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**REBUTTABLE PRESUMPTIONS IN VICARIOUS
DISQUALIFICATION CASES: CAN THE
APPEARANCE OF IMPROPRIETY BE REBUTTED?—
NOVO TERAPEUTISK LABORATORIUM A/S
V. BAXTER TRAVENOL LABORATORIES, INC.**

An attorney may be disqualified¹ from representing a former client's² opponent in litigation³ because he or she may have knowledge of confidences potentially detrimental to the former client. Recently, litigants have moved to disqualify not only their own former attorneys, but also their attorney's former colleagues. Even though these former colleagues did not personally represent the movant, they may have acquired knowledge of the movant's confidences through their prior association with the movant's attorney. Accordingly, vicarious disqualification motions⁴ are based on conten-

1. Disqualification is granted when the attorney's representation violates the Code of Professional Responsibility. ABA CODE OF PROFESSIONAL RESPONSIBILITY (*as amended* Aug. 1978) [hereinafter cited as CODE]. The Code embodies the legal profession's own concept of the ethical obligations of attorneys and contains nine Canons supplemented by Ethical Considerations and Disciplinary Rules. The Canons are "statements of axiomatic norms" while the Ethical Considerations (EC) represent ultimate goals. *Id.* at Preamble. Disciplinary Rules (DR) describe mandatory minimum standards of conduct. *Id.*

Canon 4, under which a disqualification motion may be brought, establishes the broad rule that "a lawyer should preserve the confidences and secrets of a client." *Id.* at Canon 4. Disciplinary Rules accompanying this Canon state that "a lawyer shall not knowingly reveal . . . [or] use a confidence or secret of his client to the disadvantage of the client." *Id.* at DR 4-101(B)(1) & (2). Further, an Ethical Consideration advises that "no employment should be accepted that might require such disclosure." *Id.* at EC 4-5.

The Code is binding if it has been incorporated in the rules of the court. *See, e.g.*, N.D. ILL. GEN R. 8 (a), (d). Those courts that have not specifically adopted the Code generally rely on it for guidance in resolving questions of ethics. *See, e.g.*, *Central Milk Producers Coop. v. Sentry Food Stores, Inc.*, 573 F.2d 988, 991 (8th Cir. 1978); *Woods v. Covington County Bank*, 537 F.2d 804, 810 (5th Cir. 1976); *Handelman v. Weiss*, 368 F. Supp. 258, 263 (S.D.N.Y. 1973).

A court may order disqualification absent a violation of the Code. *See, e.g.*, *Handelman v. Weiss*, 368 F. Supp. at 263 ("questionable behavior will not be permitted merely because it is not directly covered by the Canons"). Conversely, a court may refuse to disqualify an attorney even though a violation has occurred. *See, e.g.*, *Central Milk Producers Coop. v. Sentry Food Stores, Inc.*, 573 F.2d at 991 (although the Code establishes proper guidelines, a violation does not automatically result in disqualification).

2. A former client can assert a violation of Canon 4 because an attorney's ethical obligation to preserve the confidences and secrets of his or her clients continues after the termination of the attorney-client relationship. CODE, *supra* note 1, at EC 4-6. *Accord*, *American Roller Co. v. Budinger*, 513 F.2d 982, 984 (3d Cir. 1975); *American Can Co. v. Citrus Feed Co.*, 436 F.2d 1125, 1128 (5th Cir. 1971); *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265, 268 (S.D.N.Y. 1953).

3. Although an attorney's withdrawal may be sought in nonlitigation settings as well as in criminal and civil litigation, the scope of this Note is limited to a discussion of disqualification motions brought in civil litigation.

4. Since the attorney's withdrawal is sought not because of his or her prior attorney-client relationship with the movant but because of an attorney-client relationship entered into by a

tions that an attorney's representation of a party adverse to a former colleague's⁵ client creates an appearance of professional impropriety in violation of Canon 9 of the Code of Professional Responsibility.⁶ Unfortunately, courts have not been consistent in their interpretations of Canon 9.⁷ This lack of uniformity prompted one commentator to compare vicarious disqualification motions to "a game of ethical Russian Roulette."⁸

In *Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc.*,⁹ the United States Court of Appeals for the Seventh Circuit considered the ethical obligations imposed by Canon 9 in reaching its decision on a vicarious disqualification motion. The court held that if an attorney rebuts a presumption that he or she shared the confidences of a former associate's client, then the attorney's representation of that client's adversary does not create an appearance of impropriety.¹⁰ The Seventh Circuit's creation of a rebuttable presumption of shared confidences and its refusal to order disqualification even though an appearance of impropriety may have existed to a layman may diminish both the public's confidence in the integrity of the judicial system and the effectiveness of legal representation.¹¹

Following a review of prior approaches to vicarious disqualification motions, this Note analyzes the reasoning of the *Novo* opinion. It criticizes the Seventh Circuit's failure to follow its own interpretation of Canon 9 and suggests *Novo's* possible detrimental effect on the quality of legal representation. Finally, the Note concludes with a proposal for uniform guidelines in vicarious disqualification cases.

former associate, the attorney's disqualification is vicarious. For a discussion of the policy considerations underlying both traditional disqualification (*i.e.*, in which the attorney whose withdrawal is sought personally represented the movant) and vicarious disqualification, see generally Liebman, *The Changing Law of Disqualification: The Role of Presumption and Policy*, 73 Nw. U.L. REV. 996 (1979) [hereinafter cited as Liebman].

5. A vicarious disqualification motion can also be directed at a current associate. Since this situation is specifically addressed in the Code, it has not created significant problems for courts. See CODE, *supra* note 1, at DR 5-105(D) (the inability of one member of a firm to represent a client extends to all members of the firm). This Note will discuss only the more controversial issue presented when the disqualification motion is directed at an attorney *formerly* associated with the movant's attorney.

6. CODE, *supra* note 1, at Canon 9. Canon 9 states: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." *Id.*

7. See text accompanying notes 26-35 *infra*.

8. O'Toole, *Canon 9 of the Code of Professional Responsibility: An Elusive Ethical Guideline*, 62 MARQ. L. REV. 313, 316 (1979) [hereinafter cited as O'Toole]. Courts have also recognized the difficulty attorneys encounter in an effort to ensure that their conduct conforms to ethical standards. See *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225, 227 (2d Cir. 1977) ("in deciding questions of professional ethics men of goodwill often differ in their conclusions").

9. 607 F.2d 186 (7th Cir. 1979).

10. *Id.* at 197.

11. See text accompanying notes 85-90 *infra*.

PRIOR APPROACHES TO VICARIOUS
DISQUALIFICATION MOTIONS

A vicarious disqualification motion is based on one attorney's prior partnership or association with another attorney who previously represented the movant.¹² Accordingly, such motions require a two level inquiry. First, a court determines whether, hypothetically, the attorney who previously represented the movant would be disqualified if he or she represented the movant's opponent.¹³ Second, a court considers whether this hypothetical disqualification should be extended under Canon 9 to the attorney's former colleague.¹⁴

At the first level of inquiry, the proponent of a vicarious disqualification motion must prove that: (1) a previous attorney-client relationship existed; (2) the subject matter of the pending litigation and the prior representation are substantially related; and (3) confidences potentially detrimental to the proponent were reposed in the attorney.¹⁵ The first element of proof has elicited little comment because the existence of a prior attorney-client relationship is usually uncontested.¹⁶ The second and third elements are interrelated. The substantial relationship requirement is met when the nexus between the pending litigation and the prior representation enables a court reasonably to conclude that the attorney *might* have acquired information from the proponent that is relevant to the subject matter of the current litigation.¹⁷ Once a substantial relationship is established, courts irrebutta-

12. See note 4 *supra*.

13. See notes 15-20 and accompanying text *infra*.

14. See notes 21-35 and accompanying text *infra*.

15. These three elements of proof can be garnered implicitly from the courts' opinions, and are stated explicitly by some courts. See *General Elec. Co. v. Valeron Corp.*, 428 F. Supp. 68, 74 (E.D. Mich. 1977); *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 440 F. Supp. 193, 207 (N.D. Ohio 1976), *aff'd*, 573 F.2d 1310 (6th Cir. 1977), *cert. denied*, 435 U.S. 996 (1978). See also Note, *Attorney's Conflict of Interests: Representation of Interest Adverse to that of Former Client*, 55 B.U. L. REV. 61, 66 (1975); Note, *Disqualification of Counsel for the Appearance of Impropriety*, 25 CATH. U.L. REV. 343, 349-50 nn.27-28 (1976).

16. An attorney-client relationship does not depend on the payment of fees or the execution of a formal contract but can be implied from the conduct of the parties. See *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1316-19 (7th Cir. 1978) (rejecting the notion that an attorney-client relationship is one of agency dependent upon express or implied consent and including an excellent general discussion of when an attorney-client relationship arises); *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 388 (S.D. Tex. 1969) (court implied an attorney-client relationship when an attorney representing the movant's employer accompanied the movant when he testified at hearings investigating his employer's affairs).

17. See *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265, 269 (S.D.N.Y. 1953). While the *T.C. Theatre* test has been widely accepted, some courts have adopted a more rigorous standard, requiring a "patently clear" relationship between the current litigation and the previous representation. See *Government of India v. Cook Indus., Inc.*, 569 F.2d 737, 739-40 (2d Cir. 1978).

bly presume that the proponent reposed potentially detrimental confidences¹⁸ in the attorney.¹⁹

After the movant successfully proves each of the three elements required at the first level,²⁰ a court often initiates the second level of inquiry by

18. "Confidences" are defined as "information protected by the attorney-client privilege under applicable law." CODE, *supra* note 1, at DR 4-101(A). An attorney is also precluded from disclosing a client's "secrets." *Id.* at DR 4-101(B). "Secrets" are defined as "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." *Id.* at DR 4-101(A). As used throughout this Note, "confidences" will be considered to include "secrets."

19. See *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265 (S.D.N.Y. 1953). Noting that the rule of secrecy was created, in part, "to encourage clients fully and freely to make known to their attorneys all facts pertinent to their cause," the *T.C. Theatre* court reasoned that this goal would be undermined if a client were required to prove that confidences had been reposed in an attorney by revealing those confidences to a court. *Id.* at 269.

Since an attorney may participate in a legal representation without directly communicating with a client, some courts have held that the *T.C. Theatre* presumption applies when a client demonstrates that an attorney had access to confidential information. See *Consolidated Theatres, Inc. v. Warner Bros. Circuit Mgm't Corp.*, 216 F.2d 920, 927 (2d Cir. 1954); *General Elec. Co. v. Valeron Corp.*, 428 F. Supp. 68, 72-74 (E.D. Mich. 1977); *Empire Linotype School, Inc. v. United States*, 143 F. Supp. 627, 632 (S.D.N.Y. 1956). *Cf.* *NCK Org. v. Bregman*, 542 F.2d 128, 134 (2d Cir. 1976) (law firm disqualified because its attorneys had communicated with the movant's former house counsel even though there was no proof that confidences had been divulged). Moreover, if confidences were acquired as a result of an attorney-client relationship, the fact that these "confidences" are a matter of public record or are obtainable from sources other than the client does not exculpate the attorney from representing an adverse interest. See *Emlé Indus., Inc. v. Patentex, Inc.*, 478 F.2d 562, 572-73 (2d Cir. 1973); *Handelman v. Weiss*, 368 F. Supp. 258, 264 (S.D.N.Y. 1973); *Doe v. A Corp.*, 330 F. Supp. 1352, 1355 (S.D.N.Y. 1971), *aff'd sub nom.* *Hall v. A Corp.*, 453 F.2d 1375 (2d Cir. 1972). *Cf.* *NCK Org. v. Bregman*, 542 F.2d at 133 (attorney does not avoid disqualification by proving that his new client had the same knowledge of a former client's confidences as the attorney).

Although the *T.C. Theatre* presumption has been uniformly adopted, some opinions have expressed displeasure with its conclusive status. See *Government of India v. Cook Indus., Inc.*, 569 F.2d at 741 (Mansfield, J., concurring) (opining that it is unfair to exclude rebuttal that relevant confidences were received); *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 440 F. Supp. at 209 (concluding that equity demands that the presumption be rebuttable in view of the trend toward specialization of attorneys).

20. If the movant fails to establish any one of these three elements, the court will not proceed to the second level of inquiry and disqualification will not be granted. For example, courts have refused to order disqualification where a prior attorney-client relationship was not shown. See *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 609 (8th Cir. 1977) (attorney represented movant's co-defendant in a prior suit); *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 479 F. Supp. 465 (E.D. La. 1979) (attorney previously represented association of which the movant was a member); *Baglini v. Pullman, Inc.*, 412 F. Supp. 1060, 1066 (E.D. Pa. 1976) (attorney represented party named as third-party defendant in a suit against movant; the third-party defendant did not object to the attorney's representation of plaintiff). *But see* *Handelman v. Weiss*, 368 F. Supp. at 262-64 (attorney disqualified because of the appearance of impropriety even though no prior attorney-client relationship existed).

If no substantial relationship exists between the prior representation and the current litigation, disqualification will not be granted. See *Uniweld Prods., Inc. v. Union Carbide Corp.*, 385 F.2d 992, 994-95 (5th Cir. 1967), *cert. denied*, 390 U.S. 921 (1968) (court refused to disqualify

considering whether confidences reposed in one member of a firm have been shared with other members. A presumption of shared confidences was established by the Second Circuit in *Laskey Bros. of West Virginia, Inc. v. Warner Bros. Pictures, Inc.*,²¹ and has been adopted by a majority of the courts.²² The more controversial issue of whether this presumption is rebuttable has not been resolved. According to the *Laskey* decision, the presumption is irrebuttable so long as attorneys remain associated with one another, but once an association is terminated, an attorney may rebut the presumption that he or she shared confidences with a former colleague.²³ A

attorney whose prior representation of movant was unrelated to the pending trademark infringement and unfair competition action); *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 440 F. Supp. at 209 (disqualification refused because attorney's status as bond counsel for city was unrelated to antitrust suit city filed against attorney's client); *Shelley v. The Maccabees*, 184 F. Supp. 797, 800-01 (E.D.N.Y. 1960) (disqualification refused because prior legal services rendered in effecting a change in movant's organizational structure were unrelated to present breach of contract suit). *But cf.* *International Business Machs. Corp. v. Levin*, 579 F.2d 271, 280 (3d Cir. 1978) (substantial relationship test held inapplicable when an attorney concurrently represents conflicting interests); *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1387 (2d Cir. 1976) (same).

Even though a substantial relationship exists, disqualification may not be granted if a court finds that the movant disclosed confidences to an attorney with no expectation that they would be held inviolate. *See Allegaert v. Perot*, 565 F.2d 246, 250 (2d Cir. 1977) (no expectation that confidences of one party to a business combination will not be disclosed to the other party); *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 479 F. Supp. at 469 (no expectation of secrecy when movant disclosed confidences in conjunction with the defense of a trade association of which movant was a member). *Cf.* *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 440 F. Supp. at 201-05 (movant was equitably estopped from seeking disqualification since it actively sought the previous representation fully cognizant of the fact that the attorney represented a client with a potential adverse interest).

21. 224 F.2d 824 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956). The *Laskey* opinion considered disqualification motions by defendant Warner Bros. in two separate suits, one brought by Laskey Bros. and the other brought by Austin Theatres, Inc. Both suits involved private antitrust actions in which the plaintiffs were represented by the law firm of Malkan & Ellner. The disqualification motions were based on Malkan's former partnership with an attorney, Isacson, who previously had represented Warner Bros. *Id.* at 825.

The court acknowledged that a presumption of shared confidences was an extension of the Canons of Professional Ethics (the predecessor of the Code) but reasoned that such a presumption was necessary "to facilitate maximum disclosure of relevant facts on the part of clients." *Id.* at 827.

22. For cases supporting an initial presumption that client confidences are shared among members of a law firm, see *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d at 1321; *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d at 608 (dicta); *Celanese Corp. v. Leeson Corp.*, 530 F.2d 83, 89 (5th Cir. 1976); *Estep v. Johnson*, 383 F. Supp. 1323, 1326 (D. Conn. 1974); *Handelman v. Weiss*, 368 F. Supp. at 264. *But see* *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 440 F. Supp. at 211 (dicta) (argues for a presumption only among lawyers practicing in the same area of concentration within a firm).

23. 224 F.2d at 827. In support of its holding, the court expressed concern that an irrebuttable presumption "might seriously jeopardize [young lawyers'] careers by temporary affiliation with large law firms." *Id.* The court also projected an adverse effect on clients, noting that strictly applied disqualification rules might result in "difficulty in discovering technically trained attorneys in specialized areas who were not disqualified, due to their peripheral or temporally

dissenting judge in *Laskey*, however, argued that the presumption should be irrebuttable regardless of whether it is applied to present or former associates.²⁴ More recently, the Fifth Circuit implied that the presumption should be irrebuttable by specifically extending liability for disqualification to former partners of an attorney who participated in a client's representation.²⁵

Although courts consider whether a presumption of shared confidences is rebuttable or irrebuttable as one factor in determining whether to disqualify an attorney vicariously, they also seek guidance from case law interpreting Canon 9. Unfortunately, the vague language of this Canon²⁶ is susceptible to varying interpretations, and two divergent views have emerged. One view espouses a broad, prophylactic application,²⁷ while the other suggests a more

remote connections with attorneys for the other side." *Id.* See generally Liebman, *supra* note 4, at 1006 (criticizing the *Laskey* holding).

For decisions agreeing that the initial presumption of shared confidences is rebuttable, see *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 754 (2d Cir. 1975); *Baglini v. Pullman, Inc.*, 412 F. Supp. 1060, 1064 n.10 (E.D. Pa. 1976), *aff'd*, 547 F.2d 1158 (3d Cir. 1976); *W.E. Bassett Co. v. H.C. Cook Co.*, 201 F. Supp. 821, 824 (D. Conn. 1962), *aff'd per curiam*, 302 F.2d 268 (2d Cir. 1962); *Fleischer v. A.A.P., Inc.*, 163 F. Supp. 548, 552 (S.D.N.Y. 1958), *appeal dismissed sub nom.* *Fleischer v. Phillips*, 264 F.2d 515 (2d Cir. 1959), *cert. denied*, 359 U.S. 1002 (1959).

24. 224 F.2d at 833 (Ryan, J., dissenting). Recognizing that clients repose trust and confidence in their attorneys, the dissent concluded that all members of a law firm assume an obligation not to breach the trust that any of the firm's clients has placed in any member of the firm. *Id.* at 832. This obligation continues throughout an attorney's professional career regardless of whether he or she subsequently terminates an association with the individual attorney in whom the trust was originally reposed. *Id.* at 828. Moreover, the dissent concluded that the movant would be faced with an insurmountable burden if he or she were required to prove that confidences reposed in one member of a firm had been disclosed to other members. *Id.* at 833. *Accord*, *NCK Org. v. Bregman*, 542 F.2d at 134-35 (rejecting a requirement that a client prove that his or her confidences have been shared for the same policy considerations that underlie the irrebuttable presumption that a client reposes confidences in an attorney). See also Commentary, *The Disqualification Dilemma: DR 5-105(D) of the Code of Professional Responsibility*, 56 NEB. L. REV. 692, 695 n.17 (1977) (noting that it would be nearly impossible to prove oral disclosures of confidences).

25. *American Can Co. v. Citrus Feed Co.*, 436 F.2d 1125, 1129 (5th Cir. 1971). In *American Can*, the court was asked to disqualify an attorney who acted as local counsel for the plaintiff because a former partner of the attorney previously had represented the defendant. *Id.* at 1126. The court imputed knowledge of his former partner to the attorney and disqualified him. Rejecting a double imputation theory, the court refused to impute the local counsel's presumed knowledge to independent co-counsel. The court noted that a new partner of an attorney presumed to possess the knowledge of his former partners will not be disqualified unless it is shown that the attorney to whom knowledge was imputed also possessed actual knowledge. *Id.* at 1129. See also O'Toole, *supra* note 8, at 348 (suggesting that past or present partners of a firm should not be allowed to represent an interest adverse to a former client of the firm).

26. See note 6 *supra*.

27. See generally O'Toole, *supra* note 8 (containing an excellent discussion and analysis of cases considering Canon 9 in the context of disqualification motions and concluding that a broad application of the Canon is appropriate).

restrictive approach.²⁸ Courts subscribing to the broad application hold that their paramount responsibility is to preserve public confidence in the integrity of the judicial system by ensuring that attorneys scrupulously adhere to the highest standards of ethical conduct.²⁹ Under this view, the language of Canon 9 is interpreted literally, and disqualification is ordered when an attorney's conduct *might appear* unethical to the layman even though the attorney has in fact acted ethically.³⁰ Doubt as to the ethical propriety of an attorney's representation is resolved in favor of disqualification.³¹

The more restrictive approach attempts to preserve public confidence in the judicial system³² without unnecessarily restricting either a client's right to counsel of his or her choice³³ or an attorney's right to move from one professional association to another without causing the disqualification of his or her new colleagues.³⁴ Adopting this restrictive approach to Canon 9, the Fifth Circuit devised a two-prong test under which disqualification will not be ordered unless (1) it can reasonably be assumed that a specifically identifiable impropriety occurred, and (2) the risk of arousing public suspicion

28. For a strong argument in support of a restrictive application of Canon 9 in attorney disqualification cases, see Note, *The Second Circuit and Attorney Disqualification—Silver Chrysler Steers in a New Direction*, 44 *FORDHAM L. REV.* 130 (1975).

29. See *Hull v. Celanese Corp.*, 513 F.2d 568 (2d Cir. 1975); *Empire Linotype School, Inc. v. United States*, 143 F. Supp. 627 (S.D.N.Y. 1956).

30. See *International Business Machs. Corp. v. Levin*, 579 F.2d at 283; *Kramer v. Scientific Control Corp.*, 534 F.2d 1085, 1091-92 (3d Cir. 1976); *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d at 1387; *Cannon v. U.S. Acoustics Corp.*, 398 F. Supp. 209, 222 (N.D. Ill. 1975), *aff'd*, 532 F.2d 1118 (7th Cir. 1976).

31. For example, in *Emle Indus., Inc. v. Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973), the court stated that disqualification is appropriate when there is "any possibility, however slight, that confidential information acquired from a client during a previous relationship may subsequently be used to the client's disadvantage." *Id.* at 571. *Accord*, *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 225 (7th Cir. 1978); *Hull v. Celanese Corp.*, 513 F.2d at 571. Note also, that the good faith of an attorney is irrelevant. See *Armstrong v. McAlpin*, 606 F.2d 28, 34 (2d Cir. 1979); *United States v. Trafficante*, 328 F.2d 117, 120 (5th Cir. 1964); *Doe v. A Corp.*, 330 F. Supp. 1352, 1355 (S.D.N.Y. 1971), *aff'd sub nom. Hall v. A. Corp.*, 453 F.2d 1375 (2d Cir. 1972).

32. Proponents of this approach argue that to preserve public confidence it is not necessary to evaluate an attorney's conduct "by standards which can be imputed only to the most cynical members of the public." *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976). See also *International Elecs. Corp. v. Flanzer*, 527 F.2d 1288, 1295 (2d Cir. 1975) (cautioning that Canon 9 "should not be used promiscuously as a convenient tool for disqualification when the facts simply do not fit within the rubric of other specific ethical and disciplinary rules").

33. See *Government of India v. Cook Indus., Inc.*, 569 F.2d at 739; *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d at 609; *Woods v. Covington County Bank*, 537 F.2d at 812. *Cf. Laskey Bros. of W. Va., Inc. v. Warner Bros. Pictures, Inc.*, 224 F.2d at 827 (noting that clients may find it difficult to discover technically trained attorneys in specialized areas who would not be subject to disqualification).

34. See *Kesselhaut v. United States*, 555 F.2d 791, 793 (Ct. Cl. 1977); *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 754 (2d Cir. 1975). See generally Liebman, *supra* note 4 (an excellent and comprehensive discussion of the balancing of interests in attorney disqualification cases). See also O'Toole, *supra* note 8, at 321-22 (suggesting five conflicting interests commonly arising in motions to disqualify).

exceeds the benefits accruing from the attorney's continued participation in the litigation.³⁵

Against this background of conflicting case law, the Seventh Circuit was asked to decide a vicarious disqualification motion in *Novo Therapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc.*³⁶ Although only three years earlier, in an almost identical case,³⁷ the same court had implied an irrebuttable presumption of shared confidences and adopted a broad, prophylactic application of Canon 9,³⁸ the court in *Novo* declined to follow this precedent.³⁹

FACTS AND ANALYSIS OF THE DECISION

In 1977, Novo Therapeutisk Laboratorium A/S filed a suit alleging that its patent for a milk coagulating enzyme was being infringed by Baxter Travenol Laboratories, Inc.⁴⁰ Baxter moved to disqualify Novo's attorneys, members of the law firm of Hume, Clement, Brinks, Willian & Olds, Ltd.,⁴¹ because in 1976 Baxter consulted with Granger Cook, Jr., then a member of the Hume firm,⁴² concerning a matter identified as "microbial rennet."⁴³ Bax-

35. *Woods v. Covington County Bank*, 537 F.2d at 813. In *Woods*, the attorney whose disqualification was sought represented former prisoners of war in a private action seeking recovery of investments made in an allegedly fraudulent securities scheme. The attorney previously had investigated the alleged fraud while on active duty as a reserve officer in the Navy's Office of the Judge Advocate General. *Id.* at 807-09.

Undoubtedly, the court's limited application of Canon 9 was influenced by its perception that motions to disqualify were often used for "purely strategic purposes." *Id.* at 813. The court felt that the delays caused by such motions as well as the resulting disadvantage to a client whose attorney is disqualified were susceptible of eliciting public suspicion of both the bar and the judiciary. *Id.* The court concluded that it could not permit Canon 9 "to be manipulated for strategic advantage on the account of an impropriety which exists only in the minds of imaginative lawyers." *Id.* at 819. Similar concerns have been expressed by commentators. See O'Toole, *supra* note 8, at 347-48; Van Graafeiland, *Lawyer's Conflict of Interest—A Judge's View*, 50 N.Y. St. B.J. 101, 140-41 (1978).

36. 607 F.2d 186 (7th Cir. 1979).

37. *Schloetter v. Railoc of Ind., Inc.*, 546 F.2d 706 (7th Cir. 1976) (defendant's attorney was previously a member of a firm that prosecuted plaintiff's patent before the Patent Office).

38. See notes 76-81 and accompanying text *infra*.

39. See text accompanying notes 83-84 *infra*.

40. 607 F.2d at 195.

41. The action was originally filed in the United States District Court for the District of South Carolina. The Hume firm's involvement began when the suit was transferred to the Northern District of Illinois. *Id.*

42. The Hume firm maintained a single office composed of about 25 attorneys. In addition to Cook, six other members of the firm (then known as Hume, Clement, Brinks, Willian, Olds & Cook, Ltd.) rendered services to Baxter including two members actively involved in the current representation of Novo. See Defendants-Appellants' Answer to Petition for Rehearing with Request that Rehearing be En Banc at 3, *Novo Therapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc.*, 607 F.2d 186 (7th Cir. 1979).

43. Brief for Appellant at 4. Previously, in 1971, the United States Patent Office declared an interference (an inter-partes proceeding to determine priority between patent applicants claiming substantially the same invention) between patent applications filed by Novo's and Baxter's

ter alleged that the enzyme microbial rennet was substantially identical to the one on which Novo's infringement action was based.⁴⁴ Even though Cook left the Hume firm in December 1976 taking the Baxter account with him,⁴⁵ Baxter contended that confidences it had reposed in Cook while he was a member of the Hume firm should be imputed to the other members and, consequently, require their disqualification.⁴⁶ The Hume firm opposed the motion on the grounds that Cook's consultation concerning microbial rennet was the only aspect of the firm's prior representation of Baxter that related to Novo's infringement suit and no present member of the Hume firm had been involved in that consultation.⁴⁷ Moreover, each member of the Hume firm filed an affidavit denying that he or she had received confidences from either Baxter or Cook relating to the microbial rennet enzyme.⁴⁸

The district court denied Baxter's motion.⁴⁹ Noting that Cook's timesheets recorded only two and one quarter hours of work relating to microbial rennet,⁵⁰ the court held that the Hume firm's prior representation of Baxter was not substantially related to the present litigation and, accordingly, disqualification of the firm was not warranted.⁵¹

On appeal, the Seventh Circuit criticized the district court for resting its decision solely on the basis of the amount of time Cook had spent on the microbial rennet matter. Since a confidence can be revealed in a brief moment, the circuit court reasoned that the length of the prior representation was irrelevant.⁵² Rather, the proper test for determining if a substantial relationship exists is whether there is a possibility that in a prior representation the attorney might have been given confidential information relevant to the subject matter of the current litigation.⁵³ The circuit court examined

predecessors in interest. The application of Novo's predecessor was deemed to have priority. While the Hume firm did not take part in the interference proceeding, it was suggested that the purpose of Baxter's consultation with Cook was to consider initiating a declaratory judgment action against Novo regarding the patent. *Id.* at 2-5.

44. *Id.* at 24 app. (affidavit of Granger Cook, Jr. at ¶ 8).

45. *Id.* at 5. Cook also took most of the Baxter files. *Id.*

46. *Id.* at 14-15. Cook filed an affidavit outlining his prior representation of Baxter and stating that during such representation he had received confidences from Baxter. Additionally, Baxter's in-house Chief Patent Counsel filed an affidavit stating, on information and belief, that confidences had been reposed in Cook and other members of the Hume firm. Neither of these affidavits asserted specifically that confidences relating to microbial rennet had been disclosed during the consultations. *Id.* at 22-30 app. (affidavits of Granger Cook, Jr. and Paul C. Flattery).

47. Brief and Supplemental Appendix for Plaintiff-Appellee at 13-15 [hereinafter cited as Brief for Appellee].

48. *Id.* at Supp. app. 17-40.

49. 200 U.S.P.Q. (BNA) 495 (N.D. Ill. 1977).

50. Brief for Appellee, *supra* note 47, at Supp. app. 15.

51. 200 U.S.P.Q. (BNA) 495, 496 (N.D. Ill. 1977).

52. 607 F.2d at 189.

53. *Id.* (quoting *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 224 (7th Cir. 1978)).

Cook's prior representation under this definition of a substantial relationship,⁵⁴ and concluded that Baxter's allegation of substantial identity between microbial rennet and the enzyme accused of infringing Novo's patent sufficiently established a *possibility* that Cook had been privy to confidences related to the pending litigation.⁵⁵

The court next considered the issues of whether Baxter had in fact reposed confidences in Cook and whether those confidences should be imputed to the other members of the Hume firm. The court followed established precedent⁵⁶ and held that because a substantial relationship had been shown, Baxter was irrebuttably presumed to have disclosed confidences to Cook.⁵⁷ The court further held that it was unnecessary to decide whether Cook's presumed knowledge was imputed to other members of the Hume firm. Noting that the purpose of Canon 9 was to enjoin the *appearance* of

54. Reconsidering the substantial relationship issue, the circuit court undertook a three level inquiry in accordance with its previous decision in *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221 (7th Cir. 1978). The *Westinghouse* decision held that a court must: (1) reconstruct the scope of the prior legal representation; (2) determine whether it is reasonable to assume that the attorney was furnished with confidential information; and (3) determine whether such confidential information is relevant to the facts in issue in the pending litigation. *Id.* at 225.

Novo advanced two arguments attacking the scope of Cook's prior representation of Baxter. First, Novo argued that an affidavit submitted by Cook at the outset of the current litigation was tantamount to an admission that Cook had not previously represented Baxter on matters in issue in the Novo suit. Brief for Appellee, *supra* note 47, at 15-16. Alternatively, Novo contended that the services Cook rendered on the microbial rennet matter did not qualify as "legal representation." *Id.* at 16-17. The court rejected both of these arguments.

The affidavit upon which Novo's first argument was based was filed by Cook in support of a request for an extension of time to file pleadings and stated that he had not been able to study the history of the patent, the relevant prior art, and the record of a prior interference proceeding. *Id.* at Supp. app. 1-2. The court declared that it would read no more into the affidavit than appeared on its face. 607 F.2d at 190.

Novo's second argument relied on precedent established by the Second Circuit holding that an attorney will not be considered to have represented a client when he or she is involved in a matter "briefly on the periphery for a limited and specific purpose." *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 756 (2d Cir. 1975). This precedent applied, according to Novo, because a portion of Cook's work on the microbial rennet matter included a comparative study of legal authorities which could have been performed by a paralegal. Brief for Appellee, *supra* note 47, at 16-17. The Novo court, however, interpreted the precedent to apply only when an attorney's prior representation did not give rise to a fiduciary obligation, and concluded that since the facts established that Cook was in a fiduciary relationship with Baxter, Novo's reliance on the precedent was misplaced. 607 F.2d at 191.

In fact, Novo's second argument was faulty for two reasons. First, Cook's work on microbial rennet included consultations with Baxter as well as research. See Brief for Appellee, *supra* note 47, at Supp. app. 15. Clearly, consulting with clients is considered "representation." Secondly, courts have determined that the fact that services rendered by an attorney could have been rendered by a non-lawyer is irrelevant. See, e.g., *NCK Org. v. Bregman*, 542 F.2d 128 (2d Cir. 1976) (for purposes of determining a substantial relationship, no distinction is made between legal and non-legal work).

55. 607 F.2d at 191.

56. See notes 17-19 and accompanying text *supra*.

57. 607 F.2d at 191-92.

impropriety,⁵⁸ the court reasoned that it was irrelevant whether or not the Hume firm's attorneys representing Novo actually possessed knowledge of Baxter's confidences.⁵⁹ Since Cook's prior consultation with Baxter on the microbial rennet matter was so closely related to Novo's patent infringement action, the court concluded that the Hume firm must be disqualified because its representation of Novo created the appearance of impropriety.⁶⁰

On rehearing en banc, the Seventh Circuit reversed itself and denied Baxter's motion. Unlike the previous panel opinion, the en banc decision directly addressed the issue of imputed knowledge and adopted a rebuttable presumption that confidences received by one member of a firm are imputed to the other members.⁶¹ In reaching its decision, the court reasoned that the realities of law practice, as well as the ethical considerations underlying Canon 9, supported a threshold presumption that members of a law firm freely share their clients' confidences.⁶² The court expressed concern, however, that rote reliance on an irrebuttable presumption of shared confidences could result in unwarranted disqualifications and concluded that the presumption need not be irrebuttable when, in cases like *Novo*, the attorney in whom a client originally reposed confidences continued to represent that client.⁶³ The court found sufficient evidence in the record rebutting the presumption that Cook shared Baxter's confidences with other members of the Hume firm and, accordingly, held that the firm's disqualification was not required.⁶⁴

CRITICISM AND IMPACT OF THE DECISION

The court's decision in *Novo* was clearly influenced by Cook's failure to allege that he had disclosed Baxter's confidences to other members of the Hume firm even though he was in the unique position to know whether or not such a disclosure had in fact been made.⁶⁵ Consequently, the *Novo* court may have concluded that Baxter's disqualification motion was motivated not by a genuine concern that the inviolability of its confidences was

58. See text accompanying notes 29-31 *supra*.

59. 607 F.2d at 192.

60. *Id.* Chief Judge Fairchild dissented on the grounds that the majority opinion implied that Canon 9 required an irrebuttable presumption of imputed knowledge. Judge Fairchild believed that at least under the facts presented in the *Novo* case, the presumption should be rebuttable. *Id.* at 194 (Fairchild, C.J., dissenting).

61. *Id.* The opinion of the en banc hearing was written by the Chief Judge and largely adopted the reasoning of his dissent from the previous panel decision.

62. *Id.* at 196-97.

63. *Id.* at 197.

64. *Id.* Three of the eight judges dissented on the grounds that they agreed with the views expressed by the majority in the previous panel opinion. Additionally, one of the dissenters wrote a terse separate opinion in which he warned that a rebuttable presumption of shared confidences invites "casuistry and, even worse, a swearing contest." *Id.* at 197-98 (Swygert, J., dissenting).

65. *Id.* at 197. The court emphasized that Cook was "in a position to know exactly what confidences he may have shared with others in his firm" and noted that "[h]is failure to allege, even in general terms, that he shared confidences . . . [was] very significant." *Id.*

in jeopardy, but rather by a desire to gain a tactical advantage by depriving an opponent of its chosen counsel.⁶⁶ Certainly, the use of a disqualification motion for purely tactical purposes cannot be condoned and the Seventh Circuit cannot be criticized if the reason underlying its decision was to frustrate such an improper use. The court should be criticized, however, for failing to limit the applicability of its rebuttable presumption to cases similar to *Novo* in which the potential for abuse of the disqualification remedy is apparent. Because the *Novo* holding is not so limited, the rebuttable presumption it creates can be applied indiscriminately to all disqualification cases. Such a broad application finds no support in decisions reached by other circuits⁶⁷ and is at variance with an earlier Seventh Circuit opinion in a case decided on facts strikingly similar to those in *Novo*.⁶⁸ Moreover, the probable reaction of both the public and the legal profession to the newly created rebuttable presumption may result in a decline in the quality of legal representation.⁶⁹

Although other courts have reached holdings similar to *Novo*, their decisions have been based upon facts and policy considerations absent in *Novo*. For example, the Second Circuit endorsed a rebuttable presumption in a case seeking the disqualification of an attorney because, while he was an inexperienced member of a large law firm, he had been involved peripherally in the representation of the movant.⁷⁰ That court concluded, under the facts presented by the case, that an irrebuttable presumption of imputed knowledge would unduly restrict the professional mobility of attorneys who begin their careers at a large law firm, since they, as well as other members of a firm they subsequently join, may be disqualified from appearing on behalf of an interest adverse to any client of their former firm.⁷¹ A similar policy consideration induced the Fifth Circuit to apply Canon 9 less stringently in a disqualification case directed at a former government attorney.⁷² The court refused to disqualify the attorney under Canon 9 merely because his representation of a client in a matter related to work he performed while employed by the government might create an appearance of impropriety.⁷³ The Fifth Circuit's decision was based upon its concern that the government might be severely hampered in its ability to recruit competent attorneys if

66. In *Woods v. Covington County Bank*, 537 F.2d 804 (5th Cir. 1976), the court openly expressed its view that disqualification motions are often brought for strategic purposes. *Id.* at 813. See note 35 *supra*.

67. See text accompanying notes 70-74 *infra*.

68. See notes 76-84 and accompanying text *infra*.

69. See text accompanying notes 85-90 *infra*.

70. *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975).

71. See generally O'Toole, *supra* note 8, at 343 (criticizing the "young associate" exception); Liebman, *supra* note 4, at 1012-14, 1013 n.65 (heralding the *Silver Chrysler* precedent and suggesting that the judge's own former association with a large law firm may have influenced his decision).

72. *Woods v. Covington County Bank*, 537 F.2d 804 (5th Cir. 1976). See note 35 *supra* for a synopsis of the facts of the *Woods* case.

73. *Woods v. Covington County Bank*, 537 F.2d at 819.

prospective employees discerned that their practice would be restricted upon leaving government service.⁷⁴

The Second Circuit and the Fifth Circuit precedents are not applicable to *Novo*. The attorneys whose disqualification was sought in *Novo* were neither former government attorneys nor inexperienced junior members of a firm peripherally involved in a representation when they were alleged to have acquired knowledge of Baxter's confidences. Moreover, the motion in *Novo* was brought not because the attorneys whose disqualification was sought had changed firm affiliation but rather because the client had changed firms.⁷⁵ Accordingly, the *Novo* court's refusal to order the Hume firm's disqualification cannot be justified by the policy considerations underlying the Second and Fifth Circuit decisions. Precluding a *law firm* as a whole from representing an interest adverse to one of its former clients will neither restrict the professional mobility of the firm's individual members nor hinder the firm's efforts to recruit new members.

The Seventh Circuit's decision in *Novo* is not only unsupported by the reasoning underlying similar holdings of other courts but its holding also conflicts with its own earlier opinion in *Schloetter v. Railoc of Indiana, Inc.*⁷⁶ In *Schloetter*, the court embraced the broad, prophylactic view of Canon 9 which requires disqualification when there is an appearance of impropriety even though there is a possibility that no actual impropriety exists.⁷⁷ Although it adopted a presumption that members of a law firm share their clients' confidences,⁷⁸ the *Schloetter* court found it unnecessary to decide whether this presumption was rebuttable.⁷⁹ Instead, the court concluded that regardless of whether or not confidences actually had been shared, an attorney's representation of an interest adverse to a party previously represented by a former member⁸⁰ of the attorney's firm creates an

74. *Id.* at 812.

75. See text accompanying notes 45-46 *supra*.

76. 546 F.2d 706 (7th Cir. 1976). In *Schloetter*, the plaintiff in a patent infringement suit moved to disqualify the defendant's attorneys because they were members of the same firm as another attorney who had previously assisted the plaintiff in acquiring the patent on which his suit was based. *Id.* at 708. The court disqualified the defendant's attorneys even though the attorney who previously represented the plaintiff was no longer a partner in the firm. *Id.* at 712-13.

77. See text accompanying notes 29-31 *supra*.

78. 546 F.2d at 711.

79. The court noted that "even if [it] were to agree that the inference of impropriety . . . should be rebuttable," it would not disturb the lower court's finding that the evidence offered in rebuttal was insufficient. *Id.*

80. The law firm in question was based in Ohio but the attorney who rendered services to the plaintiff practiced in a Washington D.C. office formerly maintained by the firm. *Id.* at 708. There was some question as to whether the Washington attorney was a present rather than a former partner of the Ohio firm. The court, however, clearly stated that the attorney's actual status as a present partner or a former partner was not germane to the issue of whether attorneys presently associated with the Ohio firm could ethically continue to represent the defendant. *Id.* at 708 n.2.

appearance of impropriety which requires the attorney's disqualification.⁸¹ In arriving at this decision, the *Schloetter* court emphasized that it would be unreasonable to expect the public to believe that when they repose confidences in one member of a law firm, the danger of those confidences subsequently being used against them entirely dissipates upon that individual member's departure from the firm.⁸² The *Novo* court, on the other hand, chose to adopt the more restrictive view of Canon 9 under which relief will not be granted when the appearance of impropriety is unsupported by evidence of actual impropriety.⁸³ Accordingly, the *Novo* court concluded that although a former client is entitled to a threshold presumption that its confidences were shared, evidence rebutting this presumption should not be excluded.⁸⁴

The *Schloetter* holding recognized that if clients are to derive the maximum benefit from legal representation, it is crucial that they apprise their attorneys of all relevant facts, including facts which may be detrimental.⁸⁵ To overcome a natural reluctance to reveal potentially damaging information, a client must be given adequate assurance that he or she will never be jeopardized by confidences reposed in an attorney.⁸⁶ While the *Schloetter* court's strict application of Canon 9 provides clients with such assurance, the *Novo* court's creation of a rebuttable presumption of shared confidences does not. A layman might not be easily convinced that the confidences he or she divulged to one member of a firm are unknown to the other members merely because an attorney has rebutted a presumption of

81. *Id.* at 711-12.

82. *Id.* at 711. Although in ordering disqualification the court relied heavily on public policy considerations, it was convinced that disqualification was particularly appropriate in the *Schloetter* case because, except for the departure of the attorney who had represented the plaintiff, continuity in the membership of the firm had been maintained. The court believed that this continuity increased the risk that the defendant's attorneys might be exposed to the plaintiff's confidences. *Id.* In *Novo*, the Hume firm also maintained a continuity of membership subsequent to Cook's departure. Apparently, the *Novo* court, unlike the *Schloetter* court, did not believe this fact either increased the risk that a former client's confidences might be jeopardized or created an appearance of impropriety.

83. See text accompanying notes 32-35 *supra*.

84. 607 F.2d at 197.

85. See CODE, *supra* note 1, at EC 4-1 ("A client must feel free to discuss whatever he wishes with his lawyer A lawyer should be fully informed of all the facts . . . in order for his client to obtain the full advantage of our legal system"). *Accord*, *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 607 (8th Cir. 1977); *Emle Indus., Inc. v. Patentex, Inc.*, 478 F.2d 562, 570-71 (2d Cir. 1973); *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 440 F. Supp. 193, 206 (N.D. Ohio 1976), *aff'd*, 573 F.2d 1310 (6th Cir. 1977), *cert. denied*, 435 U.S. 996 (1978).

86. See *First Wis. Mortgage Trust v. First Wis. Corp.*, 571 F.2d 390, 396 (7th Cir. 1978) (the policy encouraging full and frank discussion between an attorney and client requires that the client have complete faith that his confidences will never be used against him); *Emle Indus., Inc. v. Patentex, Inc.*, 478 F.2d at 570-71 (without strict enforcement of ethical standards a client will not be inclined to discuss his problems freely and in depth with his lawyer); *Cannon v. U.S. Acoustics Corp.*, 398 F. Supp. 209, 221 (N.D. Ill. 1975), *aff'd*, 532 F.2d 1118 (7th Cir. 1976) (the remedy of disqualification is designed to encourage individuals to divulge freely to their attorneys all necessary information).

shared confidences to the satisfaction of a court.⁸⁷ Consequently, the *Novo* decision may cause clients erroneously to conclude that it is wise to withhold potentially damaging information from their attorneys.⁸⁸

The *Novo* decision may also cause attorneys to withhold information from their colleagues and, as a result, the quality of legal representation may decline. The *Novo* precedent teaches attorneys that they can escape vicarious disqualification by rebutting the presumption that they were privy to confidences reposed in other members of their firm. Further, the *Novo* opinion suggests that effective rebuttal can be achieved by submitting affidavits denying the receipt of confidences.⁸⁹ Consequently, attorneys are given a powerful incentive to isolate themselves from their colleagues so that subsequently, if the need arises, they can honestly state under oath that they did not share the confidences of their colleagues' clients. Clients, however, often choose their legal counsel on the basis of the general reputation of the law firm. They expect and are entitled to benefit from the collective experience and expertise of the firm's members. The quality of legal representation will undoubtedly decline if attorneys deprive their clients of this benefit by curtailing the free exchange of ideas and information.⁹⁰

PROPOSED GUIDELINES

Case law has demonstrated that the language of Canon 9 is too broad to furnish either courts or attorneys with adequate ethical guidelines. Recognizing a need for more specific standards, the American Bar Association's Commission on Evaluation of Professional Standards included a section on vicarious disqualification in its Discussion Draft of the Model Rules of Professional Conduct.⁹¹ Although the Commission's interpretive comments es-

87. See *Kramer v. Scientific Control Corp.*, 534 F.2d 1085, 1092 (3d Cir. 1976); *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1387 n.1 (2d Cir. 1976); *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 395 (S.D. Tex. 1969). See also O'Toole, *supra* note 8, at 345-46 (suggesting that courts should consider a layman-oriented approach to Canon 9); Commentary, *The Disqualification Dilemma: DR 5-105(D) of the Code of Professional Responsibility*, 56 NEB. L. REV. 692, 702 (1977) (unsophisticated public might not recognize subtle distinctions that are clear to a lawyer's eye).

88. See Note, *Attorney's Conflict of Interest: Representation of Interest Adverse to that of Former Client*, 55 B.U. L. REV. 61, 64 (1975) (public display of a lawyer representing conflicting interests may prevent prospective clients from confiding in their lawyers).

89. 607 F.2d at 197. The only evidence offered in rebuttal of a presumption of shared confidences were affidavits submitted by each member of the Hume firm denying the receipt of confidences from Cook. The court held that these affidavits, uncontroverted by Cook, "clearly and effectively" rebutted the presumption. *Id.*

90. See *Estep v. Johnson*, 383 F. Supp. 1323, 1325 (D. Conn. 1974) (noting that "attorney[s] must feel entirely free to consult with [their] associates, to seek their professional advice, and to share with them the facts of a case on which helpful advice can be given").

91. U.S.L.W., Special Supplement (Feb. 19, 1980) (draft available by writing the National Center for Professional Responsibility, 77 South Wacker Drive, Sixth Floor, Chicago, Illinois

establish reasonable guidelines,⁹² these comments do not appear to be completely harmonious with the formal statement of the rule.⁹³ Since the ambiguity of the Commission's proposed rule may not promote uniform and equitable decisions, the following guidelines with respect to vicarious disqualification are suggested as an alternative:⁹⁴

60606). If adopted, the Model Rules will replace the CODE. See note 1 *supra*. The proposed rule governing vicarious disqualification states, in pertinent part:

7.1 VICARIOUS DISQUALIFICATION

(b) When lawyers terminate an association in a firm, neither a lawyer remaining in the firm nor one who has left it, nor any other lawyer with whom either lawyer subsequently becomes associated, shall undertake representation that involves:

(1) a significant risk of disclosing confidences of a client in violation of Rule 1.7, or making use of information to the disadvantage of a former client in violation of Rule 1.10; or

(2) A lawyer's assuming significant participation in representing a person in the same or a substantially related matter if the interest of that person is adverse in any material respect to that of a client in whose representation the lawyer had previously participated in a significant way.

U.S.L.W., Special Supplement 25 (Feb. 19, 1980).

92. The comments indicate that the Commission's intent is to treat a law firm as if it were a sole practitioner when considering the firm's relationship with its current clients and to treat the client of any individual member of the firm as a client of the firm as a whole. Accordingly, the comments suggest that partners remaining in a firm would be precluded from representing an interest adverse to a former client even if they were able to show that the former client was represented solely by an attorney who was no longer a member of the firm and that the remaining members had not shared the former client's confidences. *Id.*

The comments also address the issue of whether an attorney's association with a new firm will require the new firm to be disqualified from representing interests adverse to clients of the attorney's former firm. The comments suggest that an inquiry should be made to determine whether the proposed representation by the attorney's new firm would involve a breach of confidences or a breach of loyalty owed to a client of the attorney's former firm. Where no such breaches would occur, disqualification of the new firm would not be required. *Id.*

93. For example, Rule 7.1 in paragraph (b)(1) states that "[a lawyer shall not make] use of information to the disadvantage of a former client in violation of Rule 1.10." See note 91 *supra*. Rule 1.10 states, in pertinent part, that "a lawyer who has represented a client in a matter shall not thereafter [represent an interest adverse to the client]." U.S.L.W., Special Supplement 9 (Feb. 19, 1980). Comments interpreting Rule 7.1 suggest that the word "lawyer" in this Rule should be read as "law firm," see note 92 *supra*, but that impression is not given by either Rule 7.1(b)(1) or Rule 1.10. Consequently, Rule 7.1(b)(1), read by itself, would appear to allow remaining members of a law firm to represent an interest adverse to a former client if the client were previously represented by an attorney no longer associated with the firm. Similarly, paragraph (b)(2) of Rule 7.1 precludes an attorney from participating in the representation of an interest adverse to a former client "in whose representation the lawyer had previously participated in a significant way." See note 91 *supra* (emphasis added). Again the language of this Rule would appear to allow remaining members of a law firm to represent an interest adverse to a former client of the firm while the comments suggest otherwise. See note 92 *supra*.

94. The guidelines proposed in this Note apply only to vicarious disqualification. Since case law governing traditional disqualification is substantially in accord, these guidelines assume that extant law will continue to be followed. See notes 15-19 and accompanying text *supra*.

1. Client confidences received⁹⁵ by any member of a firm shall be irrebuttably imputed to all persons who are partners in the firm at the time the confidences are received.
2. An attorney to whom knowledge of a former client's confidences has been imputed shall be disqualified from participating in the representation of a current client with interests adverse to the former client if the representation of the current client encompasses matters substantially related to the prior representation of the former client.
3. Present partners and associates of the attorney described in Rule 2 shall be disqualified only if, after an evidentiary hearing,⁹⁶ it is shown that there is a substantial likelihood that the attorney described in Rule 2 possesses actual knowledge of confidences as well as imputed knowledge.⁹⁷ Facts to be considered include:⁹⁸ the size and organizational structure⁹⁹ of the firm in which the attorney was associated when confidences were imputed to him or her; the attorney's seniority and re-

For other commentators' suggestions on guidelines to be applied in both traditional and vicarious disqualification cases, see generally O'Toole, *supra* note 8, at 348-49; Van Graafeiland, *Lawyer's Conflict of Interest—A Judge's View*, 50 N.Y. ST. B.J. 101, 141 (1978); Note, *Attorney's Conflict of Interests: Representation of Interest Adverse to that of Former Client*, 55 B.U. L. REV. 61, 84 (1975); Note, *Motions to Disqualify Counsel Representing an Interest Adverse to a Former Client*, 57 TEX. L. REV. 726 (1979).

95. "Receipt" of confidences as used in the context of this rule assumes application of extant case law. Accordingly, an attorney is irrebuttably presumed to have "received" confidences under the *T.C. Theatre* test and modifications of the test holding that access to confidential information is sufficient. See note 19 and accompanying text *supra*.

96. Courts have previously considered *in camera* reviews to aid in resolving the threshold question of whether the attorney possesses detrimental confidences. See *Government of India v. Cook Indus., Inc.*, 569 F.2d 737, 741 (2d Cir. 1978) (Mansfield, J., concurring) (suggesting that an *in camera* review should replace the *T.C. Theatre* irrebuttable presumption that clients repose confidences in their attorneys); *Consolidated Theatres, Inc. v. Warner Bros. Circuit Mgm't Corp.*, 216 F.2d 920, 926 (2d Cir. 1954) (dicta) (same).

97. See *American Can Co. v. Citrus Feed Co.*, 436 F.2d 1125, 1129 (5th Cir. 1971) (suggesting that a new partner of an attorney to whom knowledge had been imputed during a former partnership would not be vicariously disqualified upon a showing that the partner with imputed knowledge did not also have actual knowledge).

98. The client is not required to divulge to the court the actual confidences reposed in an attorney. Rather, the evidentiary hearing proposed by this rule contemplates an objective examination of facts relating to the environment in which knowledge was imputed to the attorney. From these facts, the court should be able to make a reasonable inference as to the likelihood that the attorney also possesses actual knowledge.

99. An attorney belonging to a large, departmentalized firm is less likely to have an opportunity to share confidences with his or her colleagues than an attorney in a small, non-departmentalized practice. This is particularly true when the former client's representation was primarily concentrated in a department of which the attorney was not a member. See *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 440 F. Supp. 193, 211 (N.D. Ohio 1976), *aff'd*, 573 F.2d 1310 (6th Cir. 1977), *cert. denied*, 435 U.S. 996 (1978) (suggesting imputation of knowledge only to attorneys practicing in the same area of specialization); Liebman, *supra* note 4, at 1036-37 (suggesting that the size of a firm and the "lack of osmosis" among departments should be considered as relevant evidence to rebut a presumption of imputed knowledge).

sponsibilities¹⁰⁰ in the firm; and, the attorney's areas of expertise.¹⁰¹

4. When disqualification is not required under Rule 3, a court may order the firm to isolate¹⁰² the attorney with imputed knowledge of a former client's confidences from the firm's representation of a current client with an adverse interest.

An irrebuttable presumption¹⁰³ of shared confidences is established in Rule 1 for four reasons. First, an irrebuttable presumption is necessary if the inviolability of a client's confidences is to be protected in accordance with the mandate of Canon 4.¹⁰⁴ Permitting attorneys to deny their receipt of a client's confidences would abrogate the protection afforded by Canon 4 because the client would be forced to refute the attorney's denial by divulging the very information he or she seeks to keep secret.¹⁰⁵ Second, the presumption will avoid the unseemly spectacle of attorneys engaging in "swearing contests" in which one attorney alleges and another attorney denies the sharing of a client's confidences.¹⁰⁶ Additionally, the elimination of "swearing contests" relieves a court of the distasteful task of deciding which attorney it chooses to believe. Third, the presumption will encourage partners of a law firm to consult freely with one another regarding their clients' representation since all partners will be assumed to be privy to the confidences of each other's clients regardless of whether or not an exchange of information occurs. Utilizing the collective knowledge and expertise of the firm's partners will not only enhance the quality of the firm's representation of its clients, but will also provide a convenient means for attorneys to benefit

100. An attorney with significant seniority and responsibility in a firm may become involved in the supervision of many clients other than the ones he or she personally represents.

101. If the attorney specializes in an area of law that encompassed the prior representation of the client, it would appear more likely that he or she may have been consulted and consequently may have been privy to the client's confidences.

102. Screening techniques which isolate an attorney from the firm's representation of a client have been approved in disqualification cases involving former government attorneys. See *Central Milk Producers Coop. v. Sentry Food Stores, Inc.*, 573 F.2d 988 (8th Cir. 1978); *Kesselhaut v. United States*, 555 F.2d 791 (Ct. Cl. 1977). See also ABA Committee on Ethics and Professional Responsibility, *Formal Opinion 343* (1975). Note, however, that in a disqualification case not involving a former government attorney, the Seventh Circuit refused to approve screening when separate offices of a multi-office law firm concurrently represented conflicting interests. See *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978).

103. See also O'Toole, *supra* note 8, at 348 (implying an irrebuttable presumption of imputed knowledge by suggesting that past or present partners of a firm should not be allowed to represent an interest adverse to any former or current client of the firm).

104. See note 1 *supra*.

105. As the court eloquently stated in *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265 (S.D.N.Y. 1953): "To compel the client to show . . . the actual confidential matters previously entrusted to the attorney and their possible value to the present client would tear aside the protective cloak drawn about the lawyer-client relationship." *Id.* at 269.

106. A dissenting judge in *Novo* noted his concern that a rebuttable presumption of shared confidences would invite "swearing contests." See note 64 *supra*.

from their colleagues' experience.¹⁰⁷ Finally, the adoption of an irrebuttable presumption will promote certainty and uniformity in the law.

In recognition of a concern expressed by some courts that irrebuttable presumptions may unduly hamper an attorney's mobility early in his or her professional career,¹⁰⁸ Rule 1 provides that the presumption is applicable only to partners.¹⁰⁹ Moreover, to preclude an endless chain of imputation, knowledge of confidences is imputed only to those firm members who are partners *at the time* a colleague receives such confidences. Accordingly, when an attorney joins a new firm, his or her new colleagues will not be presumed to acquire the confidences of all clients represented by the attorney's former firm.

Rules 2, 3, and 4 attempt to achieve an appropriate balance between the interest of a former client in ensuring that his or her confidences are not compromised and the interest of a current client in being represented by the attorney of his or her choice.¹¹⁰ Rule 2 recognizes that to maintain public confidence in the legal system, ensuring the inviolability of a client's confidences must take precedence. Accordingly, Rule 2 provides that an attorney who might possibly possess knowledge of a client's confidences because of a prior association with the client's attorney shall be automatically disqualified from representing interests adverse to that client. Such automatic disqualification is necessary because when an attorney is submerged in the complexities of litigation, even his or her good faith effort to avoid using a former client's confidences may not prevent the unconscious use of such information.¹¹¹ Alternatively, out of an excess of good faith, an attorney opposing a former associate's client may fail to make legitimate use of information because of a concern that by doing so he or she would breach professional ethics.¹¹²

Rule 3 denies disqualification when a firm's representation of a client does not jeopardize another party's confidences. The evidentiary hearing suggested by the rule provides a court with sufficient facts from which to

107. One commentator suggested that establishing a presumption that partners have knowledge of their firm's affairs may also evoke a greater sense of responsibility and ethical awareness. See Liebman, *supra* note 4, at 1036-37 n.185.

108. See text accompanying notes 70-71 *supra*.

109. See also O'Toole, *supra* note 8, at 348 (author excludes non-partners who were not personally involved in a prior representation of a former client from his suggested rule against representing interests adverse to former or current clients).

110. Courts adopting a restrictive approach to Canon 9 have expressed their concern that an appropriate balance among conflicting interests should be achieved. See notes 32-34 and accompanying text *supra*.

111. See *Emle Indus., Inc. v. Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973); *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. at 269. Automatic disqualification as well as an irrebuttable presumption of shared confidences also protects a former client from the attorney who, acting in bad faith, consciously uses knowledge of a former client's confidences to that client's disadvantage. Since such bad faith is difficult to detect or prove, an irrebuttable presumption and automatic disqualification may be the only feasible way to preclude an unethical attorney from gaining a substantial and unfair advantage at the expense of a former client.

112. See *Emle Indus., Inc. v. Patentex, Inc.*, 478 F.2d at 571.

conclude whether attorneys representing one party to litigation might be exposed to the confidences of the adverse party. If the hearing results in a conclusion that a member of a firm possesses actual knowledge of the confidences of a current client's opponent, then no member of the firm may continue to represent the client.¹¹³ Rule 4, providing for the isolation of an attorney to whom the confidences of a current client's opponent have been imputed, is designed to avoid even an appearance of impropriety and to impress upon the public the view that the legal profession is observing the highest standards of ethical conduct.

CONCLUSION

To maintain public confidence in the integrity of the legal system, courts must ensure not only that an attorney's conduct *is* ethical but also that it *appears* ethical. As one Second Circuit judge warned: "The semblance of unethical behavior by practitioners may well be as damaging to the public image as improper conduct itself."¹¹⁴ In *Novo*, the Seventh Circuit did not heed this warning. Departing from its earlier, well-reasoned decision in *Schloetter v. Railoc of Indiana, Inc.*,¹¹⁵ the Seventh Circuit refused to acknowledge that a law firm's representation of a new client with an interest adverse to its former client might create an appearance of impropriety in the eyes of a layman. The court's failure to limit narrowly the scope of the rebuttable presumption it created to cases in which the movant continues to be represented by the attorney in whom it originally reposed confidences may result in an overall decline in the effectiveness of legal representation. Faced with a rebuttable presumption that attorneys share their clients' confidences, clients may become wary of disclosing information to their attorneys, and attorneys may be discouraged from seeking the advice of their colleagues.

The opposite holdings reached by the Seventh Circuit in *Novo* and *Schloetter* clearly demonstrate that uniform results in vicarious disqualification cases cannot be achieved by relying on the broad language of Canon 9.¹¹⁶ The profession is in need of specific guidelines. It is hoped that the proposed guidelines discussed in this Note will reach a reasonable balance among the competing interests of attorneys and clients and, at the same time, will instill confidence in the integrity of the judicial system.

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113. Present partners or associates of an attorney possessing *actual* knowledge of a party with an interest adverse to a current client of the firm would be disqualified under extant law. See note 5 *supra*.

114. *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 759 (2d Cir. 1975) (Adams, J., concurring). *Accord*, *Kramer v. Scientific Control Corp.*, 534 F.2d 1085, 1088 (3d Cir. 1976) ("the appearance of conduct associated with institutions of the law [is] as important as the conduct itself").

115. 546 F.2d 706 (7th Cir. 1976).

116. See O'Toole, *supra* note 8, at 350 (suggesting that Canon 9 may be too vague for consistent application).