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Dorothy M. Gibbons-White

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MIGRATORY LAWYERS IN PRIVATE PRACTICE: SHOULD CALIFORNIA APPROVE THE USE OF ETHICAL WALLS?

I. INTRODUCTION

In the modern legal profession, where mobility is the norm, successive conflicts¹ rules can quickly spread imputed conflicts whenever lawyers move among private firms.² Imputed disqualification³ rules regularly present serious issues when attorneys move laterally from one firm to another.⁴ Without a flexible approach to conflicts of interest, the result is unnecessarily constricting for both clients and attorneys.⁵ While no one seriously suggests that two partners within a single firm could represent adversaries in litigation,⁶ secondary disqualification⁷ is not necessary, from both a practical and a policy perspective, in every situation where one lawyer in the firm has a successive conflict of interest concerning one of the firm's clients.⁸

1. Successive conflicts are conflicts of interest that arise for an individual attorney as the result of that attorney's duty of loyalty and confidentiality to a former client.

2. See RICHARD C. WYDICK & REX R. PERSCHBACHER, CALIFORNIA LEGAL ETHICS 339 (2d ed. 1997).

3. Imputed disqualification, vicarious disqualification and secondary disqualification are interchangeable terms for the disqualification of an entire law firm that occurs when one lawyer's individual conflicts of interest arising from previous employment are imputed to all other attorneys in the lawyer's workplace.

4. See WYDICK & PERSCHBACHER, *supra* note 2, at 340.

5. See *id.*

6. Even commentators favoring the use of "ethical walls" find the mechanism inadequate where the case involves current conflicting roles, rather than successive conflicting representations. See Comment, *The Chinese Wall Defense to Law-Firm Disqualification*, 128 U. PA. L. REV. 677, 684-85 (1980).

7. See definition *supra* note 3.

8. See *supra* note 3.

Where screening, or "ethical walls,"⁹ is allowed to avoid vicarious disqualification¹⁰, courts cite practical concerns. In a leading successive conflicts case, a large law firm representing Chrysler Motors Corporation attempted to disqualify a plaintiff's small law firm because one of the latter's partners had previously worked at the large firm as an associate with access to confidential information about Chrysler.¹¹ In rejecting disqualification, the court emphasized "[t]he importance of not unnecessarily constricting the careers of lawyers who started their practice of law at large law firms simply on the basis of their former association."¹²

9. This article uses the terms screening and "ethical walls" to describe the metaphorical walling off of the tainted attorney that is required to avoid imputations of conflicts. The term "Chinese Walls" is also often used to describe the screening process but will not be used in this article. This term began to appear in judicial opinions in the mid-1970s, but should be disfavored as culturally insensitive today, regardless of the reason for the term's adoption. Judge Low's concurrence in *Peat, Marwick, Mitchell & Co. v. Superior Court* is the only judicial criticism to date:

The enthusiasm for handy phrases of verbal shorthand is understandable. Occasionally, however, lawyers and judges use a term which is singularly inappropriate. "Chinese Wall" is one such piece of legal flotsam which should be emphatically abandoned. The term has an ethnic focus which many would consider a subtle form of linguistic discrimination. Certainly, the continued use of the term would be insensitive to the ethnic identity of the many persons of Chinese descent. Modern courts should not perpetuate the biases which creep into language from outmoded, and more primitive, ways of thought. . . .

. . . "Chinese Wall" is not even an architecturally accurate metaphor for the barrier to communication created to preserve confidentiality. Such a barrier functions as a hermetic seal to prevent two-way communication between two groups. The Great Wall of China, on the other hand, was only a one-way barrier. It was built to keep outsiders out—not to keep insiders in.

It is necessary to raise a clenched cry for jettisoning the outmoded legal jargon of a bygone time. If the image of a wall must be used, perhaps "ethics wall" is more suitable phraseology.

200 Cal. App. 3d 272, 293-94, 245 Cal. Rptr. 873, 887-88 (1988) (Low, P.J., concurring).

10. See definition *supra* note 3.

11. See *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 752 (2d Cir. 1975).

12. *Id.* at 753-54; see also *Manning v. Waring, Cox, James, Sklar and Al-*

California has no ethics rule specific to imputed disqualification, nor do the *California Rules of Professional Conduct* address the use of screening to avoid vicarious disqualification when successive conflicts occur in private law firm settings. The courts decide secondary disqualification on a case-by-case basis, but generally rule that knowledge obtained by one attorney in a firm will be imputed to all other attorneys in the firm.¹³ Further, California courts extend the presumption of shared confidences to summer associates.¹⁴ California courts have in fact expressed hostility to screening in private law firm settings, with a very few key exceptions.¹⁵ Similarly, the American Bar Association *Model Rules of Professional Conduct* ("Model Rules") do not formally accept the practice in private-law-firm-to-private-law-firm moves.¹⁶ Most jurisdictions impute the disqualification to all the lawyers in the firm when these conflicts arise.¹⁷

But the American Law Institute, in section 204 of its Proposed Final Draft No. 1 of the *Restatement (Third) of the Law Governing Lawyers*, approved the use of ethical walls where lawyers move from one private law firm to another.¹⁸ Section 204(2) applies only when

len, 849 F.2d 222 (6th Cir. 1988) (emphasizing that the greater mobility of lawyers and an increase in firm mergers and size necessitate a more flexible rule).

13. See *Rosenfeld Constr. Co. v. Superior Court*, 235 Cal. App. 3d 566, 573, 286 Cal. Rptr. 609, 612 (5th Dist. 1991).

14. See, e.g., *Actel Corp. v. QuickLogic Corp.*, No. C 94-20050 JW, 1996 WL 297045 (N.D. Cal. May 29, 1996). Many jurisdictions apply the successive conflicts rules to secretaries and paralegals as well, though some courts impose less stringent remedies. Query whether this makes sense, since the policy suggests that non-lawyer personnel are more trusted to keep client secrets than are the lawyers themselves. See *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831, 834 (Tex. 1994). Others equate support staff with lawyers and disqualify the entire firm when support staff bring a successive conflict of interest to the firm. See *Smart Indus. Corp. v. Superior Court*, 876 P.2d 1176, 1185 (Ariz. 1994).

15. See *Henriksen v. Great American Sav. and Loan*, 11 Cal. App. 4th 109, 117, 14 Cal. Rptr. 2d 184, 188 (1992); *Employers Ins. of Wausau v. Albert D. Seeno Constr. Co.*, 692 F. Supp. 1150 (N.D. Cal. 1988).

16. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1998); see also WYDICK & PERSCHBACHER, *supra* note 2, at 340.

17. See WYDICK & PERSCHBACHER, *supra* note 2, at 339.

18. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 204 at (Proposed Final Draft No. 1, 1996) [hereinafter RESTATEMENT]; WYDICK &

“(a) any confidential client information communicated to the personally prohibited lawyer is unlikely to be significant in the subsequent matter”; (b) adequate screening measures are in place; and (c) “timely and adequate notice of the screening has been provided to all affected clients.”¹⁹ According to comment d(ii):

Screening must assure that confidential client information will not pass from the personally-prohibited lawyer to any other lawyer in the firm. The screened lawyer should be prohibited from talking to other persons in the firm about the matter as to which the lawyer is prohibited, and from sharing documents about the matter and the like. Further, the screened lawyer should receive no direct financial benefit from the firm’s representation, based upon the outcome of the matter, such as a financial bonus or a larger share of firm income directly attributable to the matter. However, it is not impermissible that the lawyer receives compensation and benefits under standing arrangements established prior to the representation. An adequate showing of screening ordinarily requires affidavits by the personally-prohibited lawyer and by a lawyer responsible for the screening measures. A tribunal can require that other appropriate steps be taken.²⁰

This Comment explores the issue of screening by examining the law and the underlying policies and practical implications of using ethical walls to avoid imputed disqualification. Part II discusses the historical and policy reasons supporting the different approaches and the resulting problems and benefits of screening. Part III provides an overview of the current law regarding successive conflicts and imputed disqualification in private law firm settings. Part IV focuses on specific areas of California case law that indicate some judicial willingness to approve the use of ethical walls. The Comment concludes with a recommendation that California adopt a more flexible approach to successive conflicts and allow screening as a solution to the problem when lawyers move from one private law firm to another.

PERSCHBACHER, *supra* note 2, at 340.

19. RESTATEMENT, *supra* note 18, § 204(2).

20. *Id.* § 204 cmt. d(ii).

II. SCREENING V. IMPUTED DISQUALIFICATION: THE POLICY INTERESTS AND HISTORICAL DEVELOPMENT OF THE RULE

Two principles lie at the heart of the ethics rules: undivided loyalty to the client and the preservation of client confidences. California Business and Professions Code section 6068(e) states that it is the duty of an attorney "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."²¹ Lawyers' obligations to maintain client confidences in California are among the strictest in the nation.²² A lawyer may not even reveal confidential information about a client's intention to commit murder.²³ This strong policy favoring client confidentiality seeks to promote uninhibited communication between attorneys and their clients.²⁴

The imputed disqualification rules are founded on the idea that lawyers practicing in the same firm presumptively share confidences with each other. This idea received its first official recognition by the American Bar Association ("ABA") in 1931.²⁵ But modern times call for more flexible alternatives to an overly strict imputed disqualification rule.

In 1975, the ABA first approved the use of ethical walls as an alternative to vicarious disqualification of an entire firm.²⁶ In order to attract the best and the brightest law school graduates to government service, the ABA formally approved the use of screening in the context of migrating government lawyers.²⁷ The ABA also considered the client's right to her counsel of choice, and the possibility of

21. CAL. BUS. & PROF. CODE § 6068 (West 1997).

22. See WYDICK & PERSCHBACHER, *supra* note 2, at 196.

23. *See id.*

24. See Neil W. Hamilton & Kevin R. Coan, *Are We a Profession or Merely a Business?: The Erosion of the Conflicts Rules through the Increased Use of Ethical Walls*, 27 HOFSTRA L. REV. 57, 71 (1998).

25. *See id.* at 73. "The ABA concluded that '[t]he 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.'" *Id.* (quoting ABA Comm. on Professional Ethics and Grievances, Formal Op. 33 (1931)).

26. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975).

27. *See id.* at 119.

abuse of disqualification motions in its decision.²⁸ In 1983 the *Model Rules* adopted this change with Rule 1.11(a).²⁹

Also in 1983, the Seventh Circuit, in *Schiessle v. Stevens*, extended the exception to the imputed disqualification rules for former government attorneys to private migrating attorneys.³⁰ *Schiessle* was the first major case to allow the use of ethical walls as an alternative to imputed disqualification where the affected attorney brought a former client conflict from one private law firm to another. The Seventh Circuit led the way in approving screening to avoid the drastic measure of vicarious disqualification of firms, and the Second, Sixth, and Federal Circuits followed with express approval of the practice.³¹ The trend has continued with numerous jurisdictions allowing the use of screening to solve successive conflicts when lawyers change firms.³²

The policies behind the acceptance of ethical walls in private law firm settings include the client's right to counsel of his choice, concern about the financial burden of clients when they must secure new counsel, and problems with the abuse of vicarious disqualification motions.³³ Further, the "realities of modern day practice," as firms increase in size and become more departmentalized, demand a

28. *See id.*

29. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(a) (1983).

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

31. *See* *Manning v. Waring, Cox, James, Sklar and Allen*, 849 F.2d 222 (6th Cir. 1988); *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564 (Fed. Cir. 1984) (applying Seventh Circuit law); *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263 (7th Cir. 1983); *Cheng v. GAF Corp.*, 631 F.2d 1052 (2d Cir. 1980), *vacated on jurisdictional grounds*, 450 U.S. 903 (1981); *see also infra* Part III.B (noting that the Second, Sixth, Seventh, and Federal circuits, as well as federal district courts in Delaware, Kansas, and Missouri have all permitted screening).

32. *See, e.g.*, *Cromley v. Board of Educ.*, 17 F.3d 1059 (7th Cir. 1994), *cert. denied*, 513 U.S. 816 (1994); *Manning*, 849 F.2d 222 (6th Cir. 1988); *EZ Paint Corp. v. Padco, Inc.*, 746 F.2d 1459 (Fed. Cir. 1984); *Schiessle*, 717 F.2d 417 (7th Cir. 1983); *Cheng*, 631 F.2d 1052 (2d Cir. 1980), *vacated on jurisdictional grounds*, 450 U.S. 903 (1981); *Petrovich v. Petrovich*, 556 So. 2d 281 (La. Ct. App. 1990); *Jenson v. Touche Ross & Co.*, 335 N.W.2d 720 (Minn. 1983); *Kala Aluminum Smelting and Ref. Co.*, 688 N.E.2d 258 (Ohio 1998).

33. *See* *Hamilton & Coan, supra* note 24, at 86-87.

more flexible approach to the issue of successive conflicts.³⁴ The legal profession is in a state of perpetual motion,³⁵ and thus lawyer mobility must also be considered, not as a policy issue, but simply as an important reality of today's legal profession.

Some commentators give little credence to the policy considerations driving the trend toward greater acceptance of ethical walls, and are particularly offended by the notion that lawyer mobility should be considered at all.³⁶ But others recognize that

the rule of imputed disqualification [] could severely limit the ability of lawyers to move from one law firm or type of employment to another. A strict application of the rules would impute all of a lawyer's disqualifications to the lawyer's co-workers when changing jobs, even if no other lawyer in the new office would, standing alone, be disqualified.³⁷

This, of course, would have a serious impact on the right of clients to the counsel of their choice. "[T]he ability to deny one's opponent the services of capable counsel, is a potent weapon. Confronted with such a motion, courts must be sensitive to the competing public policy interest of preserving client confidences and of permitting a party to retain counsel of his choice."³⁸

A client whose attorney is disqualified incurs the loss of time and money in being deprived of her counsel of choice.³⁹ The innocent client is compelled to retain new counsel, and may lose the benefit of long-time counsel's specialized knowledge of the client's matters.⁴⁰ This is a major policy reason behind the Second Circuit's

34. See *Analytica*, 708 F.2d at 1269-70.

35. See Marcy G. Glenn, *Conflict Issues When Attorneys Switch Jobs*, COLO. LAW., May 1998, at 49, 49.

36. See Hamilton & Coan, *supra* note 24, at 86-91.

37. Stephen J. Ott, *Professional Responsibility*, 44 WAYNE L. REV. 995, 1015-16 (1998).

38. *Manning v. Waring, Cox, James, Sklar & Allen*, 849 F.2d 222, 224 (6th Cir. 1988).

39. See *Government of India v. Cook Indus.*, 569 F.2d 737, 739 (2d Cir. 1978); see also *Responsible Citizens v. Superior Court*, 16 Cal. App. 4th 1717, 1725, 20 Cal. Rptr. 2d 756, 761 (1993).

40. See *Government of India*, 569 F.2d at 739.

early honing of the practical application of the "substantial relationship" test: the court grants disqualification only upon a showing that the relationship between issues in the prior and present case is "patently clear."⁴¹

Misuse of the disqualification process is a significant problem, as the motion to disqualify opposing counsel is frequently a tactical maneuver.⁴² Even courts with a broad view of disqualification motions have expressed concern that the procedure may be abused if invoked solely to gain some tactical or strategic litigation advantage.⁴³

III. THE LAW

Whether or not a successive conflict exists and whether or not it is imputed to the entire firm involves a two-tiered analysis. The first tier and threshold question is whether there is a successive conflict. If there is no successive conflict for the individual attorney, the inquiry is over and no imputed disqualification is threatened. Where there is a successive conflict, a court moves on to the second tier of the analysis and addresses whether or not that conflict should be imputed to the entire firm. Both tiers of the imputed disqualification analysis employ the substantial relationship test.

A. *The Substantial Relationship Test*

If a current representation is adverse to the interests of a former client and, by reason of the former representation, the attorney received confidential information material to the current representation, a lawyer may be individually disqualified from the current matter.⁴⁴ The *California Rules of Professional Conduct* and the

41. *Id.* at 739-40 (quoting *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 754-56 (2d Cir. 1975)).

42. *See River West, Inc. v. Nickel*, 188 Cal. App. 3d 1297, 1306, 234 Cal. Rptr. 33, 39 (1987) ("[I]t would be naïve not to recognize that the motion to disqualify opposing counsel is frequently a tactical device to delay litigation.") (quoting *White v. Superior Court*, 98 Cal. App. 3d 51, 55, 159 Cal. Rptr. 278, 280 (1979)).

43. *See Responsible Citizens*, 16 Cal. App. 4th at 1725, 20 Cal. Rptr. 2d at 761.

44. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1997); RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA Rule 3-310 (1996).

Model Rules allow the conflict to be cured with consent from the former client.⁴⁵ Where the lawyer has actual confidential information, however, and consent is not forthcoming, the lawyer is disqualified from the subsequent representation.⁴⁶ The *Model Rules* also provide that an attorney may not oppose a former client in a “substantially related” matter.⁴⁷

The substantial relationship test was first enunciated in *T.C. Theatre v. Warner Bros. Pictures*,⁴⁸ and later was included in the *Model Rules* under Rule 1.9(a).⁴⁹ The California ethics rule on successive conflicts does not include the substantial relationship test.⁵⁰ The standard was adopted by the Ninth Circuit,⁵¹ then in the California state courts,⁵² and is now the proper test for whether a lawyer obtained confidential information by way of a former representation that is material to a current representation.⁵³

45. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1997); RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA Rule 3-310 (1996).

46. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1997); RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA Rule 3-310 (1996).

47. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(a) (1997).

48. 113 F. Supp. 265 (S.D.N.Y. 1953).

. . . [W]here any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited

. . . the former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature or extent. Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained.

Id. at 268.

49. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(a) (1997).

50. See RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA Rule 3-310 (1996).

51. See *Trone v. Smith*, 621 F.2d 994 (9th Cir. 1980).

52. See *Global Van Lines, Inc. v. Superior Court*, 144 Cal. App. 3d 483, 192 Cal. Rptr. 609 (1983).

53. See *Rosenfeld Constr. Co. v. Superior Court*, 235 Cal. App. 3d 566,

Courts take various approaches to the substantial relationship test—some broad,⁵⁴ some narrow,⁵⁵ some emphasizing access,⁵⁶ and others looking only to the facts.⁵⁷ California courts take a broad view of the substantially related test. To determine whether the former and the latter matters are substantially related, the California Court of Appeal has held that courts should look to the similarities between the two factual situations, the likeness of the legal issues involved, and the extent of the attorney's participation in the two cases.⁵⁸

B. *The Presumptions*

Once the court determines there is a successive conflict and the personally-prohibited lawyer is disqualified from the current representation, the issue of secondary disqualification of the entire firm is

575, 286 Cal. Rptr. 609, 614 (1991).

54. *See, e.g.,* *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1266 (7th Cir. 1983). Judge Posner explains that matters are "substantially related" if the lawyer could have obtained confidential information in the first representation that would have been relevant in the second. It is irrelevant whether he actually obtained such information and used it against his former client, or whether—if the lawyer is a firm rather than an individual practitioner—different people in the firm handled the two matters and scrupulously avoided discussing them.

Id.; *see also* *Cornish v. Superior Court*, 209 Cal. App. 3d 467, 475-77, 257 Cal. Rptr. 383, 387-88 (1989) (explaining that if there was even one confidential communication, a substantial relationship exists, and there is a basis for disqualification).

55. *See, e.g.,* *Government of India v. Cook Indus.*, 569 F.2d 737, 740 (2d Cir. 1978) (setting forth that "substantially related" means that the issues in the prior and present cases are "identical" or "essentially the same").

56. *See, e.g.,* *Evans v. Artek Sys.*, 715 F.2d 788, 791 (2d Cir. 1983) (stating that disqualification is appropriate if a lawyer "had access to, or was likely to have had access to, relevant privileged information in the course of his prior representation").

57. *See, e.g.,* *Carlson v. Langdon*, 751 P.2d 344, 349 (Wyo. 1988) (adopting an approach to the substantial relationship test that asks "whether in the factual context the matters involving the two clients are related in some substantial way," because if the "matters have common facts, the attorney is in a position to receive confidential information which possibly could be used to the detriment of the former client in the later proceeding").

58. *See* *H. F. Ahmanson & Co. v. Salomon Bros., Inc.*, 229 Cal. App. 3d 1445, 1455, 280 Cal. Rptr. 614, 620 (1991); *Rosenfeld Constr. Co. v. Superior Court*, 235 Cal. App. 3d 566, 576, 286 Cal. Rptr. 609, 614-15 (1991).

considered. Two presumptions guide the court's analysis of whether or not the new firm is vicariously disqualified. First, where there is a substantial relationship between the present and former matters, it is presumed that the migratory attorney learned the former client's confidences during the representation.⁵⁹ The second presumption is that the migrating attorney shared those confidences with the attorneys at his new firm.⁶⁰

There is "near universal agreement" that the first presumption is rebuttable.⁶¹ The potentially-prohibited lawyer must demonstrate to the court that she did not obtain confidential information regarding the former client while working at the previous law firm.⁶² It is customary for the migrating attorney to establish lack of knowledge of a former client's confidential information without the client's confidences being violated at the hearing.⁶³ The lawyer's proof will generally be in the form of evidence showing non-access to the work of other lawyers at the former firm.⁶⁴ If the lawyer is not able to show a lack of knowledge of client confidences regarding the previous matter, she has not rebutted the presumption.⁶⁵ Similarly, if the court finds the former and present matters to be substantially related, using the same analysis as above, then the presumption stands.

If a lawyer does not rebut the first presumption, the court moves on to the second presumption.⁶⁶ Whether the presumption of shared confidences should be rebuttable is an area of controversy in the profession and deep division in the courts.⁶⁷ Where the migrating lawyer brings confidential information concerning a current client at the new firm, the law presumes that the laterally-moving lawyer will share those confidences with the lawyers at the new firm.⁶⁸ This presumption is irrebuttable in a great majority of states, including

59. See STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 323 (5th ed., Aspen Law & Bus. 1998).

60. *See id.*

61. *Id.*

62. *See id.* at 324.

63. *See id.*

64. *See id.*

65. *See id.* at 324-25.

66. *See id.* at 325.

67. *See id.* at 323.

68. *See id.* at 325.

California.⁶⁹ In some states, however, it is rebuttable by demonstrating that “specific institutional mechanisms’ [i.e. screening] . . . [have] been implemented to effectively insulate against any flow of confidential information from the ‘infected’ attorney to any other member of [the] present firm.”⁷⁰ The Second, Sixth, Seventh, and Federal Circuits, and federal district courts in Delaware, Kansas, and Missouri have all permitted screening to rebut the presumption of shared confidences of former clients.⁷¹ The Minnesota Supreme Court, the Ohio Supreme Court, and the Louisiana Court of Appeals have also expressly approved ethical walls.⁷² Illinois, Massachusetts, Michigan, Oregon, Pennsylvania, and Washington expressly allow for screening through their ethics rules.⁷³

C. *What Factors Make an Ethical Wall?*

Building an ethical wall or screen around a newly hired, conflicted attorney requires that the partners at the firm give the proper degree of forethought and planning to the situation. Courts expect the new firm to have these screening mechanisms in place prior to the lateral lawyer’s arrival.⁷⁴ Otherwise, the possibility for breaches

69. *See id.* at 323.

70. *Cromley v. Bd. of Educ.*, 17 F.3d 1059, 1065 (7th Cir. 1994) (citation omitted).

71. *See Manning v. Waring, Cox, James, Sklar and Allen*, 849 F.2d 222, 224 (6th Cir. 1988); *EZ Paintr Corp. v. Padco, Inc.*, 746 F.2d 1459, 1461 (Fed. Cir. 1984) (applying Eighth Circuit law); *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1580 (Fed. Cir. 1984) (applying Seventh Circuit law); *Schiessle v. Stephens*, 717 F.2d 417, 421 (7th Cir. 1983); *Cheng v. GAF Corp.*, 631 F.2d 1052, 1057 (2d Cir. 1980), *vacated on jurisdictional grounds*, 450 U.S. 903 (1981); *Geisler v. Wyeth Lab.*, 716 F. Supp. 520, 526 (D. Kan. 1989); *School Dist. v. Acands, Inc.*, No. 87-0903-CV-W-6, 1989 WL 99138, at *1 (W.D. Mo. Aug. 23, 1989); *Nemours Found. v. Gilbane, Aetna, Fed. Ins. Co.*, 632 F. Supp. 418, 428 (D. Del. 1986).

72. *See Petrovich v. Petrovich*, 556 So. 2d 281, 282 (La. Ct. App. 1990); *Jenson v. Touche Ross & Co.*, 335 N.W.2d 720, 732 (Minn. 1983); *Kala Aluminum Smelting & Ref. Co.*, 688 N.E.2d 258, 268 (Ohio 1998).

73. *See ILLINOIS RULES OF PROFESSIONAL CONDUCT* Rule 1.10 (1999); *MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT* Rule 1.10 (1999); *MICHIGAN RULES OF PROFESSIONAL CONDUCT* Rule 1.10 (1999); *OREGON CODE OF PROFESSIONAL RESPONSIBILITY* DR 5-105 (1999); *PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT* Rule 1.10 (1999); *WASHINGTON RULES OF PROFESSIONAL CONDUCT* Rule 1.10 (1999).

74. *See Miller v. Chicago and N. W. Transp. Co.*, 938 F. Supp. 503 (N.D.

of confidentiality clearly exists, and there is no assurance that the former client's secrets are protected.

The typical elements of an ethical wall include "physical, geographic, and departmental separation of attorneys; prohibitions against and sanctions for discussing confidential matters; established rules and procedures preventing access to confidential information and files; procedures preventing a disqualified attorney from sharing in the profits from the representation; and continuing education in professional responsibility."⁷⁵ The firm must establish rules and procedures to prevent inadvertent disclosure of confidential information as well as sanctions that will be enforced if such disclosure occurs.⁷⁶ A court reviewing the adequacy of these safeguards will also expect some formal assurance that any inadvertent disclosures will be promptly reported.⁷⁷

The actual process implemented should include a memorandum distributed to all employees prior to the new attorney's arrival instructing them not to discuss any aspect of the conflicted matter in the new attorney's presence, and indicating that the new attorney is denied access to all files pertaining to that matter or client.⁷⁸ The respective files should be removed from common file cabinets and placed in a separate, locked, restricted cabinet.⁷⁹ The new lawyer must be instructed not to discuss the conflicted matter or client with anyone at the new firm, and not to access any of the corresponding files.⁸⁰ The new attorney should also be directed not to have any contact with the client or other individuals, such as witnesses, involved in the conflicted matter.⁸¹ And, finally, the new lawyer must not share in the fee from the matter posing a conflict.⁸²

When determining whether a proper ethical wall has been established, courts will also consider "the size and structural divisions of

III. 1996).

75. *Henriksen v. Great Am. Sav. and Loan*, 11 Cal. App. 4th 109, 116 n.6, 14 Cal. Rptr. 2d 184, 188 n.6 (1992).

76. *See Ruel v. Quinn*, No. 910640, 900153, 910522, 1994 WL 879837, at *3 (Mass. Super. Ct. June 3, 1994).

77. *See id.*

78. *See Miller*, 938 F. Supp. at 504-05, 507.

79. *See id.* at 507.

80. *See id.* at 504, 507.

81. *See id.*

82. *See id.* at 507-08.

the law firm involved.”⁸³ Even in jurisdictions that allow screening to rebut the presumption of shared confidences, the smaller the law firm, the less appropriate and effective the screening mechanism is for protecting client confidences.⁸⁴ Accordingly, screening will not enable a solo practitioner to avoid imputation of an employee’s conflicts.⁸⁵ By contrast, departmental configuration that helps facilitate the maintenance of an ethical wall by reducing the contact between the conflicted attorney and specific attorneys responsible for the present representation, will give a court more confidence in allowing the mechanism to rebut the presumption of shared confidences.⁸⁶

IV. CALIFORNIA’S REJECTION OF SCREENING FOR PRIVATE LAW FIRM CONFLICTS MAY NOT BE ABSOLUTE

There are two significant cases that seem to provide windows in California law for the potential acceptance of screening to cure lateral move conflicts in private law firms. One California Court of Appeal case, *Klein v. Superior Court*, implies that California courts might approve an ethical wall if the new lawyer did not actually work on the former client’s matter while at the previous firm.⁸⁷ In addition, the Ninth Circuit case that gave California the substantial relationship test expressed approval of the “peripheral representation” standard developed by the Second Circuit; this standard would allow the use of ethical walls in certain private law firm scenarios.⁸⁸

No California cases have arisen that provide clear guidelines for limited uses for screening of lawyers who bring successive conflicts from one private law firm to another. This is probably due to the fact that the firms with the best resources to bring such cases and make such arguments are the same firms that carefully review every new attorney’s background for any glimmer of potential conflict before finalizing that attorney’s employment with the new firm. If any such conflict is revealed, and client consent is not forthcoming, the offer

83. *Manning v. Waring, Cox, James, Sklar and Allen*, 849 F.2d 222, 226 (6th Cir. 1988).

84. *See Solow v. W. R. Grace & Co.*, 83 N.Y.2d 303, 311 (1994).

85. *See id.* Though not specifically stated, this is the natural inference.

86. *See Manning*, 849 F.2d at 226.

87. *See Klein v. Superior Court*, 198 Cal. App. 3d 894, 909, 244 Cal. Rptr. 226, 234 (1988).

88. *See Trone v. Smith*, 621 F.2d 994, 998 (9th Cir. 1980).

of employment is rescinded since the expense of a potential imputed disqualification motion and the risk of losing clients is considered too great. No one wants to take such a chance. Despite the understandable caution with which large firms approach potential conflicts, openings in the current case law do exist and could result in judicial acceptance of an expanded use of ethical walls. The exceptions suggested by these cases would allow lawyers to avoid imputed disqualification in certain circumstances when successive conflicts are brought from one private law firm to another.

A. *Klein v. Superior Court: Rebutting the Second Presumption with a Balancing of Factors*

*Klein v. Superior Court*⁸⁹ is the only California case suggesting that the presumption of shared confidences may be rebuttable in some situations.⁹⁰ In several parts of the opinion, the *Klein* court implies that California courts might approve an ethical wall where the affected attorney did not work on the former client's matter while at the prior firm.⁹¹ The court favorably cites *Chambers v. Superior Court*⁹² for the general proposition that "disqualifying the individual lawyer and screening him from the firm can suffice, in a proper

89. 198 Cal. App. 3d 894, 244 Cal. Rptr. 226 (1998).

90. *See id.* at 910, 244 Cal. Rptr. at 235.

91. *See id.* at 913, 244 Cal. Rptr. at 237 (distinguishing *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564 (Fed. Cir. 1984), *disapproved on another point* in *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985), from the case at hand). The court pointed out that in *Panduit* "the attorney [who was] held to be disqualified had not himself personally had access to confidential information about the former client The evidence . . . did not demonstrate that the client's confidences had been passed on or were likely to have been passed on to members of the second firm." *Klein*, 198 Cal. App. 3d at 911, 244 Cal. Rptr. at 236. The *Panduit* court therefore applied Seventh Circuit law and allowed screening to rebut the presumption of shared confidences. *See Panduit Corp.*, 744 F.2d at 1580, 1582. The *Klein* court also points out that the affected attorney in the *Klein* case participated directly in the former client's case, and thus both his disqualification and that imputed to his new firm must result. *See Klein*, 198 Cal. App. 3d at 913-14, 244 Cal. Rptr. at 237. The *Klein* court also distinguishes *Chambers v. Superior Court*, 121 Cal. App. 3d 893, 175 Cal. Rptr. 575 (1981), indicating that the government attorney involved in *Chambers* had not been substantially involved with matters related to the instant litigation, and had been screened off from the litigation from the beginning. *See Klein*, 198 Cal. App. 3d at 912, 244 Cal. Rptr. at 236.

92. 121 Cal. App. 3d 893, 175 Cal. Rptr. 575 (1981).

case."⁹³ *Chambers* found such an exception for a government lawyer, but the *Klein* court suggests that further exceptions exist. "The test is whether the individual attorney had any responsibility over matters related to the instant action or had acquired confidential information regarding the action and whether the firm had taken *sufficient protective measures to screen the attorney* from participation."⁹⁴

Two major points may be distilled from the *Klein* decision. First, the court emphasized that the attorney whose disqualification was upheld had been directly involved in the prior matter, and thus the trial court properly inferred that confidential information had actually been passed to other members of the present law firm.⁹⁵ Second, the court stated that it was partly *because* no ethical wall was erected that imputed disqualification had to result.⁹⁶ The court "reluctantly" ruled that vicarious disqualification was necessary "where a partner in a law firm has been disqualified from representation *because of his prior receipt of confidential information, and where there has been no attempt to screen him* from the litigation at hand."⁹⁷

While properly assessing that very few California cases have allowed a law firm to continue representing a client when a member has been disqualified, the *Klein* court also restated a standard from *William H. Raley Co. v. Superior Court*⁹⁸ that characterized automatic disqualification as harsh and unfair. *Raley* endorsed the notion that vicarious disqualification should not occur automatically, but should only result from weighing and balancing relevant factors.⁹⁹ The factors, as restated in *Klein*, are: "[(1)] the likelihood of actual conflict or imparting of confidences, [(2)] the hardship [to the client] in loss of the law firm's representation, [(3)] the stage of the legal

93. *Klein*, 198 Cal. App. 3d at 909, 244 Cal. Rptr. at 234.

94. *Id.* (emphasis added).

95. *See id.* at 913, 244 Cal. Rptr. at 237.

96. *See id.* at 913-14, 244 Cal. Rptr. at 237-38.

97. *Id.* at 913, 244 Cal. Rptr. at 238 (emphasis added).

98. 149 Cal. App. 3d 1042, 197 Cal. Rptr. 232 (1983).

99. *See Klein*, 198 Cal. App. 3d at 911, 244 Cal. Rptr. at 236.

proceedings at which the motion for recusal was made, and [(4)] other related factors."¹⁰⁰ Thus, *Klein* indicates that where a law firm has erected proper ethical walls, and the disqualified attorney's work on the former client's matter was of a more attenuated nature, screening can be an acceptable device for avoiding imputed disqualification of the entire firm.

Some commentators claim that *Henriksen v. Great American Savings & Loan*¹⁰¹ forecloses any possible acceptance of screening suggested by *Klein*.¹⁰² To the contrary, the *Henriksen* case simply distinguished *Klein* as "factually inapposite."¹⁰³ *Henriksen* pointed out that, to the extent the *Klein* court created a rule of law, the rule did not apply to the facts of *Henriksen*.¹⁰⁴ In *Henriksen* the affected attorney had blatantly switched sides and then cited *Klein* as support for avoiding imputed disqualification of the entire firm.¹⁰⁵ In fact, while *Klein* posits circumstances where screening will suffice in private law firm settings, the *Klein* court is clear that the mechanism is "not applicable when the attorney in question performed work for the opposing party *in the same lawsuit*."¹⁰⁶ The *Klein* exception to the strict prophylactic rule of imputed disqualification is not disturbed by *Henriksen*. The two cases are consistent.

B. Trone v. Smith: Rebutting the Second Presumption with the Peripheral Representation Standard

The Ninth Circuit has left open another possible area of exception to the imputed disqualification rule. In *Trone v. Smith*¹⁰⁷ the court stated, "[i]f there is a reasonable probability that confidences were disclosed which could be used against the client in later, adverse representation, a substantial relation between the two cases is presumed."¹⁰⁸ A footnote to this statement, however, indicates that

100. *Id.*

101. 11 Cal. App. 4th 109, 14 Cal. Rptr. 2d 184 (1992).

102. See THOMAS D. MORGAN & RONALD D. ROTUNDA, 1998 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 147 (1998).

103. *Henriksen*, 11 Cal. App. 4th at 116, 14 Cal. Rptr. 2d at 188.

104. See *id.* at 112, 116, 14 Cal. Rptr. 2d at 185, 188.

105. See *id.*

106. *Klein*, 198 Cal. App. 3d at 912, 244 Cal. Rptr. at 237 (emphasis added).

107. 621 F.2d 994 (9th Cir. 1980).

108. *Id.* at 998.

the harshness of this rule is mitigated by the peripheral representation standard developed by the Second Circuit.¹⁰⁹ Under this standard, an attorney previously associated with a firm that handled matters substantially related to those in which his disqualification is sought may avoid disqualification if he did not have any personal involvement in the substantially related matters, and did not actually receive any confidential information relevant to the disqualification motion.¹¹⁰ The court simply cited *Gas-A-Tron v. Union Oil Co.*¹¹¹ and *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*¹¹² for this notion of peripheral representation and failed to provide an example of the type of factual situation to which this standard applies; the court did not clarify what impact this exception has when vicarious disqualification is threatened.¹¹³

In *Gas-A-Tron*, the Ninth Circuit held that the district court abused its discretion when it ordered disqualification of an entire law firm representing plaintiffs in an antitrust action brought against several major oil companies, including Shell Oil Company ("Shell") and Exxon Corporation ("Exxon").¹¹⁴ The district court disqualified the firm because it hired a young associate who had previously worked for another law firm that represented Shell and Exxon in other matters.¹¹⁵ While at the previous law firm, the associate had performed an assortment of tasks commonly handled by young associates at large firms, and worked on litigation directly and indirectly affecting cases that the firm undertook for Shell and Exxon.¹¹⁶ The inference that the associate therefore possessed confidential information arose from his potential physical access to Shell and Exxon files, and his association with attorneys at the previous firm who actually had such confidential information.¹¹⁷

109. *See id.* at 998 n.3.

110. *See id.*

111. 534 F.2d 1322 (9th Cir. 1976).

112. 518 F.2d 751 (2d Cir. 1975).

113. *See Trone*, 621 F.2d at 998.

114. *See Gas-A-Tron*, 534 F.2d at 1324.

115. *See id.* at 1324-25.

116. *See id.*

117. *See id.* at 1325.

One interpretation of the *Trone* footnote is that the peripheral representation standard may simply be another means of rebutting the first presumption involved in an imputed disqualification analysis—that the affected attorney is presumed to have confidential information about the former client.¹¹⁸ Unlike the opening up of the irrebuttable second presumption presented by *Klein v. Superior Court*,¹¹⁹ the acceptance of a peripheral representation standard in *Trone* may be read as another avenue for establishing that no confidential information was brought to the new firm by the allegedly tainted attorney because the attorney actually had no such confidential information.

This reading is problematic, however, since the entire firm should have been disqualified on the facts of *Gas-A-Tron* if the presumption of shared confidences is irrebuttable. In *Gas-A-Tron*, the associate did not present facts suggesting non-access to the pertinent oil company files, nor did he present evidence that he did not have access to the work product of attorneys at the previous firm who, undisputedly, had personal knowledge of confidences received from Shell and Exxon.¹²⁰ Thus the associate did not rebut the first presumption as required under the broad view of disqualification in California.

On closer examination, the peripheral representation standard is more likely intended as a method of rebutting the second presumption—that the migrating lawyer will share with fellow attorneys at her new firm all confidences brought from the previous firm. In *Gas-A-Tron*, the firm was allowed to show that the associate's involvement with the previous firm's work for Shell and Exxon was of such an attenuated nature that no imputation of possible confidences was warranted.¹²¹ The court reasoned that the associate did not actually

118. See *supra* Part III.B (explaining the two presumptions involved in the vicarious disqualification analysis).

119. 198 Cal. App. 3d 894, 244 Cal. Rptr. 226 (1988).

120. See *Gas-A-Tron*, 534 F.2d at 1324; see *supra* Part III-B (explaining the two presumptions involved in the vicarious disqualification analysis).

121. See *Gas-A-Tron*, 534 F.2d at 1325.

obtain confidences about Shell or Exxon that would be relevant to the pending litigation against them, nor had he worked on matters substantially related.¹²² But the court also indicated that the facts of the case were virtually identical to those considered in *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*,¹²³ which approved rebutting the presumption of shared confidences.¹²⁴ *Silver Chrysler Plymouth, Inc.* articulated a standard that differentiated between attorneys who become heavily involved in the facts of a particular matter and those who are merely peripherally involved.¹²⁵

By citing *Gas-A-Tron* and *Silver Chrysler Plymouth, Inc.* for the peripheral representation standard, the *Trone* court suggested a narrower view of disqualification motions, such that, under limited circumstances, the second presumption would be rebuttable. Undoubtedly, one instance where this standard is applicable involves summer associates who are considered tainted by attenuated and peripheral work assigned to them when working in a big firm for just one summer.¹²⁶ The exception may extend further to other attorneys based on the extent of their involvement with a former client's matter. To what degree, however, is not evident from the case law. Nonetheless, it is clear that the Ninth Circuit is signaling the need for a narrower view of imputed disqualification with respect to certain types of potential conflicts.

V. CONCLUSION

In jurisdictions like California, which takes a broad view of imputed disqualification, there is a greater danger that the ethics rules will be invoked by opposing parties as procedural weapons, designed to harass opposing counsel.¹²⁷ When this happens, the purpose of the rules is subverted.¹²⁸ If California takes a more flexible approach

122. *See id.*

123. 518 F.2d 751 (2d Cir. 1975).

124. *See Gas-A-Tron*, 534 F.2d at 1325.

125. *See Silver Chrysler Plymouth, Inc.*, 518 F.2d at 756.

126. *See, e.g., Actel Corp. v. QuickLogic Corp.*, No. C 94-20050 JW, 1996 WL 297045 (N.D. Cal. May 29, 1996).

127. *See Kevlik v. Goldstein*, 724 F.2d 844, 848 (1st Cir. 1984).

128. *See id.*

that does not require imputed disqualification on such a broad basis, there will be less danger that the motion will be abused.

The realities of modern day legal practice must also be considered. Lawyers are moving more freely from one firm to another, and law firm mergers have become commonplace.¹²⁹ At the same time, the availability of competent legal specialists is now concentrated under fewer roofs.¹³⁰ The potential for unnecessary secondary disqualifications is great unless there are reasonable alternatives to firm disqualification whenever there is a successive conflict.

Other jurisdictions see the value of allowing screening for some types of successive conflicts in private law firm scenarios, and the result has not been widespread compromise of client confidences.¹³¹ The overriding public policy of client confidentiality at the core of all ethics rules is entirely consistent with the additional policies served where screening is permitted. The cases that have allowed the use of ethical walls to rebut the presumption of shared confidences have accorded the maintenance of confidentiality paramount effect.¹³²

Even given the heightened value placed on client confidentiality in California, a more flexible approach to secondary disqualification would not reflect a lesser commitment to this policy. To the contrary, vicarious disqualification rules do not really serve clients when the rules are applied in a strict prophylactic fashion, because inflexible, across-the-board rules do not allow for a balancing of all factors in a given situation.

When the circumstances cannot support a successful ethical wall, then imputed disqualification is necessary and should be required. But when the situation supports screening, and the most stringent measures are taken, an ethical wall can and does protect

129. See *Manning v. Waring, Cox, James, Sklar, and Allen*, 849 F.2d 222, 225 (6th Cir. 1988).

130. See *id.*

131. See *supra* Part III.A-B (discussing the vicarious disqualification rules in jurisdictions that allow screening).

132. See, e.g., *Miller v. Chicago and N. W. Transp. Co.*, 938 F. Supp. 503 (N.D. Ill. 1996) (upholding the district court's approval of an ethical wall only upon a detailed showing that a total screen protecting client confidences had been established prior to the conflicted attorney's arrival at the new firm).

former client confidences without doing so at the expense of current clients.

*Dorothy M. Gibbons-White**

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