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COMMENTARY

Rebuttable Presumptions and Intra-Firm Screening: The New Seventh Circuit Approach to Vicarious Disqualification of Litigation Counsel

*Craig A. Peterson**

Introduction

Federal courts in the Seventh and other circuits have increasingly been confronted with attempts to disqualify a law firm as litigation counsel because of a partner's or associate's previous activities. This article addresses so-called vicarious disqualification of a firm when under existing case law one of its members would be unable to represent the client.[1]

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1 The article does not focus on the difficult inquiries necessary to determine the primary matter of whether an individual lawyer should be disqualified. The threshold inquiry of individual disqualification focuses on whether there is a "substantial relationship" between the lawyer's current and former representations. The United States Court of Appeals for the Seventh Circuit has developed a somewhat complex but well thought-out approach interrelating the lawyer's prior activities with client confidences. If a "substantial relationship" did exist, then a rebuttable presumption arises that the individual attorney received confidential communications, and absent waiver by the former client, he would be unable to represent the new client against the former client. Determining a "substantial relationship" requires three levels of analysis:

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

LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252, 255-56 (7th Cir. 1983).

Nor does the article examine the standards to be used in determining whether the presumption that the firm received confidential information has been rebutted by the facts. Two 1983 Seventh Circuit cases include detailed analyses of whether proffered facts meet the "clear and effective" rebuttal standard. *See* Schiessle v. Stephens, 717 F.2d 417, 402-21 (7th Cir. 1983); *LaSalle Nat'l Bank*, 703 F.2d at 257.

Likewise, this article does not deal with the issue of the district court's power to award attorneys' fees in disqualification disputes against losing parties or their challenged counsel. *See* Analytica, Inc. v. NPD Research, Inc. 708 F.2d, at 1263, 1270 (7th Cir. 1983) (payment of $25,000 for bad faith opposition to a disqualification motion upheld).

Finally, no effort is made here to discuss a less common problem, attempted disqualifica-

Judicial resolution of disqualification disputes involves many important policies.[2] The party seeking disqualification generally asserts the need to preserve client confidences and to avoid the appearance of impropriety in his now-opposing attorneys. These policies are embodied in Canons 4 and 9 respectively of the American Bar Association Code of Professional Responsibility.[3] They are also addressed in Rule 1.9 ("Conflict of Interests: Former Client") and Rule 1.10 ("Imputed Disqualification: General Rule") of the Model Rules of Professional Conduct.[4] Unfortunately, it is also possible that some efforts to disqualify opposing counsel may be based in part on improper tactical motives. A litigant may impose both psychological

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tion of a firm which itself has switched sides. In such a case, the Seventh Circuit applies an irrebuttable presumption that confidences have been received and shared within the challenged firm. *Analytica*, 708 F.2d at 1270 (Coffey, J., dissenting).

2 *See generally* Lindgren, *Toward a New Standard of Attorney Disqualification*, 1982 AM. B. FOUND. RESEARCH J. 419; Liebman, *The Changing Law of Disqualification: The Role of Presumption and Policy*, 73 NW. U.L. REV. 996 (1979).

3 MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 ("A lawyer should preserve the confidences and secrets of a client.") & Canon 9 ("A lawyer should avoid even the appearance of professional impropriety.") (1980).

4 The Model Rules of Professional Conduct provide:

Rule 1.9 Conflict of Interest: Former Client

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

(a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) Use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

Rule 1.10 Imputed Disqualification: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

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

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

(1) The matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) Any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(b) that is material to the matter.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

MODEL RULES OF PROFESSIONAL CONDUCT (1983) (emphasis added).

hardship, by requiring his opponent to obtain new counsel with whom he has never worked, and financial hardship, by requiring his opponent to incur additional fees to allow his new counsel to become familiar with the litigation.

On the other side, the client of the attacked law firm often asserts a policy of avoiding unnecessary hardship. He has reposed trust and confidence in one law firm to manage what may be emotionally charged litigation, and now must turn to a different group of lawyers. He will sustain increased legal fees and loss of litigation momentum while the new law firm becomes familiar with the case. He must also sacrifice continuity of litigation strategy and style.[5] Nor is the effect of disqualification on the lawyers' reputations, while of less concern, without significance.[6]

Procedurally, such challenges to litigation counsel often taken the form of a motion to disqualify. Less frequently, counsel for one party files a motion to declare qualification, and the opposing party follows with a similar cross motion. Whichever way the issue arises, the trial court's resulting determinations are usually based on affidavits of the affected attorneys and clients, supplemented on occasion by facts presented at evidentiary hearings.

I. Vicarious Disqualification in the Seventh Circuit

In some cases, a lawyer has in fact received confidential informa-

5 These hardships for the client can also result in a potential crippling of the overall case, as Judge Coffey noted in his long dissent in *Analytica*, 708 F.2d at 1275 (Coffey, J., dissenting) (citation omitted):

> Moreover, as we recognized in *Freeman*, disqualification of an attorney may also adversely affect the client as disqualification deprives the individual of the representation of the attorney of his choice and "it may also be difficult, if not impossible, for an attorney to master 'the nuances of the legal and factual matters' late in the litigation of a complex case."

6 *Id.* The Court noted:

> The right to rebut allegations of impropriety is necessary because of the immediate and often irreparable ramifications as to both client and counsel alike that a disqualification order carries with it. I believe counsel and, in this instance, the law firm should not only be allowed to protect their relationship with their present client but also their good name and reputation for high ethical standards. After all, an attorney's and/or a law firm's most valuable asset is their [sic] professional reputation for competence, and above all honesty and integrity, which should not be jeopardized in a summary type of disqualification proceeding of this nature. As court proceedings are matters of public records, a news media report concerning a summary disqualification order, based on a scant record of this type, can do irreparable harm to an attorney's or law firm's professional reputation. We must recognize that the great majority of lawyers, as officers of the court, do conduct themselves well within the bounds of the Code of Professional Responsibiity.

tion from a former client concerning the subject matter of the present litigation and in an affidavit candidly admits having this knowledge. More commonly, though, a lawyer has touched on the subject matter of the litigation in his prior activities, and the application of a "substantial relation"[7] test would require his personal disqualification. When either of these two situations arises, the critical question remains whether the lawyer's new firm, notwithstanding the individual lawyer's personal disqualification, should be vicariously disqualified from continuing with the litigation. Presumptions play a major role in these vicarious disqualification inquiries.

A. *The Rebuttable Presumption That A Lawyer Possessing Confidences Of A Former Client Has Shared Them Within His New Law Firm*

Mindful that justice and common sense are often frustrated when courts deny litigants the counsel of their choice, the Seventh Circuit in 1979 refined its approach to the presumptions used in counsel disqualification cases. In *Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc.*,[8] the court en banc established the kind of analysis "needed to reach a just and sensible ruling on ethical matters."[9] Its analysis is more flexible than the rigid test which had been formulated and applied the previous February by a three-judge panel in the same case.[10]

The en banc opinion carefully distinguishes between two levels of analysis concerning confidences. The first refers to confidences shared by a client with his former lawyer, and the second to confidences shared by the former lawyer with his current law firm.[11] The opinion wisely rejects the general use of an irrebuttable presumption on the second level:[12]

> [A] rote reliance on irrebuttable presumptions may deny the courts the flexibility needed to reach a just and sensible ruling on ethical matters. As the Second Circuit has noted: 'when dealing with ethical principles, it is apparent that we cannot paint with broad strokes. The lines are fine and must be so marked. Guide-

7 *See* note 1 *supra*.

8 607 F.2d 186 (7th Cir. 1979) (en banc).

9 *Id.* at 197.

10 *Id.* at 190.

11 *Id.* at 197.

12 *Id.* The rebuttability of this second or "intra-firm" presumption had not been addressed in any Seventh Circuit case prior to *Novo*. As the three-judge panel observed in the first *Novo* opinion: "The question of whether this presumption is rebuttable was never clearly answered by this court in *Schloetter* because we found that the district court's decision supported the ban on Canon 9 [grounds]. . . ." 607 F.2d at 192.

> posts can be established when virgin ground is being explored, and the conclusion in a particular case can be reached only after painstaking analysis of the facts and precise application of precedent.[13]

The en banc opinion clearly rejected the three judge panel's view that "because [it had] already found the matters to be substantially related, [it would] follow the direction of Canon 9, *which means* that actual receipt of confidential information by other members of the [challenged law firm] is irrelevant."[14]

In the *Novo* en banc opinion, the court evaluated the "circumstances of the case" and determined that it need not be irrebuttably presumed that confidences had been shared within the challenged law firm.[15] The facts in *Novo*, however, were unusual. The moving attorney and his former and current clients were not in an adversary relationship. Nor were there any allegations that the attorney had shared confidences within his former law firm, the firm which he himself sought to disqualify. The *Novo* en banc opinion makes clear, however, that the Seventh Circuit was not limiting its "rebuttable presumption" approach to those peculiar facts.[16]

More recently, the Seventh Circuit in *Freeman v. Chicago Musical Instrument Co.*[17] struck another blow at irrebuttable presumptions in attorney disqualification cases. There the court was concerned with an alleged irrebuttable presumption that an associate of the firm representing defendant, who had been at one time an associate in a law firm representing plaintiff, was actually in possession of confidential information concerning the litigation. The presumption thus related to the first level of client-attorney sharing, rather than to the second level of sharing within the new law firm. Notwithstanding that difference, the court's resounding rejection of an irrebuttable presumption in *Freeman* is significant in vicarious disqualification cases.[18]

In *Freeman*, a three judge panel recognized that both hardship to

13 607 F.2d at 197 (quoting Silver Chrysler Plymouth, Inc. v. Chrysler Motor Corp., 518 F.2d 751, 753 n.3 (2d Cir. 1975), quoting United States v. Standard Oil Co., 136 F. Supp. 345, 367 (S.D.N.Y. 1955)).

14 607 F.2d at 192.

15 *Id.* at 197.

16 *See id.*

17 689 F.2d 715 (7th Cir. 1982).

18 The court recognized this connection in Schiessle v. Stephens, 717 F.2d 417, 421 (7th Cir. 1983): "We hold that the district court erred in relying on an irrebuttable presumption to find that confidences and secrets had been shared between [the infected lawyer] and other members of [his new firm] because our decisions in *Freeman* and *LaSalle* make it clear that the presumption of shared confidences can be rebutted."

the client and the potential for abuse required courts to view disqualification motions with "extreme caution."

> [W]e also note that disqualification, as a prophylactic device for protecting the attorney-client relationship, is a drastic measure which courts should hesitate to impose except when absolutely necessary. A disqualification of counsel, while protecting the attorney-client relationship, also serves to destroy a relationship by depriving a party of representation of their own choosing . . . . We do not mean to infer [sic] that motions to disqualify counsel may not be legitimate, for there obviously are situations where they are both legitimate and necessary; nonetheless, such motions should be viewed with extreme caution for they can be misused as techniques of harassment.[19]

The panel ordered the case remanded for an evidentiary hearing because the district court had "failed to make any determination" of whether the attorney's affidavits satisfactorily rebutted the presumption that the associate was actually in possession of confidential information concerning the litigation.[20]

The extension of rebuttable presumptions to second level intrafirm sharing became clear in 1983, when in *LaSalle National Bank v. County of Lake*,[21] the Seventh Circuit clarified that the "rebuttable presumption" approach of *Novo* was not limited to the case's unusual facts.[22]

The latest Seventh Circuit case on this question is *Schiessle v. Stephens*.[23] There, an individual lawyer allegedly received confidential communications from the defendant (then and later represented by the lawyer's former firm) and also made a telephone call to the plaintiff's attorney. That lawyer later joined the firm representing the plaintiff, but was not involved with the litigation. The defendant attempted to disqualify the new firm vicariously based on purported violations of Canons 4 and 9. The plaintiff filed a motion for declaration of qualification, and the defendants filed a cross-motion to disqualify. There was no evidentiary hearing; all testimony came by way of affidavits.[24] The district court held that since the two representations were not only "substantially related" but in fact identical,

19 689 F.2d at 721-22.

20 *Id.* at 723.

21 703 F.2d 252 (7th Cir. 1983).

22 *Id.* at 257. ("Although the knowledge possessed by one attorney in a law firm is presumed to be shared with the other attorneys in the firm, *Schloetter*, 546 F.2d at 710-11, this court has held that this presumption may be rebutted. *Novo Terapetutisk*, 607 F.2d at 197.")

23 717 F.2d 417 (7th Cir. 1983).

24 *Id.* at 419.

the individual lawyer who himself would have been disqualified was *irrebuttably* presumed to have conveyed confidential information from his former client to members of his current firm:

> Such a presumption becomes irrebuttable notwithstanding [the individual lawyer's] affidavit that no client confidences have been or will be shared with members of the [new] firm . . . . Thus the court concludes that it is compelled to grant the disqualification motion.[25]

On appeal, plaintiff argued among other things that *Novo*, *Freeman*, and *LaSalle National Bank* stood for the proposition that the presumption of intra-firm sharing was rebuttable, and that at the very least the district court should have made a factual determination on that question.[26] The Seventh Circuit held that the district court erroneously applied an irrebuttable presumption, but upheld the disqualification order on other grounds.[27] It found that no effective rebuttal had been made to the presumption that client confidences had been shared within the firm.

> [N]o evidence exists in the record establishing that the [challenged firm] has 'institutional mechanisms' in effect insulating [the personally disqualified partner] 'from all participation in any information about [the] case.'[28]

The sensitive approach reflected in *Novo*, *Freeman*, *LaSalle National Bank*, and *Schiessle* is consistent with the general trend in disqualification cases to make rulings based on facts rather than on suppositions and irrebuttable presumptions. For example, in *Lemaire v. Texaco, Inc.*,[29] the defendant sought to disqualify the plaintiff's law firm because one of its members prior to joining that firm had represented the defendant in connection with the same lawsuit. The individual lawyer (admittedly *personally* disqualified) had agreed not to become involved with the case or even to discuss it within his new firm. The defendant contended that there was an irrebuttable presumption, grounded on Canon 9, that the lawyer had shared confidences within his new firm, which required it to be disqualified.[30]

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25 Schiessle v. Stephens, No. 79 C 3160, slip. op. at 4 (E.D. Ill., June 29, 1982) (memorandum opinion).

26 717 F.2d at 421.

27 *Id.*

28 *Id.* This "screening" technique for rebutting intra-firm presumption is discussed at Part I (c) *infra*.

29 496 F. Supp. 1308 (E.D. Tex. 1980).

30 *Id.* at 1309-10.

The court rejected this contention and refused to disqualify the entire firm on those grounds:

> To warrant disqualification under Canon 9 of the Code of Professional Responsibility there must be a showing of reasonable possibility that some specifically identifiable impropriety occurred and the likelihood of public suspicion must be weighed against the interest in retaining counsel of one's choice.[31]

The district court then relied on the Seventh Circuit's approach.[32]

This trend towards increased flexibility in analyzing imputations that a client's confidences have been shared is reflected in other cases as well. For example, in *Silver Chrysler Plymouth, Inc. v. Chrysler Motor Corp.*, the Second Circuit noted:

> [W]hile this Circuit has recognized that an inference may arise that an attorney formerly associated with the firm himself received confidential information transmitted by a client to the firm, *that inference is a rebuttable one*.[33]

Balancing an alleged appearance of impropriety against the strong policy favoring free selection of counsel may often result in a

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31 *Id.* at 1309. *See also* Woods v. Covington City Bank, 537 F.2d 804, 813 (5th Cir. 1976) (movant required to show "at least a reasonable possibility that some specifically identifiable impropriety did in fact occur").

32 The district court noted:

> Tenneco cites in its Motion the Seventh Circuit case of Westinghouse Electric Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978), *cert. denied*, 439 U.S. 955 . . . [1978], for the proposition that in these circumstances an irrebuttable presumption arises that Mr. Reinstra disclosed confidences to the members of the Umphrey firm. Apparently, Tenneco has overlooked the more recent case of Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc., 607 F.2d 186, 194 (7th Cir. 1979) (en banc), where the court recanted of its position in *Kerr-McGee*, writing that "a rote reliance on irrebuttable presumptions may deny the courts the flexibility needed to reach a just and sensible ruling on ethical matters." *Id.* at 197. In that case, as in the case at bar, the evidence is not in conflict; Tenneco does not allege that Mr. Rienstra shared confidences with other members of the Umphrey firm, but relies on its position that the presumption of sharing is irrebuttable; the testimony of Mr. Umphrey and Mr. Rienstra that they did not and will not discuss this case at all is uncontradicted. The presumption of sharing, if one arises under these facts in the Fifth Circuit, "has been clearly effectively rebutted." *Id.*
>
> . . . .
>
> . . . The Court further finds that any appearance of impropriety is greatly outweighed by the Plaintiff's right to have the counsel of their choice, Mr. Umphrey.

496 F. Supp. at 1310 (citations omitted).

33 518 F.2d 751, 754 (2d Cir. 1975) (emphasis added). *See also* Akerly v. Red Barn Sys., Inc., 551 F.2d 539, 543 (3d Cir. 1977) (rebuttal of presumption in case of co-counsel); Gas-A-Tron of Ariz. v. Union Oil Co. of Calif., 534 F.2d 1322 (9th Cir. 1976); City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F. Supp. 193, 210 (N.D. Ohio 1977), *aff'd*, 573 F.2d 1310 (6th Cir. 1978), *cert. denied*, 435 U.S. 996 (1978); and General Mill Supply Co. v. SCA Servs., Inc., 697 F.2d 704 (6th Cir. 1982).

decision to retain the party's selected counsel. In *Armstrong v. McAlpin*,[34] the Second Circuit commented that the "appearance of impropriety is simply too slender a reed on which to rest a disqualification order."[35] As to the effect of disqualification, the *Armstrong* court noted that "separating the [client] from [his] counsel at this late date will seriously delay and impede, and perhaps altogether thwart, his attempt to obtain redress for defendants' alleged frauds."[36] A recent Fourth Circuit case also emphasized the unfairness of disqualifying a party's counsel of choice because of the mere supposition that a conflict may be present.

> [W]e are concerned with 'how real in the practical world [asserted ethical problems] are in fact.' In this case, the District Court merely speculated that opportunities for inadvertent disclosures would arise without analyzing the specific situation in which the disclosures were to take place.[37]

B. *The District Court's Role In Determining Whether A Presumption of Intra-Firm Sharing Has Been Rebutted*

Whether a presumption has been rebutted is, of course, a factual issue. In the Seventh Circuit, the cases suggest that district courts are now required to make specific factual determinations on the issue of rebuttal unless the challenged firm has no "institutional mechanism" to insulate the infected lawyer from his new firm. For example, in *Freeman*, the challenged law firm contended that the associate's affidavits established that he had no knowledge of the case or underlying facts. However, because the district court made no factual determination of whether the presumption had been rebutted, the panel remanded for an evidentiary hearing,[38] at which the challenged firm had to meet the heavy burden of rebutting the presumption by "clear and effective" proof.[39] The district court was instructed that it could rely on such factors as "[t]he size of the law firm, the area of specialization of the attorney, the attorney's position in the firm, and the demeanor and credibility of witnesses at the evidentiary hear-

34 625 F.2d 433 (2nd Cir. 1980)(en banc), *vacated on other grounds*, 449 U.S. 1106 (1981).

35 *Id.* at 445 (quoting Board of Educ. of New York v. Nyquist, 590 F.2d 1241, 1247 (2d Cir. 1979)).

36 *Id.*

37 Greitzer & Locks v. Johns-Manville Corp., No. 81-1379, slip. op. (4th Cir. Mar. 5, 1982), *aff'd per curiam*, 710 F.2d 127 (4th Cir.), *cert. denied*, 103 S. Ct. 364 (1982).

38 689 F.2d at 723.

39 *Id.*

ing."[40] The burden of rebuttal rests, of course, on the attacked firm, since the presumption arose because of a "substantial relationship" between the present litigation and one of its member's previous activities.[41]

Presumably, remand to the district court for an evidentiary hearing will not always be appropriate. This would be the case where previous testimony and/or affidavits "clearly and effectively" establish that the presumption either was or was not rebutted. For example, in *LaSalle National Bank*, the rebuttal of the presumption was grounded solely upon asserted "screening" of the disqualified law firm member from other members of the firm.[42] The affidavits proved, however, that certain institutional mechanisms (discussed more fully in part C below) were not in place when the disqualifying event originally occurred, i.e., the date when the attorney with previous contact joined his new firm.[43] Accordingly, the Seventh Circuit panel affirmed the district court's vicarious disqualification order. It did not discuss possible remand for an evidentiary hearing, presumably because the untimeliness of the institutional screening arrangements was clear from the affidavits.

Nor was an evidentiary hearing ordered in *Schiessle*. There, the challenged law firm argued alternatively that either (1) the uncontroverted affidavits of the individual personally disqualified lawyer and of the new partner in charge of the plaintiff's case constituted "clear and effective" rebuttal of the presumption of intra-firm sharing of any confidential information, or (2) that the vicariously disqualified firm should have been permitted to present testimony to rebut the presumption of sharing at an evidentiary hearing.[44] The appellant contended that the district court had exercised no discretion whatever in determining whether the affidavits themselves rebutted the presumption, whereas in contrast, the district court in *LaSalle National Bank* had made such a factual determination.[45] In *LaSalle National Bank*, the Seventh Circuit had concluded that the district court had not abused its discretion based on the facts presented to it.[46] Further, the appellant in *Schiessle* argued that *LaSalle National Bank* had not mitigated *Freeman*'s requirement that

40 *Id.*
41 703 F.2d at 257.
42 *Id.* at 257-58.
43 *Id.* at 259.
44 *Id.* at 257.
45 *Id.* at 256.
46 *Id.*

the district court hold an evidentiary hearing and make a factual determination.[47] At such a hearing, that argument proceeded, the inquiry would focus in part on the adequacy and timing of the challenged firm's institutional screening mechanisms. The screening steps taken within the challenged firm could then be evaluated by the district court in light of the policies and holding of *LaSalle National Bank*.

The Seventh Circuit unfortunately failed to address the request for an evidentiary hearing, finding that because there was no "*formal* institutional mechanism" the presumption of intra-firm sharing was not overcome.

> The *LaSalle* decision requires that when an attorney with knowledge of a prior client's confidences and secrets changes employment and joins a firm representing an adverse party, specific institutional mechanisms must be in place to ensure that information is not shared with members of the new firm, even if inadvertently.[48]

Yet in keeping with the *Freeman* rationale, an evidentiary hearing should have been ordered because of the important client and attorney interests at stake.

C. *Use of an "Institutional Screening Mechanism" to Rebut The Presumption of Intra-Firm Sharing of Confidential Information*

Perhaps the most useful element of the Seventh Circuit's recent approach to vicarious disqualification is its endorsement in principle of institutional screening of an "infected" attorney from his new partners and associates. Until the 1983 opinion in *LaSalle National Bank*, parties seeking disqualification of opposing counsel have generally argued that the 1978 Seventh Circuit case of *Westinghouse Electric Corp. v. Kerr-McGee Corp.*[49] rejected the use of "Chinese walls" or "screens." This argument rested in part upon the *Westinghouse* court's comment that "[d]espite this breach of the 'wall' we do not recognize the wall theory as modifying the presumption that actual knowledge of one or more lawyers in a firm is imputed to each member of that firm."[50] Countering an attempted application of *Westinghouse*, challenged law firms often argued that *Westinghouse* was distinguishable because it involved not only simultaneous representa-

47 *Id.* at 259.
48 *Schiessle*, 717 F.2d at 421.
49 580 F.2d 1311 (7th Cir. 1978), *cert. denied*, 439 U.S. 955 (1978).
50 *Id.* at 1321.

tion, but also a breach of the Chinese wall. In *Westinghouse*, the firm argued unsuccessfully that a screen between litigators assigned to a lawsuit filed on behalf of Westinghouse on one side, and lawyers engaged in lobbying representation of the American Petroleum Institute ("API") on the other, effectively protected the confidences of both clients even though the firm represented both simultaneously.[51] One of the Westinghouse litigators "breached" this "wall" by preparing a memorandum which was distributed to API member companies. Thus in *Westinghouse* the law firm simultaneously represented conflicting interests and (ironically on the same day) released the contradictory results of its two representations.[52] In addition, there was evidence that the purported screen had not in fact been observed. The court in *Westinghouse* noted that "[t]he fact that the two contrary undertakings by [the firm] occurred contemporaneously, with each involving substantial stakes and substantially related to the other, outbalances the client's interest in continuing with its chosen attorney."[53]

In *LaSalle National Bank*, the Seventh Circuit for the first time recognized that institutional screening could potentially rebut the presumption of intra-firm sharing. The panel's thoughtful analysis included application of case law in other circuits, American Bar Association and state bar association rules and opinions, and scholarly articles.[54] It concluded that screening arrangements must be established immediately when the "potentially disqualifying event" occurs, which, depending upon the facts, could be "either when the attorney first join[s] the firm or when the firm accept[s] a case presenting an ethical problem."[55]

It remains to be seen what types of screening arrangements will satisfy the Seventh Circuit. In dictum, the court noted with approval three cases in other circuits in which timely arrangements were sanctioned.[56] In *Armstrong v. McAlpin*, the screening mechanism was proved through sworn statements concerning prohibition of access to files and documents, discussion of the lawsuit, and absence of participation in fees derived from the litigation.[57] Another mechanism impliedly approved for Seventh Circuit disputes, set forth in *Greitzer &*

51 *Id.*
52 *Id.* at 1314.
53 *Id.* at 1322.
54 703 F.2d at 258.
55 *Id.* at 259.
56 *Id.*
57 625 F.2d 433, 442-43 (2d Cir. 1980).

Locks v. Johns-Manville Corp.,[58] included non-participation in profits from the proceedings and denial of access to files. Finally, the court cited with approval *Kesselhaut v. United States*,[59] where the mechanism was tightly controlled locked file drawers, a ban on intra-firm discussions, and instructions not to permit access to documents. By implication, the panel in *LaSalle National Bank* appeared to look favorably on the screening arrangement instituted by the challenged law firm, but found against it because of its tardiness in implementing the safeguards.[60] However, it appears that a mere informal understanding as to nonparticipation, and uncontradicted affidavits negating past or future sharing of confidences within the vicariously challenged law firm, are not enough to rebut the presumption of such sharing.[61]

II. Conclusion

The series of Seventh Circuit opinions issued in late 1982 and in 1983 generally constitute an integrated, sensitive approach to the significant problem of vicarious disqualification of litigation counsel. The court has nicely balanced the several policies at stake in these increasingly frequent disputes, especially in respect to its approval of timely screening mechanisms and its requirement that the district court make factual determinations of whether the presumption of intra-firm sharing of confidential information has been rebutted. However, the court's refusal to permit an evidentiary hearing in *Schiessle* does not adequately protect the interests of either the client denied counsel of his choice, or of the challenged law firm whose reputation and ethical standing have been questioned.

58 No. 81-1379, slip. op. (4th Cir. Mar. 5, 1982), *aff'd per curiam*, 710 F.2d 127 (4th Cir.), *cert. denied*, 103 S. Ct. 364 (1982).

59 555 F.2d 791, 793 (Ct. Cl. 1977).

60 *See* note 46 *supra* and accompanying text.

61 *See, e.g.*, *Schiessle*, 717 F.2d 417 (7th Cir. 1983).