. At least one state is considering suggested amendments to Rule 1.11.[138] Although moving slowly, the states have accepted the concept of screening for the government employee but have not extended it to the private lawyer.

Both state and national bar associations have considered a vicarious disqualification standard. No bar has sanctioned screening other than in the narrow context of the government employee. Ratification records of the *Model Rules* reveal little or no particular attention given to the use of internal protection devices—Chinese walls—as a defense against disqualification of the private attorney.

B. Lack of Empirical Support

Despite Formal Opinion 342 and experience under the *Code*, no objective evaluation of the effectiveness of the Chinese wall exists. Courts have relied on affidavits but have not seen evidence of how well modern, computerized screening works in the large firm.[139] Most firms have established some mechanisms for screening clients and attorneys to avoid a variety of potential conflicts of interest.[140] Some would argue that current screening methods provide adequate safeguards; the legal profession need not fear such breaches of confidentiality.[141] The many court de-

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134. [1 Current Reports] Law. Man. on Prof. Conduct (ABA/BNA) 17 (Jan. 25, 1984); *id.* at 334 (July 25, 1984).

135. *Id.* at 1047 (Nov. 13, 1985).

136. *Id.* at 1048 (Nov. 13, 1985).

137. *Id.* at 881-82 (July 24, 1985).

138. Utah, *id.* at 881 (July 24, 1985).

139. *See* Note, *supra* note 79, at 1047: "Yet, the effectiveness of screening is questionable. For example, attorneys can ignore or circumvent the segregation of the disqualified attorney from the firm's earnings and the prohibition on contacts with other attorneys." *Cf.* Note, *supra* note 7, at 705 (analyzing the Chinese wall in financial institutions and finding it secure).

140. *See* Huffman, *Conflicts, Disqualifications Cause Persistent Headaches*, Legal Times, May 5, 1980, at 1, col. 1, *reprinted in* Commission Papers, *supra* note 43. In one survey, 98% of the 50 responding law firms had some screening procedures in place.

141. *Id.*

cisions that find inadequacies in those walls, however, suggest that, at a minimum, the courts need more information about the security of such a wall before permitting a relaxation of the imputation of disqualification.[142]

Many questions relating to conflicts of interest in successive representation and vicarious disqualification remain unanswered. Most firms today have adopted screening procedures to prevent conflicts, and screening works to the extent that former clients do, in fact, waive the disqualification. Presumably, if consent is denied, the attorney disqualifies himself. Unanswered questions for empirical observation and study include: What screening procedures are in place?[143] What distinguishes those cases where consent is granted from those where consent is denied?[144] Are existing differences related to the quality of the screening, the degree of the substantial relationship, or the role of the individual attorney?[145] Where a conflict is not resolved by waiver or withdrawal, and a former client brings a motion for disqualification, did the screening process break down? To what extent is the motion for disqualification a strategic litigation decision?[146]

Little information on the incentive effect of a Chinese wall defense is available. Because one objective of the conflict of interest rules is to protect the client's confidences, an effective standard must strengthen the firm's initial screening, encourage attorney or firm withdrawal for apparent conflicts, and assure disqualification where such confidences are threatened. The consent or waiver provision in the rules, the ethical obligation to avoid conflicts of interest, and the desire to avoid disqualification provide a strong incentive for a strict initial screening of any new client and for withdrawal where a conflict is identified.

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142. The Seventh Circuit has suggested that the court will move cautiously, "[r]ecognizing that this is an area in which the relevant information is singularly within the ken of the party defending against the motion to disqualify and in which the reputation of the bar as a whole is implicated." LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252, 259 (7th Cir. 1983).

143. Important questions include when the firm started using computerized systems to prevent conflicts of interest and how extensively they are used.

144. The argument for a strict rule of disqualification is strengthened if cases in which consent is withheld are actually those where confidences are more likely to be revealed.

145. To understand the efficacy of screening, it is helpful to examine the weight accorded informal communications and reliance by one firm on the goodwill of others, or the degree of cooperation that exists.

146. These last two questions are related. Before a court can determine whether screening is valid, it must be able to recognize an actual breakdown or failure in screening.

Without the Chinese wall defense, this remains the best route to avoiding disqualification.

The effect of the Chinese wall upon the use of the motion to disqualify poses a more difficult question. Acknowledging screening as a legitimate defense may discourage such a tactic and encourage effective screening. Disallowing the defense, on the other hand, may encourage attorneys to disqualify themselves where there is an apparent conflict, thus enhancing confidentiality and reducing the potential for use of the motion to disqualify. Courts have favored the second approach, but no study has demonstrated its effect upon confidentiality. Similarly, no one has examined the possible effects of other approaches that courts may use to avoid disqualification where they feel that the screening has been adequate yet the rule prohibits the Chinese wall defense.[147]

Several of the arguments favoring the wall defense present empirical questions for which data is not currently available. One argument is that vicarious disqualification threatens the mobility of private attorneys in the same way that it threatened the mobility of the former government attorney. The two attorneys are similar in experience and ambition. Today, the private attorney has a specialized practice; he is as apt to desire a career change after significant experience with one firm as is the government attorney. No study has compared the experience of the two. Thus, important questions about mobility—such as whether firms consider potential conflicts in new or lateral hires, and whether the possibility of future motions to disqualify actually constrains attorneys—remain unanswered.

Proponents' arguments focus on the lawyer in the big firm. After all, the big firms with large numbers of clients, particularly clients with multiple associations, and with large numbers of lawyers with many former clients, seem to invite inquiry.[148] Courts have been adamant in their refusal to acknowledge the possibility of effective screening in a small firm.[149] Is such a distinction between large and small firms warranted? Data on firm

147. *See supra* text following note 64.

148. Thus, major firms such as Paul, Weiss, Rifkind, Wharton & Garrison and Kirkland & Ellis have been involved in disqualification litigation. *See* USFL v. NFL, 605 F. Supp. 1448 (S.D.N.Y. 1985) (Paul, Weiss, Rifkind, Wharton & Garrison); Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.) (Kirkland & Ellis), *cert. denied*, 439 U.S. 955 (1978).

149. *See* Yaretsky v. Blum, 525 F. Supp. 24, 30 (S.D.N.Y. 1981); Note, *supra* note 21, at 1068; *Developments in the Law, supra* note 7, at 1355. The size of the firm is one factor considered by virtually every court and commentator. *See supra* notes 112-18 and accompanying text.

size and screening practices would help courts to determine whether firm size should be one factor in an evaluation of the effectiveness of any particular wall and whether, and when, it should operate to preclude the defense.

Despite the lack of empirical data, the judiciary may possess special expertise in legal ethics to compensate for any lack of data on the successful implementation of techniques to isolate an attorney. The question, however, is not simply one of expertise in ethics, but whether judges have the requisite familiarity with large law firm practice to evaluate the efficacy and desirability of the Chinese wall.[150] A survey of the panels of three federal circuits reveals varied backgrounds but a decided lack of large law firm experience in the post-1965 era of expansion.[151] Few judges have had the opportunity to evaluate screening from the perspective of their own employment in a large firm.

C. Practical and Policy Arguments

In evaluating the policies underlying the Chinese wall defense, the bar and the courts must address pragmatic and ethical considerations. Opponents of the Chinese wall defense emphasize the ethical concerns—protecting confidentiality and avoiding conflicts of interest. Thus, vicarious disqualification provides a strong disincentive to conflicts of interest; the Chinese wall is an important self-help, internal security device, not for use as a defense against disqualification.

Proponents of the Chinese wall suggest that the defense is not inconsistent with justifications for the ethical standards regarding confidentiality.[152] If the lawyer's obligation is to protect the confidences of the client, disqualification on the mere presumption of a violation of confidences is unnecessarily restrictive. In addition, many would suggest that even the presumption that an attorney has acquired confidential information by virtue of his

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150. Conversation with Professor Wade McCree, Jr., Ann Arbor, Mich. (Sept. 23, 1985).

151. The criterion for large firm experience was whether the judge had practiced in a firm of more than 40 lawyers for at least five years since 1960. In the three circuits studied, three judges in the D.C. Circuit, three in the Second Circuit, and one in the Seventh Circuit met the criterion (credentials are listed in 2 ALMANAC OF THE FEDERAL JUDICIARY (1985)). The probability of a randomly selected three-judge panel including no judge with such experience ranged from .339 in the D.C. Circuit to .70 in the Seventh Circuit. Consultation with Daniel S. Hamermesh, Professor of Economics, Mich. State Univ., East Lansing, Mich. (Mar. 1, 1986).

152. Note, *supra* note 7, at 715.

membership in the firm is rebuttable, particularly in this era of large firms.[153] The prevalence of arguments for the Chinese wall and persistent litigation suggest pressure to revise the standard. Proponents' arguments, however, lack support and retain more than a hint of self-interest.

1. The realities of legal practice— Courts have demonstrated a reluctance to disqualify, and a willingness to accept the Chinese wall concept, where they believe that the motion for disqualification is being used as a delaying tactic in litigation.[154] Proposed standards for the Chinese wall suggest some sympathy for the realities of today's legal practice; although large firms suggest that any one lawyer may be far removed from another matter handled by the firm, the trend toward larger firms increases the potential for conflicts of interest.[155] Attorney mobility and misuse of the disqualification motion remain the strongest arguments supporting the Chinese wall defense.[156]

Arguments in favor of the Chinese wall have stressed its pragmatic virtues. Even the possibility of vicarious disqualification threatens many of the basic characteristics of large-scale legal practice.[157] These characteristics include interfirm mobility, consultation, farming out of corporate work, and specialization.[158]

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153. *Developments in the Law*, *supra* note 7, at 1330, 1355.

154.

> [T]he rule serves no worthwhile public interest if it becomes a mere tool enabling a litigant to improve his prospects by depriving his opponent of competent counsel; and the rule should not be permitted to interfere needlessly with the right of litigants to obtain competent counsel of their choosing, particularly in specialized areas requiring special technical training and experience.

Formal Opinion 342, *supra* note 3, *reprinted in* 62 A.B.A. J. at 518-19 (footnotes omitted); *see also* Kaufman, *Conflict Problems: Introduction*, 33 BUS. LAW. 1191 (1978); O'Dea, *supra* note 8, at 694.

155. *See supra* notes 111-14 and accompanying text; *see also* USFL v. NFL, 605 F. Supp. 1448, 1467-68 (S.D.N.Y. 1985).

156. Few courts have, as yet, handed down opinions under the new *Model Rules*. Some decisions, however, have considered the standard set forth in the *Model Rules* even where the state has not as yet adopted them. One Arizona opinion examined the problem of mobility as addressed in the comment to Rule 1.10, pointing to the expressed concern that the rules

> not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. The comments also acknowledge that if imputed disqualification "were defined with unqualified rigor" there would be a radical curtailment of the opportunity for lawyers to move from one practice setting to another . . . .

Golleher v. Horton, 148 Ariz. 537, 547, 715 P.2d 1225, 1235 (Ct. App. 1985); *see also Developments in the Law*, *supra* note 7, at 1366.

157. Huffman, *supra* note 140; *see also* Note, *supra* note 111, at 220-21, 232.

158.

> One factor that will often be relevant in determining whether screening will significantly increase attorney mobility is the degree to which the attorney and

Furthermore, the increased use of the motion for disqualification as a tool in litigation threatens added delay and costs to an already overburdened legal system.[159]

Preservation of the client's right to choice of counsel has been the other major argument put forward by proponents of the Chinese wall as a defense to disqualification.[160] The Seventh Circuit has referred to the delicate balance between "the sacrosanct privacy of the attorney-client relationship (and the professional integrity implicated by that relationship) and the prerogative of a party to proceed with counsel of its choice."[161] The Second Circuit has also suggested that the client's right to choose counsel freely requires courts to impose a high standard of proof on the side seeking to disqualify opposing counsel.[162] Limiting the use of disqualification as a sanction for a conflict of interest violation preserves the client's right to his choice of attorney.[163]

Critics of the Chinese wall have challenged the ability of law firms to regulate themselves.[164] Allowing firms to build a wall may create a false sense of security for the public. First, as the wall becomes institutionalized, an adversary claiming a breach or potential breach of confidences will have more difficulty gathering evidence to prove that the wall is ineffective. At present, the threshold test is proof that the matters at issue in the cur-

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> his potential firm engage in a specialized practice with a relatively restricted clientele. . . . It is one thing to bar an attorney who has developed such a specialty from opposing former clients in matters substantially related to ones in which he has represented them; this may reduce his marketability to some degree, but it will not necessarily preclude his becoming affiliated with lawyers engaged in a similar practice. It is quite another thing, however, to extend the attorney's disability to all attorneys in any firm he joins; such a rule may increase the security of former clients, but it devastates the attorney's future employment prospects. In such situations, permitting Chinese wall rebuttal of the presumption of shared knowledge can save the attorney from becoming a professional pariah.

Developments in the Law, supra note 7, at 1366.

159. Greene, *Everybody's Doing It—But Who Should Be? Standing to Make a Disqualification Motion Based on an Attorney's Representation of a Client with Interests Adverse to Those of a Former Client*, 6 U. PUGET SOUND L. REV. 205, 229 (1983); O'Dea, *supra* note 8, at 693-94.

160. Greene, *supra* note 159, at 206.

161. Schiessle v. Stephens, 717 F.2d 417, 420 (7th Cir. 1983).

162. Government of India v. Cook Indus., 569 F.2d 737, 739 (2d Cir. 1978).

163. Commentators have stressed their concern about overriding this right where courts have disqualified an attorney or firm. *See* Note, *Attorney Disqualification: The Case for an Irrebuttable Presumption Rebutted*, 44 ALB. L. REV. 645, 647-48 (1980); Note, *Attorney's Conflict of Interests: Representation of Interest Adverse to That of Former Client*, 55 B.U.L. REV. 61 (1975); Note, *supra* note 21, at 1067.

164. Victor, *Firms Facing More Ethical Challenges*, Nat'l L.J., Dec. 1, 1986, at 1, col. 4.

rent and former representation are substantially related.[165] Where the presumption of imputed confidences is rebuttable, the burden will shift to the present firm to prove that they have constructed an effective wall or that confidences have not been violated. To refute such testimony is an imposing task for the party seeking disqualification.

2. *Other arguments*— Most discussion of vicarious disqualification has focused on the desirability of modifying or relaxing the strict rule. Some commentators have suggested that the easiest way to resolve the uncertainty regarding the standard is to maintain an absolute rule of disqualification,[166] excluding even the government employee exception.[167] Such an approach, they argue, is the best way to safeguard confidentiality, assuming that is the goal. Anything less poses the temptation of circumventing the rule and introduces an appearance of impropriety.

But there are also risks in such an absolute standard. First, it encourages the tactical use of the motion to disqualify. Firms need screening systems[168] and will implement them. The absolute standard, however, provides no additional incentive for firms to try to build as secure a system as possible. Given the strength of sentiment favoring some discretion in vicarious disqualification, courts should seek alternative theories for avoiding disqualification, such as the "taint to the trial" rule.[169]

CONCLUSION

The spectre of large law firms, increased specialization, and mobility at the associate level suggest the need for protection

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165. *See supra* notes 50-52 and accompanying text.

166. Telephone interview with Prof. Monroe Freedman, Hofstra Univ. School of Law (Nov. 20, 1985) [hereinafter Freedman interview]. The proposed standards of the American Trial Lawyer's Association permit successive representation only with the client's knowing and voluntary consent. The Roscoe Pound-American Trial Lawyers Foundation, The American Lawyer's Code of Conduct, Rule 1.2 (revised draft, May 1982). *But see* Comment, *Disqualification of Counsel: Adverse Interests and Revolving Doors*, 81 COLUM. L. REV. 199, 215 (1981) (footnote omitted): "Chinese walls, therefore, should be permitted in adverse interest disqualifications not only because they prevent the substantive impropriety of misuse of confidential information, but also because their very preclusion lends to these situations a greater appearance of impropriety than they objectively should entail."

167. Professor Freedman argues that the government context provides a good example of the risk of conflict. How unlikely is it that anyone currently serving on a government commission, but soon to be out in the private sector, will reject his former colleague's request for consent? Freedman interview, *supra* note 166.

168. O'Dea, *supra* note 8, at 718.

169. *See supra* note 59 and accompanying text.

against conflicts of interest in successive representation. Firms are successfully utilizing computerized systems to screen for and avoid potential conflicts. That success has increased the confidence of firms in their own systems to the point where they are eager to argue that such screening, or the well-constructed Chinese wall, should be a defense against a motion for disqualification. But the limited nature of discussions within the profession and the lack of evaluation of the effectiveness of Chinese walls caution against permitting private attorneys to use this potent defense against vicarious disqualification of firms.

Proponents of the Chinese wall defense urge that the professional responsibility rules treat all attorneys alike—if there is an exception for some, then there should be an exception for all. Opponents say that the exception should not swallow the rule. Given the inadequacies of discussions in the profession to date, the lack of empirical evidence available to support either position, and the courts' inability to resolve concerns regarding abuse in the use of the motion to disqualify, no justification exists at present for judicial acceptance of the Chinese wall as a defense to vicarious disqualification. The *Model Rules* may provide the framework for a rare case that will permit a court to evaluate the adequacy of a particular wall. Meanwhile, those who would make the case for the wall have much work to do. Those who oppose the Chinese wall defense must examine the implications of the defense for traditional standards of confidentiality, consent in the attorney-client relationship, and conflict of interest.

—*Frances Witty Hamermesh*