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I. INTRODUCTION

As witnessed by a continual parade of litigation, attorney conflict of interest dilemmas occur with great frequency.[1] The growth of the "megafirm," specializing in defined areas of the law with offices in many cities as well as in foreign countries, has multiplied the situations in which a firm may find itself representing adverse or potentially adverse clients.[2] The increasing mobility of lawyers has significantly raised the possibility of conflicts.[3] This problem is especially acute in the area of corporate and securities law, which involve many large firms in one or a series of related representations, and attorney movement among such firms is common.

The judiciary's response to questions of conflict of interests, as well as the rules of professional ethics, at times seemingly exacerbate the above problems. A number of court decisions reflect

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1 *See, e.g.*, Note, *Conflicts of Interest: Simultaneous Representation*, 2 GEO. J. LEGAL ETHICS 103, 103 n.1 (1988) (law firm settled an action for $27 million on alleged conflict of interest). As a general rule, federal district court orders granting or denying motions to disqualify opposing counsel are not immediately appealable. *See* Richard-Merrell, Inc. v. Koller, 472 U.S. 424 (1985); Flanagan v. United States, 465 U.S. 259 (1984), Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981). *See generally* G. HAZARD & W. HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT (1985).

2 Comment, *Corporate Legal Ethics—An Empirical Study: The Model Rules, The Code of Professional Responsibility, and Counsel's Continuing Struggle Between Theory and Practice*, 8 J. CORP. L. 601, 651 (1983). Law firm use of computers is helpful, if not necessary, in ascertaining the existence of conflicts of interest. *See* Keane, *Microcomputers Can Resolve Conflicts of Interest*, Legal Times, June 10, 1985, at 13.

3 *See generally* Bishop, *An Equitable Alternative to the Discriminatory Imposition of Vicarious Firm Disqualification*, 31 WAYNE L. REV. 1030 (1985).

the inconsistency and vagueness that exist in this area. These decisions generally fail to recognize that conflict questions arise in a wide variety of situations. Each of these situations involves different issues and requires separate treatment. The potential consequence is the widespread recognition of unduly broad rules which in turn will lead to undesirable results.[4] In addition, both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct do not adequately balance the competing interests of clients and the practicing bar. This failure results in a wooden framework that disserves everyone.[5]

This article will focus on conflict questions arising in the context of attorney movement between firms with respect to both present and former clients. As discussed below, the rules of professional ethics and decisions in this area are far from acceptable. Their inadequacy is due to their failure to recognize fundamental differences between various types of conflict questions. This deficiency has precipitated an increase in disqualification motions and further complicated an already difficult area of the law.

II. CONFLICTS OF INTEREST—IN GENERAL

A. *Simultaneous Representation*

Possible conflicts of interest relating to the representation of adverse clients arise in two broad contexts. The first involves the simultaneous representation of adverse or potentially adverse parties.[6] For example, the principal office of a law firm situated in

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4 *Compare* Schiessle v. Stephens, 717 F.2d 417 (7th Cir. 1983) *with* Freeman v. Chicago Musical Instrument Co., 689 F.2d 715 (7th Cir. 1982). Each case applies the same analysis, although they involve extremely different situations. For examples of the results of such decisions on lower court determinations, see *infra* notes 134-149 and accompanying text.

5 *See infra* notes 72-75 and accompanying text. It is clear that the Bar's ethical rules do not have the force of law. As the Ninth Circuit has observed: "Until the Model Code is adopted as law by the courts, the legislature, or the regulatory authority charged with the discipline of lawyers in a particular jurisdiction, the canons and disciplinary rules of the Model Code are merely hortatory, not proscriptive." Paul E. Iacono Structural Eng'r, Inc. v. Humphrey, 722 F.2d 435, 438 (9th Cir. 1983).

6 MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1980) provides in pertinent part:

> (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment on behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
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> (B) A lawyer shall not continue multiple employment if the exercise of his

New York City may act as outside counsel in a public offering by a corporation, while the Chicago branch office of the same firm represents the plaintiff in an employment discrimination suit against the corporation. In this context, courts have generally adopted a prima facie prophylactic rule which prohibits attorneys from simultaneously representing clients with adverse interests, even in unrelated matters.[7] Simultaneous representation is permitted only if the potential for actual conflict is minimal and the respective clients consent after disclosure of the common representation and its implications.[8] The rule against simultaneous representation is based principally on the duty of undivided loyal-

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independent professional judgement on behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent judgment on behalf of each . . . .

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1989) states:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to the other client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

7 *See, e.g.*, IBM v. Levin, 579 F.2d 271 (3d Cir. 1978); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (1989) ("Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated.").

8 *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (1989) ("For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation."); United States v. Nabisco, 117 F.R.D. 40, 44 (E.D.N.Y. 1987) (prima facie prohibition unless no actual or apparent conflict and consent obtained from both parties); *See generally* Steinberg, *Corporate/Securities Counsel—Conflicts of Interest*, 8 J. CORP. L. 577, 579-84 (1983); *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1269-72 (1981) [hereinafter *Developments*].

ty.[9] Both the Model Code of Professional Responsibility[10] and the Model Rules of Professional Conduct adopt the above rule against simutaneous representation.[11] Courts have held that the rule applies equally to individual attorneys as well as law firms, irrespective of a law firm's size.[12]

Representation of multiple parties with potentially adverse interests is not prohibited per se.[13] Counsel may undertake a representation, provided that counsel reasonably believes the po-

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9 *See* Williams v. Reed, 29 F. Cas. 1386, 1390 (C.C.D. Me. 1824) (No. 17,732) ("When a client employs an attorney he has a right to presume, if the latter be silent on the point, that he has no engagements which interfere, in any degree, with his exclusive devotion to the cause confided to him; that he has no interest which may betray his judgment or endanger his fidelity."); *Developments*, *supra* note 8, at 1295-96 ("[O]ne's loss translates directly into another's gain, [and] the fiduciary will almost certainly be unable to avoid a breach of his duty to promote the interests of each with loyal vigor.").

10 MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1980) provides that "[a] lawyer should exercise independent professional judgment on behalf of a client." Various Ethical Considerations also address this subject. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-14, 5-15, 5-16, 5-17, 5-18 and 5-19 (1980). Ethical Consideration 5-15, in conjunction with EC 5-16, provides that a lawyer should carefully weigh the possibility that counsel's loyalty may be impaired and, if justified in representing both parties, must nonetheless obtain the consent of both parties. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-15, 5-16 (1980).

11 The Model Rules are much more straightforward in their prohibition of simultaneous representation:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
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> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
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> (2) each client consents after consultation.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(a) (1989).

12 *See* LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252, 257 (7th Cir. 1983) (simultaneous representation prohibited regardless of size of firm or screening mechanisms); Westinghouse Elec. Corp. v. Kerr-McGee, 580 F.2d 1311, 1321 (7th Cir. 1978) ("Chinese Walls" ineffective to overcome prohibition against simultaneous representation). In United States v. Nabisco, 117 F.R.D. 40 (S.D.N.Y. 1987), the court stated:

> Generally, in cases where the movant establishes that a law firm is simultaneously employed by two or more adverse parties in the same action, such representation is deemed '*prima facie* improper.' To rebut this characterization, the law firm that is the target of the motion must establish that: (1) its clients have consented to the adverse representation or (2) at the very least, . . . there will be no actual or apparent conflict in loyalties or diminution in the vigor of [its] representation.

Id. at 44 (citing Cinema 5 Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1387 (2d Cir. 1976)). With respect to simultaneous representation problems induced by two law firms merging (merger-induced conflict of interest), see Picker Int'l v. Varian Assoc., 869 F.2d 578 (Fed. Cir. 1989), and Harte Biltmore Ltd. v. First Penn. Bank, 655 F. Supp. 419 (S.D. Fla. 1987).

13 *See supra* notes 8-11 and accompanying text.

tential conflict will not adversely affect the rendition of legal services in the best interests of each client and each client consents to the multiple representation after explanation of the pertinent ramifications.[14] Multiple representation in the corporate setting may include (depending on an ad hoc evaluation that no disabling conflict of interest exists and that the requisite client consent has been given): drafting a shareholder agreement for clients desiring to form a close corporation,[15] representing both the corporation and corporate fiduciaries in a shareholder derivative suit alleging misconduct by such fiduciaries,[16] serving as counsel to a registered broker-dealer and to the subject registered representatives in a Securities and Exchange Commission (SEC) enforcement action,[17] and representing both the corporate entity and management in acquisitions for corporate control.[18]

B. Successive Representation

A second type of conflict may arise when a lawyer or law firm seeks to represent a client whose interests are adverse to a former client without the former client's consent.[19] This situation

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14 *See supra* note 8.

15 *See* L. SOLOMON, D. SCHWARTZ & J. BAUMAN, CORPORATIONS: LAW AND POLICY 129-33 (2d ed. 1988).

16 *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(e) (1989); *Developments*, *supra* note 8, at 1341 ("The better rule is to require that outside counsel represent the corporation, while the corporate attorney represents the insider defendant."). *Compare* Messing v. FDI, Inc., 439 F. Supp. 776, 782 n.8 (D.N.J. 1977) ("The need for independent counsel is underscored by the duty of counsel for the corporation in a derivative suit to safeguard the corporation's interest.") *with* Otis & Co. v. Pennsylvania R.R., 57 F. Supp. 680, 684 (E.D. Pa. 1944) ("[T]here are many stockholders' suits on record in which the same counsel represented both the individual and corporate defendants.").

17 *See, In re* First Republic Bank Securities Litigation, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,554 (N.D. Tex. 1989) (where attorney received consents from plaintiffs having potential conflict of interest problem, multiple representation of such clients not grounds for disqualification); *In re* Merrill Lynch, Pierce, Fenner & Smith, Inc., [1973-1974 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,608 (ALJ 1973) (where only potential conflict exists, and after being informed of the implications, clients consent to the multiple representation, such representation permitted). *See generally* M. STEINBERG & R. FERRARA, SECURITIES PRACTICE: FEDERAL AND STATE ENFORCEMENT (1985 & 1990 Supp.); Sonde, *The Responsibility of Professionals Under the Federal Securities Laws—Some Observations*, 68 NW. U.L. REV. 1, 11 (1973).

18 For discussion on this subject, see Steinberg, *Attorneys Conflicts of Interest in Corporate Acquisitions*, 39 HASTINGS L.J. 579 (1988).

19 *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1989):

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the for-

is referred to as "successive representation."[20] Unlike simultaneous representation, successive representation is not prima facie improper.[21]

The duty to preserve client confidences is the primary ethical consideration implicated by successive representation.[22] For this reason, it is argued that lawyers need not be prohibited from advocating interests adverse to their former clients unless the past representation involved confidences that could be damaging to the former client in the successive representation.

Successive representation implicates both the duty of loyalty and the preservation of the attorney-client relationship.[23] Attorneys "profess and owe undivided loyalty to their clients."[24] To use confidences against a former client in a later matter would violate the duty of loyalty owed to the former client and make future clients reluctant to disclose confidences.[25] The foundation of the attorney-client relationship would thus be undermined.[26]

Courts have adopted the "substantial relationship" test, first enunciated in *T.C. Theatre Corp. v. Warner Bros. Pictures*,[27] to de-

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mer client unless the former client consents after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client,

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client consents after consultation.

20 *See generally* C. WOLFRAM, MODERN LEGAL ETHICS § 7.1 (1987).

21 *See* T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 268 (E.D.N.Y. 1953); cases discussed *infra* notes 27-49 and accompanying text.

22 *See, e.g.*, Smith v. Whatcott, 757 F.2d 1098 (10th Cir. 1985); Satellite Fin. Planning v. First Nat'l Bank of Wilmington, 652 F. Supp. 1281 (D. Del. 1987); *Developments*, *supra*, note 4, at 1352.

Note that the term "confidences" in this context is not confined by the attorney-client privilege. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment (1989) ("The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.").

23 *See* Consolidated Theatres, Inc. v. Warner Bros. Circuit Mgt. Corp., 216 F.2d 920 (2d Cir. 1954); In re Evans, 113 Ariz. 458, 556 P.2d 792 (1976).

24 Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 646 F.2d 1020, 1027 (5th Cir.), *cert. denied*, 454 U.S. 895 (1981).

25 *See* Steinberg, *supra* note 8, at 585.

26 *See* Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 570-71 (2d Cir. 1973) ("Without strict enforcement of such high ethical standards, a client would hardly be inclined to discuss his problems freely and in depth with his lawyer, for he would justifiably fear that information he reveals to his lawyer one day may be used against him on the next.")

27 113 F. Supp. 265 (E.D.N.Y. 1953).

termine if a successive representation should be permitted. Under this standard, if the issues presented in the previous representation bear a substantial relationship to issues in the successive representation, a lawyer participating in the first representation is irrebuttably presumed to have received confidential information.[28] The former client whose interests are materially adverse to the issues raised in the successive representation need not demonstrate that any relevant confidences were in fact disclosed. The rationale underlying the presumption is that to force the client to make such a showing would mandate disclosure in court of the very confidences that the client seeks to protect.[29]

In applying the substantial relationship test, courts[30] have cited Model Code Canon 4, which provides that lawyers should preserve client confidences,[31] and Canon 9, which provides that lawyers should avoid "even the appearance of professional impropriety."[32] On the other hand, the Model Rules specifically adopt the substantial relationship test[33] and explicitly decline to apply the appearance of impropriety standard as a basis for disqualification.[34] Although the appearance of impropriety formula is vague and leads to uncertain results,[35] it nonetheless serves the useful function of stressing that disqualification properly may be imposed to protect the reasonable expectations of former and present clients. The impropriety standard also promotes the public's confidence in the integrity of the legal profession. For

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28 *Id.* at 268.

29 *See, e.g.*, Trone v. Smith, 621 F.2d 994, 999 (9th Cir. 1980); Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221 (7th Cir. 1978); *T.C. Theatre*, 113 F. Supp. at 268.

30 *See. e.g.*, Smith v. Whatcott, 757 F.2d 1098, 1100 (10th Cir. 1985); Ettinger v. Cranberry Hill Corp., 665 F. Supp. 368, 370 (M.D. Pa. 1986).

31 MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1980).

32 *Id.* Canon 9.

33 *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1989), *supra* note 19; Riger, *The Model Rules and Corporate Practice—New Ethics for a Competitive Era*, 17 CONN. L. REV. 729, 747-52 (1985).

34 *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment, Rule 1.9 comment (1989).

35 *See* Kramer, *The Appearance of Impropriety under Canon 9: A Study of the Federal Judicial Process Applied to Lawyers*, 65 MINN. L. REV. 243 (1987)). *Compare* Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980) (en banc) (case of subsequent representation where any possible appearance of impropriety was not a sufficient reason for a disqualification order due to serious consequences which would have resulted from such an order and since the appearance of impropriety was not very clear), *vacated for lack of jurisdiction*, 449 U.S. 1106 (1981), *with* Iacono Structural Eng'r, Inc. v. Humphrey, 722 F.2d 435 (9th Cir. 1983) (case of subsequent representation where Canon 9 prohibition required disqualification where substantial relationship existed between former and present adverse representation).

these reasons, courts should retain the appearance of impropriety standard as an independent basis of assessment.[36] This standard should be sparingly invoked by itself, but more often used in conjunction with the substantial relationship standard.

As the substantial relationship test has gained universal recognition,[37] courts have refined and relaxed the test as enunciated in *T.C. Theatre*. For example, the Seventh Circuit has held that a court must engage in a three-step analysis to determine if the representations are substantially related.[38] The court must first conduct a factual reconstruction of the prior representation and assess its nature and scope.[39] Second, it must determine whether a reasonable inference exists that confidential information would have been communicated to the lawyer in the course of the first representation.[40] Finally, the court must decide if this information is relevant to the issues presented in the successive representation.[41]

The Second Circuit has lessened the onus of disqualification caused by strict application of the *T.C. Theatre* substantial relationship test. The Second Circuit will not disqualify a lawyer unless the relationship between the issues in the former and current representations is "patently clear,"[42] meaning that they are "identical" or "substantially the same."[43] Courts in other jurisdictions

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36 *See generally* Aronson, *Conflict of Interest*, 52 WASH. L. REV. 807, 810-11 (1977); Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211, 228 (1982). *But see* WOLFRAM, *supra* note 20, at 322 ("But courts lack both access to reliable facts and a workable method for thinking through, on a case-by-case basis, the question whether the particular result sought by one or the other of the parties will increase, decrease, or leave unaffected the general level of public or private confidence.").

37 *See* Tashier & Casper, *Vicarious Disqualification of Co-counsel Because of "Taint"*, 1 GEO. J. LEGAL ETHICS 155, 166 (1987).

38 LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252, 255 (7th Cir. 1983); Novo Terapeutisk Laboratorium v. Baxter Travenol Laboratories, Inc., 607 F.2d 186, 190-91 (7th Cir. 1979) (en banc).

39 *LaSalle*, 703 F.2d at 255.

40 *Id.* at 255-56.

41 *Id.* at 256. For an analysis of the Seventh and Second Circuits' approaches to the substantial relationship test, *see* Comment, *Conflicts of Interest: Subsequent Adverse Representation*, 2 GEO. J. LEGAL ETHICS 119, 121-24 (1988).

42 *See* Government of India v. Cook Indus., 569 F.2d 737 (2d Cir. 1978); Silver Chrysler Plymouth, Inc. v. Chrysler Motor Corp., 518 F.2d 751 (2d Cir. 1975).

43 *See Government of India*, 569 F.2d at 740; United States Football League v. National Football League, 605 F. Supp. 1448, 1457 (S.D.N.Y. 1985). An attorney-client relationship must exist with respect to the former client before the substantial relationship test can be invoked. Hence, the scope of the test may hinge on whether a broad or restrictive standard is applied to the establishment of an attorney-client relationship. In ascertaining whether the attorney and prior client had a substantial relationship, courts

have relaxed the *T.C. Theatre* test,[44] although some to a lesser degree.[45]

In addition to relaxing the test, the Second Circuit has recognized a "peripheral representation" exception to the substantial relationship test. The court introduced this doctrine in *Silver Chrysler Plymouth, Inc. v. Chrysler Motor Corp.*[46] In *Silver*, the court addressed a motion to disqualify the plaintiff's lawyer on the grounds that he had represented the defendant while working in his previous position as an associate at a large law firm. The court noted that substantially related matters may have involved the lawyer at the old firm. Nonetheless, because this involvement was limited to "brief, informal discussions on procedural matters or research on a specific point of law,"[47] the court concluded that this minimal involvement was not a "prior representation" as defined in *T.C. Theatre*. The substantial relationship test was thus not met.[48] Several decisions since *Silver* have adopted this rationale.[49]

Although the substantial relationship test is more lenient than the prima facie rule against simultaneous representation, it may be farther reaching. Disqualification for simultaneous representation forces lawyers and law firms to choose to represent one cli-

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may consider the time period that has elapsed between the current and former representations. The longer the time period, "the less likely the appearance of impropriety and substantiality in the relationship between the matters." Note, *Motions to Disqualify Counsel Representing an Interest Adverse to a Former Client*, 57 TEXAS L. REV. 726, 733 (1979), (citing Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1322 (7th Cir. 1978) and General Motors Corp. v. City of New York, 501 F.2d 639, 650 n. 21 (2d Cir. 1974)).

44 *See* City of Cleveland v. Cleveland Elec. Illumination, 440 F. Supp. 193, 208 (N.D. Ohio 1977), *aff'd mem.*, 573 F.2d 1310 (6th Cir.), *cert. denied*, 435 U.S. 996 (1978).

45 *See* Trone v. Smith, 621 F.2d 994, 1000 (9th Cir. 1980) ("reasonable probability" that information disclosed in the former representation will be useful in the successive representation); Satellite Fin. Planning v. First Nat'l Bank of Wilmington, 652 F. Supp. 1281, 1284 (D. Del. 1987) (utilizing the substantial relationship test with "cautious scrutiny" and cautioning against letting "imagination run free" when determining whether confidential information was disclosed). For state court decisions in this area, see the cases discussed in Comment, *Disqualification of Attorneys and Their Firms for Conflicts of Interest: A Lack of Consistency in Both Federal and State Courts*, 26 WASHBURN L.J. 493, 515-23 (1987).

46 518 F.2d 751 (2d Cir. 1975).

47 *Id.* at 756.

48 *Id.* at 757.

49 *See* Atasi Corp. v. Seagate Technology, 847 F.2d 826, 829 (Fed. Cir. 1988); United States *ex rel.* Lord Elec. Co. v. Titan Pac. Const., 637 F. Supp. 1556, 1561 (W.D. Wash. 1986); Papst Motoren GMBH & Co., KG v. Manematsu-Gashu, 629 F. Supp. 864, 876 (S.D.N.Y. 1986).

ent or another at a particular time.[50] Although this may cause a problem for firms forced to choose between two prospective clients,[51] the disqualification only lasts as long as the client's interests are adverse.[52] In the area of successive representation, disqualification may continue indefinitely. As long as related matters are outstanding, there is the potential for disqualification.[53] This dilemma becomes more acute when it implicates the possibility of vicarious disqualification.

III. VICARIOUS DISQUALIFICATION

A. In General

Traditionally, if a lawyer is ineligible to represent a particular client, all members of the lawyer's firm also are ineligible. This general rule is contained in both the Model Code and the Model Rules. The Model Code provides that "[i]f a lawyer is required to . . . withdraw from employment . . . no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."[54] Similarly, the Model Rules provide that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so."[55]

The basis for vicarious disqualification is the "presumption of shared confidences," which seeks to prevent disclosure of client confidences, preserve counsel loyalty, and avoid the appearance of impropriety.[56] Under this presumption, when a lawyer is shown to have received confidences, the lawyer is presumed to have shared them with members of his firm.[57] Traditionally, the courts and the rules of professional ethics view this as an irrebut-

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50 If counsel already represents multiple parties, he or she may well be foreclosed from representing *any* party in the event of a disabling conflict. This is due to concerns with maintaining client confidences and secrets, counsel's loyalty, and the appearance of impropriety. *See, e.g.*, cases cited *supra* note 12.

51 Comment, *supra* note 2, at 651. This is especially true considering that the representations do not need to be related in any way. *Id.* at 656. Also, courts have not been receptive to "Chinese Wall" defenses in this context. *See infra* notes 150-157 and accompanying text.

52 *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (1989).

53 *Id.* Rule 1.9 comment.

54 MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D) (1980).

55 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10(a) (1989).

56 *See, e.g.*, Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225 (2d Cir. 1977).

57 *See, e.g.*, Amoco Chemicals Corp. v. MacArthur, 568 F. Supp. 42, 45 (N.D. Ga. 1983); Realco Services, Inc. v. Holt, 479 F. Supp. 867, 871 (E.D. Pa. 1979).

table presumption.[58]

It is important to note that the two presumptions discussed above are distinct. Before the presumption of shared confidences is invoked to vicariously "taint" a law firm, one must determine if the "primary" lawyer is tainted.[59] In successive representation cases, if the application of the substantial relationship test does not warrant presuming that the former client disclosed relevant confidences to counsel, the question of vicarious disqualification will never be reached.[60]

Many situations occur where vicarious disqualification may prevent counsel and her law firm from engaging in a representation. In varying degrees, each of these situations presents problems of balancing interests.

B. Relevant Interests

Several interests are promoted by utilizing the presumption of shared confidences in successive representation cases. These interests include the former client's interest in protecting confidences, the lawyer's duty of loyalty to the former client, and the judicial system's interest in avoiding the appearance of impropriety.[61] As courts and commentators increasingly recognize, some countervailing interests are implicated by disqualifying counsel on the grounds of successive representation. The first, and most often cited, is the new client's interest in retaining his counsel of choice.[62] Disqualification of counsel also involves other hardships

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58 Neither the MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10(a) nor the MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D) provide for rebuttal of the presumption in cases involving non-government attorneys. As will be seen, *infra* notes 71-149 and accompanying text, a number of courts now permit the presumption against vicarious disqualification in such successive representation cases to be rebutted. *See* Manning v. Waring, Cox, James, Sklar & Allen, 849 F.2d 222, 226 (6th Cir. 1988) ("[W]e see no reason why the considerations which led the American Bar Association to approve appropriate screening for former government attorneys, should not apply in the case of private attorneys who change their association.").

59 *See* Steinberg, *supra* note 8, at 589 (and cases cited therein).

60 *See id.;* Caracciolo v. Ballard, 687 F. Supp. 159 (E.D. Pa. 1988). Unfortunately, courts sometimes confuse the two presumptions. *See* Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1577 (Fed. Cir. 1984).

61 *See supra* notes 22-27, 37 and accompanying text.

62 *See Panduit,* 744 F.2d at 1576; Schiessle v. Stephens, 717 F.2d 417, 420 (7th Cir. 1983); Silver Chrysler Plymouth, Inc. v. Chrysler Motor Corp., 518 F.2d 751, 753 (2d Cir. 1975); Steinberg, *supra* note 8, at 586; Tashier & Casper, *supra* note 37, at 157. Nonetheless, the point certainly can be made that no party has the right to "tainted" counsel who is privy to confidences of the former client. *See supra* notes 22-26, 36 and accompanying text.

for the new client,[63] including increased cost, possible loss of work product,[64] delay,[65] and the psychological stress incident to having trusted counsel replaced with an unknown quantity.[66]

Imputed disqualification also works significant hardship on the affected lawyer. Disqualification may reflect negatively on a lawyer's character.[67] Further, the threat of disqualification has the potential to severely limit the mobility of attorneys,[68] particularly specialists.[69]

In weighing the above interests, it must also be recognized that disqualification motions are often abused. Such motions are increasingly being used as tools to harass the opposing party or force a settlement.[70]

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63 *See* Bishop, *supra* note 3, at 1047.

64 *See* EZ Paintr Corp. v. Padco, Inc., 746 F.2d 1459 (Fed. Cir. 1984); First Wisconsin Mortgage Trust v. First Wisconsin Corp., 584 F.2d 201 (7th Cir. 1978); Comment, *The Availability of Work Product of a Disqualified Attorney: What Standard?*, 127 U. PA. L. REV. 1607 (1979).

65 *See* Fiandaca v. Cunningham, 827 F.2d 825 (1st Cir. 1987); Winslow, *Federal Courts and Attorney Disqualification Motions: A Realistic Approach to Conflicts of Interest*, 62 WASH. L. REV. 863, 864 (1987).

66 *See* Peterson, *Rebuttable Presumptions and Intra-Firm Screening: The New Seventh Circuit Approach to Vicarious Disqualification of Litigation Counsel*, 59 NOTRE DAME L. REV. 399, 401 (1984).

67 *See* Government of India v. Cook Indus., 569 F.2d 737, 739-40 (2d Cir. 1978) (Mansfield C.J., concurring); Comment, *supra* note 2, at 652. *Cf.* General Elec. Co. v. Indus. Prods., 683 F. Supp. 1254, 1260 (N.D. Ind. 1988) (irrebuttable presumption assumes attorneys are unethical).

68 *See, e.g.*, Silver Chrysler Plymouth, Inc. v. Chrysler Motor Corp., 518 F.2d 751, 755 (2d Cir. 1975); NFC, Inc. v. General Nutrition, Inc., 562 F. Supp. 332, 334 (D. Mass. 1983); Bishop, *supra* note 3, at 1032; Winslow, *supra* note 66, at 864.

69 In some areas of law, such as SEC enforcement practice, attorneys may develop specialties that are useful to only a fairly small number of clients. Because the pool of potential clients is relatively small, attorneys engaged in such a practice will be especially reluctant to hire an attorney if it will prevent the entire firm from serving a number of such potential clients. *See* Comment, *supra* note 2, at 1366.

70 Richardson-Merrel, Inc. v. Koller, 472 U.S. 424, 436, 440 (1985); Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564 (Fed. Cir. 1984); Trinity Ambulance Serv. v. G&L Ambulance Serv., 578 F. Supp. 1280 (D. Conn. 1984); Goldberg, *The Former Client's Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly*, 72 MINN. L. REV. 227, 279 (1987) ("The costs [of the successive conflict disqualification doctrine] to the system and to individuals are disproportionately large.").

The effectiveness of using such motions as a delaying tactic may be somewhat reduced by the Supreme Court's holdings that the denial or granting of disqualification motions are not immediately appealable. *See* cases cited *supra* note 1.

Another possible means to deter such a use of motions for disqualification is the imposition of sanctions under Rule 11 of the Federal Rules of Civil Procedure. Given the uncertainty in this area of the law, however, and that Rule 11 requires that an argument be "warranted by existing law or a good faith argument for the extension, modification or reversal of existing law," it may be difficult to justify the imposition of sanctions in many cases. Fed. R. Civ. P. 11. Perhaps for this reason, Rule 11 is not

C. *Current State of the Law*

The significant costs incident to the disqualification of attorneys is slowly eroding the irrebuttable presumption of shared confidences. As the cases examined in the following section of this article demonstrate, there is a trend in the federal courts towards allowing counsel to rebut this presumption. This development is occurring even though the applicable ethical rules generally do not permit screening or other mechanisms to avert firm-wide disqualification, absent waiver by the affected client.[71]

The movement towards relaxing the presumption of shared confidences appears warranted, given the realities of the modern practice of law. Although protecting client confidences is an important consideration, the use of an irrebuttable presumption does not give sufficient weight to competing concerns such as attorney mobility, the modern day realities of law firm practice, and the client's right to counsel of choice.[72] In this respect, the growth of the "megafirm," to a significant degree, undermines the logical basis for the presumption. It may be reasonable to assume that all of the lawyers in a small firm will share in the confidences of each of the firm's clients. It is quite different to irrebuttably presume that a lawyer in the Chicago office of a 500-lawyer firm obtained confidential information about a client represented by a lawyer in the firm's New York office.[73]

Similarly, the increasing specialization of the practice of law weighs in favor of relaxing the presumption. For example, a lawyer in a large firm's estates and trusts department is unlikely, as a matter of course, to obtain confidential information about a client represented by the firm's corporate litigation department. In today's highly specialized and mobile practice of law, inferring an irrebuttable presumption of shared confidences in all successive

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often used in this context. Comment, *Federal Courts and Attorney Disqualification Motions: A Realistic Approach to Conflicts of Interest*, 62 WASH. L. REV. 863, 874 (1987).

71 *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 comment (1989). *But see* PENNSYLVANIA MODEL RULES OF PROFESSIONAL CONDUCT (1987) (permitting screening of affected attorney and notice to client as a means to avert firm-wide disqualification). *See also* ABA Comm. on Ethics and Professional Responsibility Informal Op. 88-1526, *discussed in* Reich, *Beyond Yes and No*, 75 A.B.A. J. 114 (June 1989) (permitting law firm to avert vicarious disqualification when personally disqualified non-lawyer is affiliated with the firm provided that non-lawyer is subject to appropriate screening mechanisms). For a definition of "screening," see *infra* notes 89-94 and accompanying text.

72 *See supra* notes 62-66 and accompanying text.

73 *See generally* Winslow, *supra* note 65, at 874; Comment, *supra* note 45, at 514.

representation situations fails to give appropriate weight to contemporary realities.

Hence, the current judicial trend relaxing the presumption of shared confidences is laudable. However, the approach adopted by a number of courts is deficient. In particular, some courts have failed to recognize that the numerous situations in which vicarious disqualification issues may arise each involve distinct problems and warrant separate consideration. As shown below, while certain situations justify allowing rebuttal of the presumption, others do not. Too many courts fail to recognize this distinction. Instead, these courts aggregate questions implicating vicarious disqualification. They issue broad pronouncements as to whether the presumption of shared confidences is rebuttable and, if so, what steps are necessary to rebut the presumption.[74] By using such faulty analysis, courts have established dangerous precedents and invited even more litigation of disqualification motions.

D. Varieties of Vicarious Disqualification

The following discussion sets forth the usual situations in which vicarious disqualification issues may arise and examines the desirability of a rebuttable presumption in each situation. There are at least five situations in which vicarious disqualification may prevent attorneys from engaging in the successive representation of adverse clients. These include cases involving firms "switching sides" and attorney movement between firms.

1. Firms "Switching Sides."

The first situation, and the one that calls for an irrebuttable presumption to be universally applied, occurs when the primary lawyers in both the first and the successive representations are members of the same firm. In other words, the firm switches sides. For example, lawyer X from firm A defends XYZ corporation in a securities fraud case. While lawyer X is still employed at Firm A, and after the end of the first case, lawyer Y from firm A represents the plaintiff in a second related securities litigation matter against XYZ.

This scenario presents a strong case for disqualification: it raises concerns regarding the transmission of confidential informa-

74 *See supra* note 4 and accompanying text.

tion to the disadvantage of the former client, the zeal of representation that was rendered, and the unseemliness of these lawyers in the public's view. Moreover, adopting an irrebuttable presumption in this situation would not adversely affect the movement of attorneys between firms.

Another variable that militates for firm-wide disqualification is that screening the affected lawyers involved in the first case may be difficult, considering that many lawyers at the firm may be involved in both cases. Further, even if the firm were to adopt screening mechanisms, this does not address the possibility that a primary attorney in the second litigation received confidential information before the screening process began. Perhaps for these reasons, courts rarely permit rebuttal of the presumption of shared confidences in this situation.[75]

2. Attorney Movement Between Firms.

The remaining four scenarios involve an attorney switching firms. Each of these cases presents a different potential for the misuse of confidential information, and to some extent, courts treat each of these differently.

(a) "Situation One" Cases.—The "situation one" cases are those in which a lawyer not directly involved in a representation moves to a firm that represents an adverse client, but does not become involved in the representation at the second firm. For example, assume that Firm A represents corporation XYZ as defense counsel in a securities fraud case. Firm B represents the plaintiff. Lawyer X at Firm A, who is not involved in the litigation, leaves Firm A and takes a position with Firm B. X does not work on the litigation at Firm B.

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75 Apparently, only one court has denied a motion for disqualification in such a situation. City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F. Supp. 193 (N.D. Ohio), *aff'd mem.*, 573 F.2d 1310 (6th Cir. 1977), *cert. denied*, 435 U.S. 996 (1978). The facts of this case, however, are unique. The movant caused the conflict by requesting legal services from a firm it knew was a long-time client of its opponent. The court held that the movant was therefore estopped from asserting a conflict. 440 F. Supp. at 203. The court went on, in dicta, to say that the presumption of shared confidences is rebuttable. *Id.* at 209. *Contra* Smith v. Whatcott, 757 F.2d 1098, 1102 (10th Cir. 1985) (presumption irrebuttable); Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1267 (7th Cir. 1983) (presumption not rebuttable when entire firm switches sides); Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221 (7th Cir. 1978) (firm that switched sides disqualified).

For further discussion on the use of screening mechanisms, see *infra* notes 89-95, 98-103, 126-132 and accompanying text.

In cases such as these, several courts will find it unnecessary to address the presumption of shared confidences. For example, the Second Circuit, under its peripheral representation exception, would not consider that X had participated in a "representation" of XYZ while she was at Firm A.[76] Under the substantial relationship test, the court would not disqualify X from representing an adverse party in a related matter. Because X herself is not disqualified, the question of vicarious disqualification never arises.[77]

Courts that have not adopted the peripheral representation exception or a similar exception must address the question of vicarious disqualification. The traditional presumption of shared confidences test would disqualify Firm B from representing the plaintiff.[78] X is tainted by her association with Firm A, and by moving to Firm B, taints Firm B as well. Courts, however, are unwilling to stretch the presumption quite that far. Courts have either adopted a flat rule that disqualification may not be imputed from a lawyer who is herself vicariously disqualified,[79] or have denied disqualification on some other grounds.[80]

Disallowing vicarious disqualification in situation one cases ordinarily makes a great deal of sense. If knowledge imputed to a lawyer may be imputed to other lawyers at different firms, vicarious disqualification could "continue *ad infinitum*."[81] Moreover, the risk of disclosure is minimal since the lawyer is neither directly involved nor privy to confidential information in either the former or current representation. Thus, a rule placing the burden on the challenged firm to produce affidavits demonstrating that the lawyer was not involved in either representation and was not privy to confidential information relating to such representation should be sufficient to protect client confidences in these situations.

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76 *See supra* notes 46-49 and accompanying text. In such cases, the analysis utilized by the Seventh Circuit should reach the lead to result. *See supra* notes 38-41 and accompanying text.

77 *See supra* notes 46-49 and accompanying text.

78 *See supra* notes 54-58 and accompanying text.

79 Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1579 (Fed. Cir. 1984); American Can Co. v. Citrus Feed Co., 436 F.2d 1125, 1129 (5th Cir. 1971).

80 *See* Freeman v. Chicago Musical Instrument Co., 689 F.2d 715 (7th Cir. 1983) (applying Seventh Circuit rebuttable presumption but nonetheless denying disqualification).

81 *American Can*, 436 F.2d at 1129. The court further noted that applying such a rule in the case at bar would have required the disqualification of all counsel for both parties. *Id.*

(b) "Situation Two" Cases.—Situation two presents a more difficult scenario. In such cases, a lawyer who was not directly involved in the prior representation wishes to directly represent an adverse client in the second representation. Using the above example, assume that X does not work directly on the securities fraud case at Firm A. After moving to Firm B during the course of the litigation, X wishes to represent the plaintiff in the same case.

In situation two cases, several courts apply the peripheral representation exception, or a similar exception, and authorize X to undertake the representation.[82] Moreover, even in those jurisdictions that decline to apply such an exception, it is reasonable to permit rebuttal of the presumption of shared confidences.[83] Although the second representation directly involves the challenged lawyer, inadvertent disclosure is not a significant issue. The challenged lawyer who did not take part in the prior representation has left the firm that possesses the affected client's confidences. The danger of the lawyer receiving confidential information through daily informal contact with attorneys who are representing the former client is thus no longer present. Moreover, if the challenged attorney received confidential information before leaving the firm, the former client should find it easier to demonstrate this fact because the lawyer's former colleagues no longer have an incentive to protect the lawyer. Indeed, for "abandoning ship," they may have a stronger impetus to seek disqualification. Hence, requiring the challenged lawyer to execute a sworn statement as well as to produce affidavits from his former colleagues that the challenged attorney was not privy to confidential information should effectively rebut the presumption.[84]

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82 See *supra* notes 38-49, 77 and accompanying text.

83 *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10(b) and comment (1989). According to the comment, Rule 1.10(b) adopts the peripheral representation exception. The comment makes clear that when the attorney in the prior representation received no confidential information, neither the lawyer nor the law firm in the successive representation is disqualified even if the interests of the former and present client conflict. In any event, the comment provides that the presumption of shared confidences may be rebutted by the law firm seeking to avoid vicarious disqualification.

84 *See* Silver Chrysler Plymouth, Inc. v. Chrysler Motor Corp., 518 F.2d 751, 752 (2d Cir. 1975). The court did not need to address this issue because, as noted above, application of the peripheral representation exception led the court to conclude that the primary lawyer was not disqualified. The court stated in dicta, however, that a lawyer's sworn statements, along with the statements of his former colleagues, are sufficient to rebut the presumption in such cases. *See also* Gas-A-Tron of Arizona v. Union Oil Co., 534

The risk of intentional disclosure of confidences revealed in the prior representation is slight. One of the rationales underlying the presumption of shared confidences is that lawyers in a firm are economically interdependent, and may be tempted to disclose any confidences which will assist the firm's clients. In situation two scenarios, however, there is no economic advantage—and indeed there may exist a financial disincentive—for those who possess the confidences to disclose them. The lawyer who would benefit from such revelation is not a member of their firm. Indeed, if the firm that the challenged lawyer left is still representing the former client, disclosing confidences would work against the firm's economic interests.

(c) "Situation Three" Cases.—Situation three presents an analytically similar, but less commonly litigated scenario. In this situation, a lawyer possessing confidences disclosed in a prior related representation leaves the firm. The lawyer's previous firm then represents an adverse client in a successive representation. For example, assume that lawyer X is employed at Firm A where he represents XYZ corporation as defense counsel in a securities fraud case. The litigation does not involve any other lawyers at Firm A. X leaves Firm A, taking the XYZ account with him. A few months later, the plaintiff in a related securities fraud case against corporation XYZ asks Firm A to represent him.[85]

Situation three cases present difficult analytical problems. In one sense, they may be viewed under the rule that whole firms may not switch sides. In the above example, Firm A, through X, had previously represented XYZ in a related matter. Nevertheless, because X was the only member of the firm who received relevant confidences, the same reasons for relaxing the presumption of shared confidences that are present in situation two cases may be invoked here. The lawyer who is in possession of the confi-

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F.2d 1322 (4th Cir. 1976); Laskey Bros. v. Warner Bros. Pictures, 224 F.2d 824, 827 (2d Cir. 1955).

85 An example of a situation three case is Novo Terapeutisk Laboratorium v. Baxter Travenol Laboratories, Inc., 607 F.2d 186 (7th Cir. 1979) (en banc). In *Novo*, an attorney representing Baxter left the firm and took the Baxter account with him. The lawyer's former firm then represented the plaintiff in a suit against Baxter. The lawyer moved to disqualify his old firm. The Seventh Circuit held that the presumption was rebuttable, and that testimony of the challenged attorneys stating that they had no contact with the case rebutted the presumption. *Id.* at 197. In so holding, however, the court noted that this was a unique situation, in that the moving attorney would have known if confidences had been disclosed, but had failed to so allege. *Id.* at 196 n.40.

dences has no incentive to disclose them. Indeed, in the above example, it would be adverse to X's interest to do so, given that he still represents XYZ. For such reasons, it appears that when a lawyer who is in sole possession of confidences leaves a firm, the lawyer's former firm should not be irrebuttably presumed to have shared the relevant confidences.

There is a paucity of case law addressing situation three cases, possibly because it is uncommon to have only one attorney involved in a representation.[86] The issues presented by such cases may gain increasing importance in the future when large groups of attorneys leave a firm, taking many clients with them. Perhaps in anticipation of this development, Rule 1.10(b) of the Model Rules expressly permits the law firm to accept the successive related representation if it can establish that no attorney remaining in the firm possesses confidential information acquired in the former representation.[87]

As an example of a more complex situation three scenario, assume that several members of Firm A's corporate litigation department are defending XYZ corporation in a securities fraud case. All the lawyers involved in the case leave Firm A, taking the XYZ account with them. The plaintiff in a related securities fraud case against XYZ then asks Firm A to represent him.

These cases, as the Model Rules recognize,[88] should be treated in the same manner as cases in which a single lawyer who is in sole possession of a client's confidences leaves a firm. In both situations, a firm should not be disqualified if it can produce affidavits from the lawyers who left the firm that those lawyers were in sole possession of the former client's confidences. Although the departed lawyers may be reluctant to provide such statements, particularly in situations where they are still representing the firm's former client, courts have the option to subpoena the lawyers and compel their testimony. Assuming, as one must, that the lawyers will not perjure themselves, such procedures will allow the firm to rebut the presumption in a manner adequate to

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86 One other situation three case, Donohoe v. Consolidated Operating & Prod. Corp., 691 F. Supp. 1556 (W.D. Wash. 1986), is discussed *infra* at notes 146-148 and accompanying text. *Laskey*, 244 F.2d 824, may also be analyzed from this perspective. The firm that the lawyer in *Laskey* left was a two-person firm. Therefore, if the challenged lawyer is considered to have been the "firm" which the other attorney left, *Laskey* becomes a situation three case.

87 *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10(b) and comment (1989).

88 *Id.*

protect the former client's interests.

(d) "Situation Four" Cases.—Situation four presents the most litigated scenario in this area. In such cases, an attorney who directly represented a client at one firm joins a new firm which represents an adverse client in the same or a substantially related matter.

To continue with the same example, assume that X defends XYZ corporation in a securities fraud case while working at Firm A. During the litigation, X leaves Firm A and joins the plaintiff's firm, Firm B. Alternatively, after the litigation terminates, X becomes affiliated with Firm B which thereafter seeks to represent the plaintiff in related litigation against XYZ. In either situation, presume that X does not work on the case at Firm B.

The debate in situation four cases revolves around the propriety of using screening mechanisms, commonly known as "Chinese Walls," to rebut the presumption of shared confidences. Chinese Walls are "specific institutional mechanisms" which prevent contact between the "tainted" attorney and members of the firm working on the related matter.[89] Such mechanisms may be structural, such as departmentalization,[90] procedural, as in restricting access to files,[91] pecuniary, by denying the tainted attorney any remuneration from fees derived from the representation,[92] or educational, such as providing programs that make firm members aware of the ban on exchange of information.[93] Usually, effective screening procedures involve all of the above components.[94]

For example, Firm B in the above scenario should assign X to a different department, group or office than the department, group or office that is handling the securities fraud case. Access to the files of the case should be restricted to those attorneys directly involved in the litigation. X should not be entitled to any remuneration from fees generated in the case.[95] Further, the

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89 *See, e.g.*, Smith v. Whatcott, 757 F.2d 1098, 1101 (10th Cir. 1985).

90 *See infra* notes 127-128 and accompanying text.

91 *See supra* note 89.

92 *See* WOLFRAM, *supra* note 20, at 402.

93 *See Developments, supra* note 8, at 1368.

94 *Id. See* Note, *The Chinese Wall Defense to Law Firm Disqualification*, 128 U. PA. L. REV. 677 (1980).

95 With respect to precluding the tainted attorney from sharing in the fees, one commentator remains critical:

> The economic structure of firms makes a large fee for one attorney redound to the benefit of all . . . . [A]t the very least, increasing another lawyer's fees

firm should circulate memoranda informing all members of the firm that the case is not to be discussed with X.

(i) Former Government Attorneys.—The earliest situation four cases in which the presumption of shared confidences was held rebuttable involved former government attorneys.[96] The purpose of relaxing the rule in this context is to protect the government's ability to attract qualified attorneys by removing any disincentive to entering public service that might result from the ramifications of vicarious law firm disqualification.[97] For example, a lawyer who works as an enforcement attorney for the SEC, particularly one who has supervisory authority, might find it difficult to secure employment with a private firm if any firm the lawyer entered would be disqualified from participating in matters adverse and substantially related to cases the attorney worked on at the SEC. Qualified attorneys would thus be reluctant to accept employment with government agencies because of the negative effect on their mobility. To avoid this problem, several courts[98] have held, and the Model Rules[99] provide, that law firms may rebut the presumption of shared confidences in such cases if they demonstrate that the firm screened the former government attorney from involvement in matters substantially related to cases the attorney worked on while employed by the government agency.

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within a firm enhances the firm's ability to afford overhead and, through referrals and sharing of work within the firm, helps to keep all lawyers productive. A similar economic interdependence may to some extent characterize some office-sharing arrangements in which lawyers who are not partners pool their resources to pay for office expenses.

WOLFRAM, *supra* note 20, at 392.

96 *See, e.g.*, Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980) (en banc), *vacated for lack of jurisdiction*, 449 U.S. 1106 (1981).

97 *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1985), *reprinted in* 62 A.B.A. J. 517 (1986); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(b) (1989); Steinberg, *supra* note 8, at 590-93.

98 *See, e.g.*, Greitzer & Locks v. Johns-Manville Corp., 710 F.2d 127 (4th Cir.), *cert. denied*, 459 U.S. 1010 (1982); Kesselhaut v. United States, 555 F.2d 791 (Ct. Cl. 1977).

99 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(a) (1989). This is not to suggest that the rule meets with unanimous approbation. In asserting that screening of a former government attorney was not sufficient to prevent firm-wide disqualification, Judge Newman, writing for the panel in *Armstrong v. McAlpin*, stated: "A government attorney with direct, personal involvement in a matter involving enforcement of laws that are the bases for private causes of action must understand, and it must appear to the public, that there will be no possibility of financial reward if he succumbs to the temptation to shape the government action in the hope of enhancing private employment." 606 F.2d 28, 34 (2d Cir. 1979), *vacated*, 625 F.2d 433 (2d Cir. 1980) (en banc), *vacated for lack of jurisdiction*, 449 U.S. 1106 (1981).

The propriety of expanding the above rule to cases involving non-government attorneys has been the subject of considerable debate. Some courts and commentators[100] have argued that if screening mechanisms are sufficient to protect the interests of former clients in the context of government attorneys, the same is true in the private sector.[101]

Other courts[102] and commentators[103] have noted that this argument fails to recognize that vicarious disqualification in situations involving former government attorneys implicates interests not present in the context of attorney movement between private firms. First, because the government deals with *all* private citizens and organizations, it has a "much wider circle of adverse legal interests" than any single law firm.[104] A much greater possibility exists that a government attorney's future clients will be involved in some dealings with the attorney's former "client." To illustrate, assume that XYZ corporation makes two related public offerings. Attorney X works at the SEC where she is involved in an enforcement action against XYZ arising from the first offering. In a related private securities fraud case, attorney Y represents a plaintiff who purchased shares in the first offering. After the completion of both cases, X and Y accept employment at Firm A. Later, it becomes apparent that XYZ violated securities laws in the course of the second offering as well. XYZ retains Firm A to

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100 *See, e.g.*, Analytica, Inc. v. NPD Research, Inc., 708 F.2d 263, 277 (7th Cir. 1983) (Coffey, J., dissenting); Bishop, *supra* note 3, at 1046.

101 In his dissent in *Analytica*, Judge Coffee pointed out that:

> The irrebuttable presumption that all information is shared among every attorney in a firm ignores the practical realities of modern day legal practice. The practice of law has changed dramatically in recent years with many lawyers working in firms consisting of . . . 300 or more attorneys, and with some firms having offices located throughout the country or even throughout the world. Additionally, the trend within law firms has been toward greater specialization and departmentalization. Surely, it defies logic and common sense to establish a presumption, with no opportunity for rebuttal, that every individual lawyer in such a multi-member and multi-specialized firm has *substantial knowledge* of the confidences of each of the firm's clients. Recognizing these realities of the modern practice of law, we must continue to take a more realistic view toward the law of attorney disqualification by allowing the presumption that confidences have been shared throughout a firm to be rebuttable . . . .

708 F.2d at 1274.

102 *See, e.g.*, Cheng v. G.A.F. Corp., 631 F.2d 1052, 1058 n.7 (2d Cir. 1980), *vacated for lack of jurisdiction*, 450 U.S. 903 (1981); Amoco Chemicals Corp. v. MacArthur, 568 F. Supp. 42, 47 (N.D. Ga. 1983).

103 *See, e.g.*, *Developments*, *supra* note 8, at 1364.

104 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 comment (1989).

represent it in any litigation arising from the second offering.

In actions arising from the second offering, the employment of Y is not as likely to present disqualification problems for Firm A as the employment of X. Disqualification issues generally arise in successive representation cases if the second matter is substantially related to the prior matter and invokes interests materially adverse to the former client.[105] Hence, the potential for disqualification is normally only as great as the possibility that the later related matter will adversely affect a lawyer's former client.[106] In the above example, unless Y's former client bought shares in the second offering, disqualification issues as to Y will rarely arise as it is unlikely that any litigation arising out of the second offering will involve Y's former client.[107] On the other hand, any federal civil enforcement action arising from the second offering will necessarily involve X's former "client" since the SEC is the only party that brings such actions. The employment of X thus raises a greater potential for disqualification than the employment of Y.

Supervisory capacities at governmental agencies exacerbate the problem raised in the above example. If X serves as the Director of Enforcement at the SEC, she will participate in many investigations during her tenure at the SEC. Further, these matters will involve a greater number of individuals and corporations than any law firm could possibly represent. If a firm that X subsequently joined were disqualified from representing any of these clients in related litigation, X might find it very difficult to secure employment in the private sector.[108]

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105 *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 comment (1989) (Disqualification caused by the successive representation may be waived by the former client.).

106 Even if the former client is not an adverse party in the current representation, the lawyer cannot use confidential information (other than generally known information) derived from the former representation to the disadvantage of the former client. *Id. See also infra* note 108.

107 It is unlikely that any confidential information derived from the prior representation will be used by Y to the disadvantage of the former client. *See supra* note 106. Nevertheless, there exist situations where successive representation may adversely affect the former client's interests, even where the former client is not a party to the present litigation. *See, e.g.*, Don King Productions, Inc. v. Harlow, [1988-1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,089 (S.D.N.Y. 1988).

108 Model Rule 1.11(a) disqualifies the former government attorney only as to those matters in which he or she "participated personally and substantially" while serving with the government. The appropriate government agency may consent to the former government attorney personally participating in the subsequent matter after disclosure is made to the agency of the conflict. By requiring that the former government attorney must participate "personally and substantially" in order to be disqualified, the Model Rules

For these reasons, vicarious disqualification has a broader reach in the context of government attorneys. Moreover, the application of an irrebuttable presumption of shared confidences in cases involving former government attorneys may harm the very "client" that the presumption is intended to protect. The focus of the presumption of shared confidences is to protect a former client's interests.[109] When the government is the former client, an irrebuttable presumption may actually work against the "client's" long term interests by impeding its ability to attract qualified counsel. The purpose of the presumption—protecting the former client—is frustrated, and warrants a relaxation of the presumption. Recognizing this policy justification, the Model Rules,[110] several courts[111] as well as other sources[112] permit a law firm to implement effective screening mechanisms and avert vicarious disqualification in the former government attorney con-

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apparently provide greater leeway than the Model Code. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-101(B) states that "[a] lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

The former government attorney also must be concerned with the Federal Conflict of Interest Statutes, Pub. L. No. 87-849, § 1(a), 76 Stat. 1123 (codified as amended at 18 U.S.C. § 207(a)-(c)(1962)). The Ethics in Government Act imposes several restrictions on post-employment conduct by a former government employee:

> — First, it bars a former government employee from ever making an appearance before or a communication to a court or agency on behalf of a party in a particular matter in which he participated personally and substantially while in government service.
>
> . . .
>
> — Second, the Act places a two year ban on appearing before or communicating with a court or an agency on behalf of a party in a particular matter which was pending under the employee's official responsibility in his last year of government service.
>
> . . .
>
> — Third, the Act also imposes a one year ban on senior government officials from appearing before their former agencies on any matter, including new matters . . . .

Mundheim, *Conflict of Interest and the Former Government Employee: Rethinking the Revolving Door*, 14 CREIGHTON L. REV. 707, 714 (1981).

109 *See supra* notes 22-26, 36 and accompanying text.

110 *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(b) (1989).

111 *See* cases cited *supra* note 98.

112 *See e.g.*, ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975) *reprinted in* 62 A.B.A. J. 517, 518 (1976) ("[T]he ability of government to recruit young professionals and competent lawyers should not be interfered with by imposition of harsh restraints upon future practice nor should too great a sacrifice be demanded of the lawyers willing to enter government service.").

text.[113] This analysis is inapplicable outside the government attorney context. Private sector cases require a separate examination.

(ii) Non-Government Attorneys.—The ABA Model Rules do not approve of the use of screening outside of the former government attorney context.[114] Nevertheless, a number of lower federal courts adhere to a contrary viewpoint. For example, the Seventh Circuit is at the forefront of a movement allowing rebuttal of the presumption of shared confidences in situation four cases that deal with non-government attorneys. In a series of decisions in the early 1980s, that court indicated that a law firm may rebut the presumption by the use of screening mechanisms.[115]

In *Schiessle v. Stephens*,[116] the Seventh Circuit heard a case in which an attorney who represented one of the multiple defendants withdrew and joined the firm representing the plaintiffs in the same case.[117] In deciding whether to disqualify the plaintiff's firm, the court first noted that disqualification is a "drastic measure which courts should hesitate to impose unless absolutely necessary."[118] The court then set forth a three-step test for deciding disqualification motions:

> (1) The court must first determine if a substantial relationship exists between the subject matter of the prior and subsequent representations.
> (2) The court must next determine whether the presumption

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113 Several commentators have discussed the propriety of screening mechanisms in the former government attorney context. *See, e.g.*, Cutler, *Conflicts of Interest*, 30 EMORY L.J. 1015, 1022-27 (1981); Ferber & Gonson, *Disqualification of Law Firms*, 13 REV. SEC. REG. 875 (1980); Murphy, *Vicarious Disqualification of Government Lawyers*, 69 A.B.A. J. 299 (1983); Comment, *Disqualifications of Counsel: Adverse Interests and Revolving Doors*, 81 COLUM. L. REV. 199, 209-16 (1981); Note, *The Former Government Attorney and the Code of Professional Responsibility: Insulation or Disqualification?*, 26 CATH. U.L. REV. 402 (1977); Note, *Ethical Problems for the Law Firm of a Former Government Attorney: Firm or Individual Disqualification?*, 1977 DUKE L.J. 512; Note, *Conflicts of Interest and the Former Government Attorney*, 65 GEO. L.J. 1025 (1977); Note, *The Chinese Wall Defense to Law Firm Disqualification*, 128 U. PA. L. REV. 677 (1980); Note, *The Future of the Chinese Wall Defense to Vicarious Disqualification of a Former Government Attorney's Law Firm*, 38 WASH. & LEE L. REV. 151 (1981).

114 *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 comment (1989).

115 *See, e.g.*, Schiessle v. Stephens, 717 F.2d 417, 421 (7th Cir. 1983); Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1267 (7th Cir. 1983); Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 721 (7th Cir. 1982).

116 717 F.2d 417 (7th Cir. 1983).

117 *Id.* at 418.

118 *Id.* at 420 (quoting *Freeman*, 689 F.2d at 721).

> of shared confidences has been rebutted with respect to the prior representation.
>
> (3) Finally, the court must determine whether the presumption is rebutted as to the present representation.[119]

All such presumptions must be "clearly and effectively" rebutted.[120]

Applying the above test, the Seventh Circuit concluded that the representations were substantially related and that the primary attorney received confidences at his former firm. The court asserted that the effective use of Chinese Walls to screen the lawyer from involvement in the case at the new firm could rebut the presumption of shared confidences. The court observed, however, that in this case the new firm had failed to institute such procedures. The *Schiessle* court, therefore, affirmed the district court's order of disqualification.[121]

Manning v. Waring, Cox, James, Sklar & Allen[122] is a more

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119 717 F.2d at 420.

120 *Id.*

121 *Id.* at 421. At least four other circuits have indicated that they are considering allowing the presumption of shared confidences to be rebutted in situation four cases. The status of the law is unclear in the Second Circuit, Huntington v. Great Western Resources, 655 F. Supp. 565, 573 (S.D.N.Y. 1987) (suggesting presumption may only be rebuttable in situation 2 cases) and the Eighth Circuit, EZ Paintr Corp. v. Padco, Inc., 746 F.2d 1459, 1460 (Fed. Cir. 1984) (status of law unclear in Eighth Circuit). The Ninth and Tenth Circuits have expressly left the question open. Paul E. Iacono Structural Eng'r, Inc. v. Humphrey, 722 F.2d 435, 439 (9th Cir.), *cert. denied*, 464 U.S. 851 (1983); Atasi Corp. v. Seagate Technolgy, 847 F.2d 826 (Fed. Cir. 1988) (noting open question in Ninth Circuit); Smith v. Whatcott, 757 F.2d 1098 (10th Cir. 1985). A number of states also permit screening mechanisms to avert firm-wide disqualification, *see, e.g.*, Jenson v. Touche Ross & Co., 335 N.W.2d 720 (Minn. 1983), and certain state ethical rules do so as well, *see e.g.*, PENNSYLVANIA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10(b) (1987).

122 849 F.2d 222 (6th Cir. 1988). *Manning* involved two litigations. The first was a state court action relating to a dispute between bondholders, bond counsel, and others. Bond counsel was represented by the firm of Heiskell, Donelson, Bearman, Adams, Williams, & Kirsch. The second action was brought by the bondholders as a class against an underwriter. The underwriter's counsel was Mr. Hatzenbuehler of the firm of Boone, Wellford, Clark, Langschmidt & Pemberton. During the course of the second litigation, Mr. Hatzenbuehler left Boone, Wellford and joined Heiskell, Donelson (the bond counsel's firm), but continued to represent the underwriter. The underwriter, however, decided to join the bond counsel as a third-party defendant. Mr. Hatzenbuehler terminated his relationship with the underwriter, and the bond counsel again retained its old firm, Heiskell, Donelson. The underwriter moved for disqualification of Heiskell, Donelson on the grounds that Mr. Hatzenbuehler had obtained confidential information which should be imputed to the other members of his firm. *Id.* at 223-24.

The Sixth Circuit noted that there was no question as to whether Mr. Hatzenbuehler himself was disqualified, and addressed the vicarious disqualification of his firm. After examining relevant case law in the Seventh Circuit, the court held that the

recent federal court of appeals decision holding that the presumption of shared confidences is rebuttable in situation four cases. In *Manning*, the Sixth Circuit adopted the Seventh Circuit's approach,[123] but indicated that it may limit its holding to cases where disqualification would work a hardship on the client.[124]

Although these Sixth and Seventh Circuit cases indicate that the use of Chinese Walls in situation four cases may rebut the presumption of shared confidences, none of the decisions held that the facts of the particular case justified rebuttal of the presumption. A number of district court cases, however, have found the presumption rebutted.[125]

Of the cases involving attorney movement, situation four cases present the greatest potential for disclosure of client confidences. In such cases, the timely implementation[126] of comprehensive Chinese Walls may prevent the inadvertent disclosure of confidences.[127] Common forms of Chinese Walls include structural, procedural and educational methods which may (1) prohibit the attorney from having any connection with the case or receiving any share of the fees attributable to it, (2) ban relevant discussion with or the transfer of relevant documents to or from the tainted attorney, (3) restrict access to files, (4) educate all mem-

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presumption of shared confidences is rebuttable in such cases. *Id.* at 226. The court then remanded to the district court for further factual findings. *Id.* at 227-28.

123 *Id.* at 225.

124 *Id.* ("Where, as here, it has been demonstrated that disqualification will work a hardship, it is clear that the quarantined lawyer was privy to confidential information received from the former client now seeking disqualification of the lawyer's present firm, and there is a substantial relationship between the subject matter of the prior and present representations, then the district court must determine whether the presumption of shared confidences has been rebutted.").

125 *See, e.g.*, Nemours Found. v. Gilbane, Aetna, Fed. Ins. Co., 632 F. Supp. 418 (D. Del. 1986) (presumption rebutted by "cone of silence"); Kapco Mfg. Co. v. C&O Enter., Inc., 637 F. Supp. 1231 (N.D. Ill. 1985) (holding presumption applicable to secretary who switched firms but that presumption rebutted); NFC, Inc. v. General Nutrition, Inc., 562 F. Supp. 332 (D. Mass. 1983) (imposing Chinese Walls by court order).

126 It is essential to implement timely the Chinese Wall. Establishment of screening mechanisms on an untimely basis, such as sometime after the tainted attorney becomes affiliated with the firm, does not adequately protect against inadvertent disclosure. *See, e.g.*, EZ Paintr Corp. v. Padco, Inc., 746 F.2d 1459, 1462 (Fed. Cir. 1984) (applying Eighth Circuit law) (screening mechanisms put in place three months after tainted attorney joined firm not sufficient to avert vicarious disqualification); Brodeur, *Building Chinese Walls: Current Implementation and a Proposal for Reforming Law Firm Disqualification*, 7 REV. LITIG. 167, 183 (1988) ("Institutional mechanisms, no matter how perfect in form, must be put in place immediately upon the creation of a risk that client confidences could be disclosed inadvertently to members of the new firm.").

127 *But see* WOLFRAM, *supra* note 20, at 402 (expressing skepticism toward integrity of institutional screening mechanisms to avert law firm vicarious disqualification).

bers of the firm as to the importance of the wall, (5) separate, both organizationally and physically, groups of attorneys working on conflicting matters, and (6) mandate that the tainted attorney and all lawyers of the firm affirm by affidavit under oath that they have not breached the Chinese Wall. In addition, if someone raises a judicial challenge against the screening mechanisms that a firm uses to avert firm-wide vicarious disqualification, such mechanisms should be subject to court order and supervision, including protective orders. Noncompliance with these orders raises the possibility of contempt sanctions.[128]

Guarding against intentional disclosures is another difficult issue. Unlike situations one through three, the lawyer in possession of the confidences is a member of the same firm as the attorneys directly involved in the successive representation. As a consequence, those privy to the confidential information may benefit other members of the same firm and ultimately themselves by disclosing such confidences. Chinese Walls are of little value in protecting against intentional disclosure.[129]

To illustrate, suppose lawyer T is an associate at Firm A and directly represents XYZ corporation. T moves to Firm B which represents the plaintiff in a related suit against XYZ. Screening mechanisms are timely instituted. A senior partner at Firm B then confers with the new associate T and requests confidential information about XYZ, assuring T he will keep it "under his hat." As a career-minded junior associate, T may be hard pressed to refuse. Screening mechanisms are ineffective against such intentional conduct.[130]

On balance, it appears that a court should permit the rebuttal of the presumption of shared confidences in situation four cases when the challenged firm "clearly and effectively"[131] demonstrates that the potential for disclosure of confidences is minimal. Given the potential for abuse and the appearance of impro-

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128 *See* Brodeur, *supra* note 126, at 182-85; Note, *The Chinese Wall Defense to Law Firm Disqualification*, 128 U. PA. L. REV. 677, 708 (1980). Protective orders in this context may be defined as "court-ordered barriers against the exchange of information with an attorney possessing confidences or secrets that create an ethical problem." Lerner, *Eliminating the Gamesmanship: Motions to Disqualify Opposing Counsel*, 191 N.Y.L.J. 5 (1984).

129 *See* WOLFRAM, *supra* note 20, at 402 ("[T]here is little but the self-serving assurance of the screening-lawyer foxes that they will carefully guard the screened-lawyer chickens.").

130 *Id.*

131 The Seventh Circuit adopted the "clearly and effectively" standard in Schiessle v. Stephens, 717 F.2d 417, 420 (7th Cir. 1983).

priety, application of this standard should require the firm to satisfy a rigorous burden. In addition to those mechanisms specified above,[132] the firm seeking to avert vicarious disqualification should establish that the "tainted" attorney is a member of a department or group that is not in any way involved in the subject litigation. Alternatively, the firm may demonstrate that the tainted lawyer practices in an office in a different geographic location and works principally, if not exclusively, with attorneys in that office. Second, the firm should establish that, at the time the tainted attorney accepted employment with the firm, there were procedures in place to restrict the flow of confidential information between the relevant departments and offices. Third, the firm should demonstrate, through the production of contemporaneous policy statements, memoranda, and evidence of any prior compliance, a firm-wide commitment to a policy prohibiting formal or informal discussion of cases with attorneys (and other personnel) who were involved in representing adverse parties in related matters.

These procedures, particularly the assignment of the tainted lawyer to a different department or office, could pose insurmountable obstacles for small firms and may even present significant problems for large firms. For example, if a firm hires an attorney who specializes in securities litigation, the firm will obviously want to assign that attorney to the corporate litigation department. That department will likely be the same department involved in any litigation adverse to the lawyer's former clients.

To allow tainted attorneys to work in the same department or office as the primary attorneys in a successive representation, however, would present an unacceptably high risk of disclosure. Over the course of years that it may take to litigate a case, the tainted lawyer would have daily informal contact with lawyers directly involved in the related representation. The potential for disclosure of confidences, whether intentional or inadvertent, is simply too great.

Although the procedures suggested above will not eliminate the risk of disclosure of confidences, they will considerably reduce the possibility of disclosure. Moreover, such procedures further the interests of attorney mobility and the current client's right to counsel of choice.

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132 *See supra* notes 127-129 and accompanying text.

E. The Effect of Courts of Appeals Decisions On Lower Federal Courts

The various situations in which vicarious disqualification issues arise present different concerns and warrant separate treatment. Moreover, if we examine only the end result (not the reasoning), courts of appeals appear to have recognized this distinction. The appellate courts are more likely to grant disqualification motions in situation four cases than in cases involving situations one through three.

Generally, the language contained in decisions in this area fails to distinguish between the four scenarios, and the holdings do not expressly limit themselves to similar factual situations.[133] Rather, some appellate court decisions contain broad language as to whether a firm may rebut the presumption and what steps it must take to do so.[134] This deficiency has led to the improper application of such decisions by some lower courts.

An example of this phenomenon is *United States ex rel. Lord Electric Co. v. Titan Pacific Construction*,[135] a situation four case. In *Lord Electric*, the challenged attorney was "of counsel" to the plaintiff firm. The court disqualified the attorney because he had personally represented the defendants in a previous substantially related matter.[136] Because the court held that the attorney's firm had rebutted the presumption of shared confidences—even though the firm had not instituted significant screening mechanisms[137]—it did not disqualify the firm.[138] The court stated that such mechanisms are not necessary,[139] and based its holding primarily on affidavits that disclaimed the sharing of confidences.[140]

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133 *See* Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1577 (Fed. Cir. 1984) (applying standard Seventh Circuit analysis in situation one case); Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 723 (7th Cir. 1982) (applying standard Seventh Circuit analysis even though motion based on double imputation of knowledge (situation one)); Novo Terapeutisk Laboratorium v. Baxter Travenol Laboratories, Inc., 607 F.2d 186, 190 (7th Cir. 1979) (en banc) (applying general test in situation three case).

134 *See* cases cited *supra* note 133.

135 637 F. Supp. 1556 (W.D. Wash. 1986).

136 *Id.* at 1561-62.

137 The firm simply instructed the lawyers not to speak of the matter and made the conclusory statement that access to the files was restricted. *Id.* at 1566.

138 *Id.* at 1568.

139 *Id.* at 1565.

140 *Id.* at 1566. The court also ordered the imposition of screening mechanisms in the future. *Id.* at 1566-67.

The *Lord Electric* court's holding—that Chinese Walls are not necessary to rebut the presumption of shared confidences in a situation four case—stems directly from a court of appeals failure to distinguish between situations one and four. The district court relied on the Federal Circuit's decision in *Panduit Corp. v. All States Plastic.*[141] *Panduit*, however, concerned a disqualification motion in a situation one case. The previous litigation did not involve the attorney while he was at his former firm nor was he involved in the successive representation at the new firm.[142] The *Panduit* court held that the use of Chinese Walls was not necessary to rebut the presumption of shared confidences.[143] This holding appears sound, as situation one cases present a less persuasive scenario for disqualification than many other cases.[144] The *Panduit* court, however, did not expressly limit its holding to cases with similar fact patterns. This omission allowed the *Lord Electric* court to apply the *Panduit* holding in a situation four case, which presents a much more compelling argument for disqualification.

Another disconcerting development is that due to the vagueness and inconsistency of decisions in this area, there exists the danger that some courts may ignore the presumption of shared confidences altogether. *Donohoe v. Consolidated Operating & Production Corp.*[145] provides a striking example. In *Donohoe*, the defendant moved to disqualify the plaintiff's law firm on the basis that a lawyer who once worked for the firm had represented the defendant in a prior related case. The lawyer had since left the firm; a situation three case.[146] The court found that the firm had not rebutted the presumption of shared confidences, but nonetheless it refused to disqualify the firm. The court held that disqualification would involve substantial harm to the plaintiff. The court concluded that the client had probably already received any confidences that the firm had in its possession. Therefore, the court reasoned, disqualification would not have any positive effect.[147]

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141 744 F.2d 1564 (Fed. Cir. 1984) (applying Seventh Circuit law).

142 *Id.* at 1577-79. Indeed, under the peripheral representation exception, the attorney would not be personally disqualified from providing legal counsel in the successive matter. *See supra* notes 47-50 and accompanying text.

143 744 F.2d at 1580.

144 *See supra* notes 77-82 and accompanying text.

145 691 F. Supp. 109 (N.D. Ill. 1988).

146 *See supra* notes 86-89 and accompanying text.

147 *Donohoe*, 691 F. Supp. at 118-19.

Lord Electric and *Donohoe*, along with other decisions,[148] raise the concern that the state of the law relating to conflicts of interest in successive representations may become far too uncertain. To remedy this situation, courts should adopt different rules for each of the above scenarios. In so doing, courts should develop a standard for rebutting the presumption in each situation that takes into account the varying risks of disclosure presented: namely, the most stringent standard for situation four cases, which present the greatest danger for disclosure of confidences, and varying lesser standards in each of situations one through three. This Article seeks to implement this suggestion by setting forth applicable standards. If the framework proposed herein were adopted, it would further sound policy objectives as well as provide much needed consistency in this area.[149]

IV. CHINESE WALLS IN SIMULTANEOUS REPRESENTATION CASES

The increasing acceptance of the use of Chinese Walls in successive representation matters will likely prompt the corporate bar to renew the promotion of use of such mechanisms in simultaneous representation cases. Such an argument has some facial appeal. A closer examination, however, demonstrates that the imposition of Chinese Walls in such situations would not adequately address the underlying policy of the rule which bars simultaneous representation of adverse clients.

As noted earlier, the primary policy underlying the bar against simultaneous representation of adverse parties is the duty of loyalty.[150] Every client has the right to his or her attorney's

148 *See e.g.*, Nemours Found. v. Gilbane, Aetna, Fed. Ins. Co., 632 F. Supp. 418, 428 (D. Del. 1986).

149 It should be recognized that irrespective of the efficacy of the Chinese Wall in place, serious problems remain. The foremost problem is that the wall may not be adequate to deter intentional breaches. Another problem is that such walls do not foster public confidence; the details of a law firm's compliance with the applicable procedures will have only a small impact upon the public's impression. A third problem is that these procedures disproportionately affect smaller firms. They are less likely to implement effective screening procedures as compared to firms with hundreds of attorneys or multiple offices situated in different locales. The implementation of effective screening mechanisms is often impractical in the small firm setting due to closer working relationships, the lack of having multiple intra-firm departments, and the awareness that firm lawyers have with respect to a large percentage of client matters. *See* authorities cited *supra* notes 128-129; Riger, *Disqualifying Counsel in Corporate Representation—Eroding Standards in Changing Times*, 34 U. MIAMI L. REV. 995 (1980).

150 See *supra* notes 9-12 and accompanying text.

undivided loyalty.[151] Such a policy assures a client that the lawyer's loyalty to another client will not impair the exercise of the lawyer's independent professional judgment. Simultaneous representation presents the risk that an attorney may breach this duty by favoring the interests of a more important client over those of a less favored client.[152]

Moreover, the breach of the lawyer's duty of undivided loyalty may have adverse effects on the judicial system. A principal tenet of the American judicial system is that the most effective means of reaching the truth is a clash between opposing parties. This proposition rests on the assumption that opposing attorneys, within the bounds of legal and ethical norms, will engage in a zealous, uninhibited presentation of their clients' positions. When loyalties to another client impair a lawyer's representation, it undermines the legitimacy of the system.[153] Consistent with the above principles, courts have rejected the use of screening procedures to avert firm-wide disqualification in simultaneous representation cases.[154]

Irrespective of a law firm's size and the presence of multiple offices, clients tend to identify legal representation not only by the particular attorneys working on the matter but also by the law firm that the client chooses to retain. Even though the client may waive the conflict,[155] simultaneous representation of clients having adverse interests raises the specter of firm disloyalty to the affected client. The Model Rules recognize this dual loyalty dilemma by providing that the law firm retained "is essentially one lawyer for purposes of the rules governing loyalty to the client."[156] As a consequence, each lawyer and the firm as a whole are bound by

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151 *Id. See also* United States v. Nabisco, 117 F.R.D. 40, 44-45 (E.D.N.Y. 1987).

152 *See* Picker Int'l, Inc. v. Varian Assocs., Inc., 869 F.2d 578, 583 (Fed. Cir. 1989) (applying Sixth and Tenth Circuit law) ("To allow the merged firm to pick and choose which clients will survive the merger would violate the duty of undivided loyalty that the firms owe each of their clients under DR 5-105.").

153 *See Developments, supra* note 8, at 1294-96.

154 There have been very few decisions addressing this issue. *See* Manning v. Waring, Cox, James, Sklar & Allen, 849 F.2d 222, 227-28 (6th Cir. 1988) (Merritt, J., concurring); Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1321 (7th Cir.), *cert. denied*, 439 U.S. 855 (1978); Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 233 (2d Cir. 1977) (stating that simultaneous representation of adverse clients breaches the client's "absolute right to the firm's undivided loyalty"). The Seventh Circuit's decision in *Westinghouse* has limited impact in this context as the court principally addressed the breach of confidence concern of Canon 4 of the Model Code rather than Canon 5's dual loyalty focus. 580 F.2d at 1321.

155 *See* MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7, 1.10(c) (1989).

156 *Id.* Rule 1.10 comment.

the duty of loyalty. Chinese Walls and other such screening procedures have no place in this context, as these mechanisms focus on client confidentiality concerns.[157]

The following scenario provides an example of the possible adverse effects of simultaneous representation. Assume that X is an attorney in the Salt Lake City office of Firm A, a large firm based principally in New York City. One of Firm A's valued clients is Giant Computer Company, a publicly-held company which lists its securities on the New York Stock Exchange. Over the past twenty years, Firm A, through its New York City office, has served as Giant's securities counsel in stock offerings, SEC filings, and securities law advisory issues. At no time has Firm A represented Giant in any litigation matter. The Salt Lake City office of firm A, on the other hand, has never worked on any matter involving Giant, and does not otherwise possess any confidential information pertaining to Giant.

The proprietor of Tiny Computer Sales, a small retail computer store in Salt Lake City, retains Firm A and X in particular to represent Tiny in a breach of contract action against Giant. X believes he can zealously represent Tiny without upsetting Giant because another law firm represents Giant in this matter and the amount in dispute is relatively small. X thereupon obtains Giant's and Tiny's consent to the dual representation and accepts the case.

After a few months of discovery, it becomes apparent that Tiny may have a colorable antitrust claim against Giant. Moreover, although the contract dispute is relatively minor, an antitrust suit could involve a significant amount of damages and set a precedent that would be disastrous for Giant. Because X is aware that Giant is one of Firm A's valued clients, he may be reluctant to assert such a claim. Moreover, in any action against Giant, X may be unwilling to engage in aggressive discovery or cross-examination that may alienate or embarrass Giant or its executives. Tiny is thus deprived of the benefit of X's (and Firm A's) unimpaired professional judgment and loyalty.

The fact that the firm isolates X from any other attorney who may possess relevant confidences of Giant will not solve these problems. The impairment of X's loyalty arises from his knowl-

157 *Id.* (adopting the rule of imputed disqualification which "gives effect to the principle of loyalty to the client as it applies to lawyers who [currently] practice in a law firm."). *See also* Miller & Warren, *Conflicts of Interest and Ethical Issues for the Inside and Outside Counsel*, 40 BUS. LAW. 631, 647 (1985).

edge that Giant is a large and valued client while Tiny is a small and relatively unimportant client. The imposition of Chinese Walls may prevent X from disclosing Tiny's confidences to Giant, or Giant's confidences to Tiny, but they will not erase X's knowledge that keeping Giant as a client is of paramount importance to the law firm.

Of course, some simultaneous representation cases may not present such a compelling case for disqualification as the above example. Law firms may sometimes engage in simultaneous representation involving unrelated matters of two adverse clients, with no negative effect on either client. However, allowing simultaneous representation in such cases could well present insurmountable problems of line drawing. For example, when is one client so large or valued that we can assume the firm is not exercising independent judgment on behalf of a smaller adverse client?

For these reasons, we should preserve the general rule which states that simultaneous representation of adverse clients is improper. The rule may reduce the revenues of some firms, but that is a small price to pay for protecting the integrity of the judicial system and preserving a client's right to the unimpaired exercise of counsel's professional judgment.

V. CONCLUSION

The approach thus far adopted by a number of courts and the rules of professional ethics in relaxing the presumption of shared confidences is largely inadequate. By failing to recognize that each of the situations in which issues of vicarious disqualification arise presents different problems and, therefore, warrants separate treatment, courts have developed precedents that may lead to improper results. Until the courts and the drafters of professional ethics rules recognize this distinction, this area of the law will remain confused and inadequate.

If courts were to develop a more sound analysis, the relaxation of the presumption of shared confidences could further the interests of attorney mobility and the right to counsel of choice while preserving client confidences. The use of effective Chinese Walls in this area is often helpful. Nevertheless, courts should not extend the use of such mechanisms to simultaneous representation cases, where they are of little use in protecting the relevant interests of clients and the judicial system.