Duquesne Law Review

Volume 33 | Number 2 Article 4

1995

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Recommended Citation

Randall B. Bateman, *Return to the Ethics Rules as a Standard for Attorney Disqualification: Attempting Consistency in Motions for Disqualification by the Use of Chinese Walls*, 33 Duq. L. Rev. 249 (1995).
Available at: https://dsc.duq.edu/dlr/vol33/iss2/4

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Return to the Ethics Rules as a Standard for Attorney Disqualification: Attempting Consistency in Motions for Disqualification by the Use of Chinese Walls

*Randall B. Bateman**

INTRODUCTION

The motion to disqualify an attorney for a conflict of interest has a lengthy, although sporadic history in the courts. Traditionally, the motion was used to enforce the Canons of Ethics.[1] Because it was used infrequently, the motion, and the way in which the courts applied the ethics rules to reach decisions, received little attention from commentators.[2] Recently, however, there has been a surge in the filing of motions to disqualify. This surge has increased support for the critical position that the motion has been changed from a method of protecting client confidences, to a method of gaining a tactical advantage for the moving party.

Since the Canons of Ethics was adopted, the ethics rules have intended to prevent one party from gaining a tactical advantage by hiring an attorney who formerly represented the opposing party. As the motion commonly operates now, however, the disqualification itself grants a greater tactical advantage to the party making the motion.[3] Additionally, the motion to disqualify often serves to increase the conflicts of interest present in the litigation by setting the client's interests against those of the

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1. Steven Goldberg, *The Former Client's Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly*, 72 MINN. L. REV. 227, 227 (1987). *See also* CANON OF PROFESSIONAL ETHICS OF THE AMERICAN BAR ASSOCIATION Canon 6 (1908).

2. Goldberg, cited at note 1, at 227.

3. *See* Zachary Tobin, *Towards a More Balanced Balancing: A Chronological Approach to Attorney Disqualification*, 1985 U. ILL. L. REV. 219, 219-20 (1985) ("Ironically, despite the courts' desire to achieve a fairer trial by disqualifying the firm, disqualification may actually precipitate greater injustice.").

attorney.[4]

In the past, courts have relied heavily on the ethics rules to determine when an attorney should be disqualified.[5] In virtually all disqualification cases, the courts have first decided whether the attorney has violated one or more of the ethics rules.[6] If so, the decision has generally been for disqualification. The courts have also relied on the ethics rule of imputed (or vicarious) disqualification.[7] Not only was an attorney presumed to have received confidential information, but the attorney's disqualification was imputed to the entire firm.

Recent changes in the legal profession, however, have made the rule of imputed disqualification less of a justifiable safeguard and more of a hinderance to fair play in the litigation arena.[8] For this reason, courts have departed from their reli-

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4. *See* James Lindgren, *Toward a New Standard of Attorney Disqualification*, 1982 AM. B. FOUND. RES. J. 421, 432 (1982). The motion to disqualify instantly creates a conflict of interest between the attorney that is the subject of the motion and his or her client. *Id.* The attorney may be tempted to litigate the matter to clear his or her name; to settle so that the opposing side will withdraw the motion; or withdraw, even if the motion is groundless, to avoid bad publicity. *Id.* Each of these options puts the attorney in a potential conflict with the best interests of the client. *Id.*

5. *See, e.g.*, USFL v. NFL, 605 F. Supp. 1448 (S.D.N.Y. 1985). While declaring that the code of professional responsibility was not binding on the courts, the court in *USFL* stated, "[t]he Code nevertheless will continue to provide guidance for the courts in determining whether a case would be tainted by the participation of an attorney or firm." *USFL*, 605 F. Supp. at 1463 n.31 (quoting Armstrong v. McAlpin, 625 F.2d 433, 446 n.26 (2d Cir. 1980), *vacated on other grounds*, 449 U.S. 1106 (1981)).

6. *See* Lindgren, cited at note 4, at 425 ("Indeed, most courts begin their analyses of disqualification by examining the Code, or cases that themselves are based on the Code. Courts deciding disqualification motions often see their job as applying or interpreting the Code.").

7. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D) (1974) ("If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner or associate, or any other lawyer affiliated with him or his firm may accept or continue such employment."); MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.10(a) (1983) ("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.").

8. *See* Koller v. Richardson-Merrell, Inc., 737 F.2d 1038, 1051 (D.C. Cir. 1984), *vacated on other grounds*, 472 U.S. 424 (1985). In *Koller*, the court stated:

> The tactical use of motions to disqualify counsel in order to delay proceedings, deprive the opposing party of counsel of its choice, and harass and embarrass the opponent has become so prevalent in large civil cases in recent years as to prompt frequent judicial and academic commentary. We are aware of no comparable phenomenon in criminal cases. The apparent interest of many civil litigants in delaying adjudication and their use of disqualification motions to help accomplish that end militate in favor of immediate review of orders granting such motions. To insulate from prompt review an erroneous order granting a motion to disqualify counsel would only raise the stakes in this dangerous game.

ance on the disciplinary rules as the standard for disqualification. Instead, many courts have adopted the view that imputed disqualification may be overcome by the use of attorney screening.[9]

Screening procedures and mechanisms are often referred to as "Chinese walls," as a fictional wall is constructed between the attorney allegedly having the confidential information and the attorney or attorneys who are handling the related case. If used properly, the process of screening attorneys with confidential information should be able to achieve the goal of preserving client confidences while avoiding the abuse of the disqualification motion as a tactical device.

This article begins by discussing the rationale behind the doctrine of imputed disqualification. It then considers the various approaches that the ethics rules have taken with respect to imputed disqualification. Next, the article traces the evolution of the doctrine of imputed disqualification that has developed from courts' decreased reliance on the ethics rules as the standard upon which disqualifications are based. This article also addresses the approaches of the federal circuit courts to the screening controversy. Finally, the varying approaches are used as a basis to propose standards for applying the ethics rules in determining whether to grant a motion for disqualification. If applied properly, the use of screening devices and procedures should protect the confidences of former clients without overly restricting attorney mobility and the subsequent client's right to counsel of choice.

IMPUTED DISQUALIFICATION

The Purpose of Disqualification

The prohibition against the representation of clients with conflicting interests reflects three major ideals. First, the attorney owes a duty of loyalty to his client and to the client's confidences. Second, the attorney must represent the client in a zealous manner. Third, the attorney must not attempt to represent a client when the attorney's judgment may be clouded by other concerns.[10]

Koller, 737 F.2d at 1051 (citations omitted). *See also* Smith v. Whatcott, 757 F.2d 1098, 1099-1100 (10th Cir. 1985); Melamed v. ITT Continental Baking Co., 592 F.2d 290, 295 (6th Cir. 1979); Tessier v. Plastic Surgery Specialists, Inc., 731 F. Supp. 724, 719 (E.D. Va. 1990).

9. See notes 145-75 and accompanying text.

10. *See* T. C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265,

Successive representation fosters an inherent conflict among these ideals.[11] When an attorney has knowledge of confidential information about his client's adversary, it is difficult to provide a zealous representation to the present client without revealing the former client's confidences. The attorney is placed in the difficult situation of determining exactly what information may be used and what must be kept confidential. Additionally, the possibility that the former client's confidences will be accidentally revealed and harm the former client is always present.[12] To avoid these problems, the ethics rules and the courts have taken a prophylactic approach, which generally prohibits the subsequent representation.[13]

Applying Imputed Disqualification

The practical application of the prohibition involves two steps. The first is the "primary" disqualification — that of the attorney. Once a court determines that the two representations are "substantially related,"[14] the court will presume that the client's confidences were revealed to the attorney during the earlier representation.[15] The presumption that confidences were shared with the attorney is generally held to be irrebuttable.[16] This is because in many cases, although an attorney may not have received any confidential information from the former client, to determine whether confidences were actually shared would require an inquiry into the very information that the

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266-68 (S.D.N.Y. 1953).

11. *See* Frances Hamermesh, *In Defense of a Double Standard in the Rules of Ethics: A Critical Reevaluation of the Chinese Wall and Vicarious Disqualification*, 20 U. MICH. J.L. REF. 245, 247 (1986).

12. *T. C. Theatre*, 113 F. Supp. at 269.

13. *See* Note, *Developments In The Law: Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1471 n.8 (1981) ("[T]he 'substantial relationship' test . . . is a standard for determining when representation is to be proscribed for prophylactic reasons.") (citations omitted).

14. *See T. C. Theatre*, 113 F. Supp. at 268 (noting that, "where any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited").

15. *Id.*

16. *See, e.g.*, Paul E. Iacono Structural Eng'r, Inc. v. Humphrey, 722 F.2d 435, 440 (9th Cir.), *cert. denied*, 464 U.S. 851 (1983); Analytica v. NDP Research, Inc., 708 F.2d 1263, 1267 (7th Cir. 1983); Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1321 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978). *But see* Freeman v. Chicago Musical Instrument Co., 689 F.2d 715 (7th Cir. 1982); Cheng v. GAF Corp., 631 F.2d 1052 (2d Cir.), *vacated on other grounds*, 450 U.S. 903 (1981); Silver Chrysler Plymouth Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975). For a discussion of those cases where the presumption was held to be irrebuttable see notes 74-90 and accompanying text.

former client is seeking to protect.[17] In recognition of this problem, the courts have typically held that the nature and extent of the confidential information actually received by the attorney is irrelevant and not subject to inquiry.[18] Instead, the attorney must simply be disqualified from the case.

Several more recent decisions have adopted the view that the presumption of shared confidences can be rebutted if the attorney can show that he or she was not privy to any confidential information.[19] This view, however, is the minority and rarely used. The situations that have permitted an attorney to rebut the presumption have generally involved associates of large firms who performed minor tasks such as researching specific points of law.[20]

If a court finds that an attorney has acquired confidential information, or finds that any presumption has not been rebutted, the attorney must be disqualified. After the initial disqualification, the court must also decide whether to apply the presumption of shared confidences to the firm of the disqualified attorney. This "secondary" presumption is referred to as the doctrine of imputed disqualification.[21] The doctrine presumes that the disqualified attorney shared the confidences of the prior client with the entire firm. If this presumption is applied and accepted, the disqualified attorney's entire firm must also be disqualified in order to prevent the firm from using confidential information obtained from the prior representation.[22]

The courts have taken two views on the doctrine of imputed disqualification. The traditional approach has corresponded to that of the doctrine of primary disqualification. If an attorney was actually or presumptively exposed to confidential information it was also presumed that the attorney had shared the information with the firm.[23] Like the doctrine of primary dis-

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17. *T. C. Theatre*, 113 F. Supp. at 268.

18. This view is expressed in *T. C. Theatre*, "[t]he Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent." *Id.*

19. See notes 91-102 and accompanying text.

20. *See, e.g., Silver Chrysler Plymouth*, 518 F.2d at 757; *Freeman*, 689 F.2d at 723 n.11.

21. The doctrine of imputed disqualification is also known as the "vicarious disqualification doctrine." *See* Warren Fields, *Attorneys: Vicarious Disqualification and the Model Rules of Professional Conduct*, 40 OKLA. L. REV. 231, 231 n.1 (1987). The term "imputed" is now common due to the use of the word in the Model Rules of Professional Conduct. *Id.*

22. *See* Fields, cited at note 21, at 235.

23. *Id.* at 236.

qualification, this presumption was held to be irrebuttable. Thus, if an attorney was disqualified, the attorney's firm was automatically disqualified. This view has been adopted and is currently applied by the ethics rules as well.[24]

The problem with this view is that it casts an unnecessarily wide shadow. Not only is it possible that an attorney who did not actually receive confidential information will be disqualified, but that his or her entire firm may also be disqualified. To allow irrebuttable presumptions to disqualify a party's counsel causes significant hardship in exchange for arguably little additional protection.

Because of the changes that have occurred in the legal profession, the developing trend is to make the presumption of shared confidences rebuttable.[25] Thus, if the firm can show that the disqualified attorney did not share any confidential information with other members of the firm, only the individual attorney will be disqualified. In order to show that confidences have not been shared, the firm may rely on the use of the screening mechanisms and procedures commonly referred to as "Chinese walls."[26]

The use of Chinese walls raises two questions. First, does the use of screening procedures strike the proper balance between protecting client confidences and allowing opponents relative freedom to counsel of choice? Secondly, if these procedures are effective, should the ethics rules be altered so that a court-approved screening procedure does not remain a technical violation of the rules? If used properly, Chinese walls may permit an affirmative answer to both questions.

The Flood of Motions to Disqualify

Over the last twenty-five years, the legal profession has changed dramatically. During this time, two significant factors have increased the risk of conflicts of interest. First, the manner in which law is practiced has changed substantially. Where most

24. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 33 (1931); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D) (1969); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10(b) (1983).

25. *See* Tobin, cited at note 3, at 221.

26. *See* Schiessle v. Stephens, 717 F.2d 417, 421 (7th Cir. 1983). For a discussion of *Schiessle* see notes 111-14 and accompanying text. The term "Chinese wall" refers to a non-physical barrier erected between one attorney and the other members of the firm, so as to not "taint" the firm or the other attorneys in their representation of a client. *See Developments in the Law*, cited at note 14, at 1367 ("Chinese walls therefore rely on 'structural, procedural, and educational methods for containing confidential information.' ").

attorneys formerly practiced in small firms, today, large firms that employ hundreds of attorneys are commonplace.[27] Large firms, and especially those with many remote offices, render an irrebuttable presumption of shared confidences between an attorney and every member of the firm unrealistic. It is unlikely that a particular attorney has been privy to the confidences shared between every client and attorney in the firm. The problem of imputed disqualification as a consistently applied rule becomes more significant when one realizes that the trend toward large firms has led to an increase in actual conflicts of interest.[28] While the number of firms being "conflicted out" is increasing, the courts should not continue to employ standards that disqualify firms when no actual conflict exists.

The second factor increasing the risk of conflicts is the increased mobility of attorneys. Similar to other professions, attorneys have become increasingly mobile in the last two decades.[29] While it used to be common for an attorney to stay with the firm that hired him out of law school, it is now common for associates and even partners to change firms due to firm restructuring and other causes.[30] With a change of firms comes greater potential for conflicts. The attorney changing firms must not only consider that his current clients may have interests adverse to the new firm, but must also consider all clients represented in the past.

When these two trends are combined, the problem grows exponentially. Large firms with a great number of "lateral" hires and attorneys who leave are placed in a very difficult position. For example, if the transferring attorney is in a specialized field, such as intellectual property or admiralty, the probability is high that any firm he or she joins will have some conflict with the clients of the former firm.[31]

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27. Donald McMinn, *ABA Formal Op. 88-356: New Justification for Increased Use of Screening Devices to Avert Attorney Disqualification*, 65 N.Y.U. L. REV. 1231, 1232 (1990) (noting that firms of more than 100 attorneys were considered remarkably large in 1964; in contrast, in 1990 there were over 250 firms with more than 100 attorneys, the largest being Baker & McKenzie with 1339 attorneys).

28. Geoffrey Hazard, *Close Watch Must Be Kept For Conflicts*, NAT'L L.J., Sept. 26, 1988, at 13 (recommending that all firms develop a system for keeping track of possible conflicts because "the risk of a disqualification has become ever-present").

29. *See* Goldberg, cited at note 1, at 228-30 (noting that lateral moves and mergers have become so common that legal publications have regular columns regarding the "most noteworthy rearrangements").

30. *See Lawyer Layoffs*, SALT LAKE TRIBUNE, July 10, 1994, at F3. Seven percent of attorneys laid off in 1993 were partners having an average base salary of $175,500. *Id.*

31. The problem is only exacerbated by the current downturn in the legal economy. Large lay-offs at major firms result in an increased transfer of attorneys between firms. This may cause many attorneys in a given practice area to be "con-

While the number of disqualifications caused by the changes in the practice of law is reason for concern, there is another cause for the increase in motions for disqualification. In recent years, attorneys have learned that they can use the disqualification rules to their tactical advantage.[32] By using the motion strategically, an attorney can drive up an opponent's litigation costs, delay a case from being resolved, embarrass the opposing attorney or that attorney's client, and even force an opposing party to settle.[33]

By the early 1980s, the courts and scholars began to recognize that many motions to disqualify were being made for such tactical purposes rather than for the protection of client confidences.[34] To discourage this practice, courts began to provide stricter standards for disqualification.[35] The courts soon realized that although there were circumstances that justified attorney disqualification due to prior representation, the harm done to a current client by disqualifying the entire firm would greatly outweigh the protection given to the confidences of the former client.[36] Thus, courts borrowed the concept of screening devices from the investment banking industry in order to protect the former client's confidences while allowing the current client their counsel of choice.[37]

THE ETHICS RULES AND THE ABA

While the ethics rules promulgated by the American Bar Association are not binding on the courts, the courts have traditionally relied heavily on these rules to determine when a motion for disqualification should be granted.[38] The courts' recent accep-

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flicted out."

32. *See* Goldberg, cited at note 1, at 228.

33. *See* Craig A. 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).

34. *See, e.g.*, Koller v. Richardson-Merrell, Inc., 737 F.2d 1038, 1051 (D.C. Cir. 1984), *vacated on other grounds*, 472 U.S. 424 (1985); Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 721-22 (7th Cir. 1982); *see also* Anthony D'Amato, *Disqualification of Counsel: The Westinghouse Litigation*, 61 CHI. B. REC. 88 (1979); Tobin cited at note 3, at 219; Christian F. Hummel, Note, *Attorney Disqualification: The Case for an Irrebuttable Presumption Rebutted*, 44 ALB. L. REV. 645, 648 (1980).

35. The courts which led the move to stricter standards for disqualification are the Courts of Appeals for the Second and Seventh Circuits. For a discussion of these cases see notes 91-102 and accompanying text.

36. *See, e.g.*, Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Lab., 607 F.2d 186, 196-97 (7th Cir. 1979) (en banc).

37. *See* Linda Ann Winslow, Comment, *Federal Courts and Attorney Disqualification Motions: A Realistic Approach to Conflicts of Interest*, 62 WASH. L. REV. 863, 882-83 (1987).

38. *See* USFL v. NFL, 605 F. Supp. 1448, 1463 (S.D.N.Y. 1985). *See also*

tance of the use of screening to avoid imputed disqualification in private law firms, however, marks a divergence from the ethics rules. The acceptance of screening by courts and the changes in the practice of law have led the American Bar Association to recognize the necessity of updating the rules of ethics.[39]

The Canons of Professional Ethics

The principle behind the prohibition on subsequent representation of adverse interests dates back to the original Canons of Professional Ethics. Canon 6 stated, in part, "[t]he obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."[40] Canon 6 provided the basis for the presumption of shared confidences. Canon 6, however, failed to mention other members of an attorney's firm. On its face, Canon 6 did not indicate that there was anything wrong with allowing another member of a firm to take a case that one attorney could not. Unfortunately, the failure of the canon to address the ability of another attorney within the firm to take such a case created the potential for abuse.

In 1931, the American Bar Association issued its first opinion on the doctrine of imputed disqualification.[41] Formal Opinion 33 maintained that because relations within a firm are very close, members should not handle cases that other members of the firm could not under Canon 6.[42] This restriction was to apply even if the attorney had not been affiliated with the firm at the time of the previous representation.[43] The opinion succinctly concluded that "all the members [of the firm] are barred from accepting any employment, that any one member of the firm is

Winslow, cited at note 37, at 864 ("Historically, the bases for disqualification[s] . . . have been violations of the American Bar Association Canons of Professional Ethics, the Model Code of Professional Responsibility and most recently, the Model Rules of Professional Conduct.").

39. *See, e.g.*, ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356 (1988), *reprinted in*, Lawyers Manual on Professional Conduct (ABA/BNA) 901:116-127 (1991) [hereinafter Formal Op. 88-356].

40. *T. C. Theatre*, 113 F. Supp. at 268 (quoting THE CANONS OF PROFESSIONAL ETHICS OF THE AMERICAN BAR ASSOCIATION (1908)).

41. ABA Comm. on Professional Ethics and Grievances, Formal Op. 33 (1931) [hereinafter Formal Op. 33]. *See also* Thomas D. Morgan, *Screening the Disqualified Lawyer: The Wrong Solution to the Wrong Problem*, 10 U. ARK. LITTLE ROCK L.J. 37, 39 (1987).

42. Formal Op. 33, cited at note 41.

43. *Id.*

prohibited from taking."[44]

The Code of Professional Responsibility

In 1969, the American Bar Association adopted the Model Code of Professional Responsibility (the "Code"). For the first time, the ethics rules adopted the doctrine of imputed disqualification.[45] The rule, however, was extremely narrow. Imputed disqualification was limited to situations occurring "under DR 5-105."[46] Rule 5-105 required an attorney to decline employment where "his independent professional judgment on behalf of a client will be or is likely to be adversely affected by the proffered employment."[47] Unlike Formal Opinion 33, however, the Code did not explicitly prohibit firm members, in all instances, from representing someone that a particular member of the firm could not. The Code prohibition focused upon the effect of the representation on the attorney's judgment — where one attorney was disqualified from representing a client, another attorney within the firm could represent that client provided it would not adversely affect the representing attorney's judgment.

Recognizing the vagueness of the provision, the ABA attempted to clarify and broaden the scope of the rule. In 1974, Rule 5-105 was amended to apply to situations such as subsequent representation, but the amendment made the rule much too broad.[48] The new rule prohibited firm members from representing a client whenever another member would be prevented from doing so under any of the disciplinary rules.[49]

Soon after the amendment, the ABA realized the problems such a broad prohibition created. In 1975, the ABA released Formal Opinion 342[50] in an apparent attempt to mitigate the amendment's effects. Formal Opinion 342 adopted the view that screening could serve as a defense to a motion for disqualifica-

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44. *Id.*

45. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D) (1969) [hereinafter Rule 5-105].

46. Rule 5-105, cited at note 45.

47. *Id.*

48. *See* Fields, cited at note 21, at 236.

49. The new rule provided that, "[i]f a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner or associate, or any other lawyer affiliated with him or his firm may accept or continue such employment." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D) (1974).

50. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975), *reprinted in* 62 A.B.A. J. 517 (1976) [hereinafter Formal Op. 342].

tion.[51] The opinion, however, limited the defense to former government attorneys and required that the government consent to the representation.[52]

In promulgating Formal Opinion 342, the Ethics Committee was aware that strict application of the disqualification rule would prevent qualified lawyers from accepting positions in the government.[53] As the opinion noted, strict application would turn government employees into "typhoid Marys."[54] Few attorneys would accept a job with the government if such a position would prevent them from obtaining future employment. Likewise, law firms would be unlikely to hire former government attorneys if the firms would be barred from any case involving the attorney's former agency.

Although the Code did not make specific reference to the use of screening, the courts viewed Formal Opinion 342 as a de facto amendment to the Code.[55] It was not long before attorneys and commentators in the private sector argued that allowing the screening defense for former public attorneys, but not for private attorneys, was both unreasonable and unfair. The courts agreed, and permitted screening by private law firms.[56]

The Model Rules of Professional Conduct

At the same time that the courts permitted screening for attorneys in private practice, the ABA was debating whether to allow screening under the Model Rules of Professional Conduct.[57] The original comment to Rule 1.10 implicitly allowed screening as a defense in the private sector. The second paragraph of comment 11 provided:

> Relevant factors in determining the likelihood of actual access of information relating to representation of a client include the professional experience of the lawyer in question, the division of actual responsibility for the matter involved, the organizational structure of the firm or other association involved, the sensitivity of the information and its relevance to the affairs of the affected clients, and the nature and probable effec-

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51. Formal Op. 342, cited at note 50.

52. *Id.*

53. *See* Fields, cited at note 21, at 241.

54. Formal Op. 342, cited at note 50, at 518.

55. *See* Fields, cited at note 21, at 243.

56. *Id.* The first court to adopt this view appears to have been the Court of Claims. In *Kesselhaut v. United States*, the court relied on Formal Op. 342 to decide that screening the conflicted attorney was sufficient to prevent firm disqualification. Kesselhaut v. United States 555 F.2d 791, 792-93 (Ct. Cl. 1977) (per curiam).

57. *Compare* Schiessle v. Stephens, 717 F.2d 417 (7th Cir. 1983) *with* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1983).

tiveness of screening measures.[58]

Unlike the courts, however, the ABA decided against adopting the screening defense. Instead the ABA used the comment to explain why screening is permissible for former government attorneys but not for private attorneys.[59] The primary rationale given was that, although the government's confidences should be protected, a strict application of the rule could prevent it from obtaining competent counsel. Thus, the government's own need for attorneys outweighed the risk of its confidences being revealed. With this explanation, the ABA clarified its position that the screening defense should remain limited to former government attorneys.

Formal Opinion 88-356 — The Expansion of Screening

In 1988, the ABA finally extended the use of screening to private attorneys, but on a limited scale.[60] In Formal Opinion 88-356, the ABA recognized that the realities of today's legal practice require screening to avoid imputed disqualification. The opinion acknowledged that the use of temporary attorneys was growing rapidly.[61] The opinion also acknowledged that applying the ABA's traditional view of imputed disqualification meant that many firms would be prohibited from using temporary attorneys.[62] To resolve the problem, the ABA opinion permitted the isolation of the temporary attorneys from the rest of the firm to avoid conflicts.[63]

The acceptance of a screening defense for temporary attorneys has been significant. Unlike the screening of former government attorneys approved in Formal Opinion 342, the screening of temporary attorneys avoids the public policy argument upon which the government relied. Instead, the opinion is based on the realities of the legal profession. When viewed together, Formal Opinions 342 and 88-356 provide a good foundation for the argument that a screening defense should be allowed for full-time, nongovernment attorneys, so long as the screen is effective.[64]

58. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10, cmt. 11 (original draft).

59. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10, cmt. 11 (1983).

60. Formal Op. 88-356, cited at note 39.

61. *Id.*

62. *Id.*

63. *Id.*

64. McMinn, cited at note 27, at 1235.

Formal Opinion 90-358

Two years after Formal Opinion 88-356, the ABA refused to broaden screening to cover other private attorneys. In Formal Opinion 90-358,[65] the ABA addressed the disqualification of a firm based on a preemployment interview. One tactic used by some companies is to discuss their case with most of the major law firms in an area before deciding on who will actually be retained as counsel. As a result of the initial consultation, none of these firms could then represent the company's opponent.[66] Thus, law firms requested the ABA to issue an opinion on the acceptability of screening the attorney that conducted the interview so that the firm could accept the case.

Although the ABA recognized that screening had become the trend, it held to the Model Rules of Professional Conduct and refused to permit the screening defense unless the information was of minor importance.[67] This strict interpretation and adherence to the Model Rules marks an extended split between the courts and the ABA over the issue of attorney disqualification. By resisting the transition toward screening instead of guiding it, the ABA is losing the role it has had in setting standards for attorney disqualification.

THE CHANGING APPROACH

Even before any ethics rules were formally adopted, attorneys were expected to avoid certain types of conduct. For more than a century, courts have held that an attorney should not switch sides in a legal dispute. In *Hatch v. Fogerty*,[68] the New York Superior Court adopted a preventative approach to keep attorneys from using information obtained from one side in the representation of the opponent in the same matter. The court stated:

> It is fundamental in respect to the duty of an attorney towards his client, that he should not use any information which he has derived from his client, to the prejudice or injury of his client; and especially, that he shall not act in opposition to his client's interests; . . . lest any temptation should exist to violate professional confidence, or to make any improper use of information which an attorney has acquired confidentially, as well as upon the principles of public policy, "he will not be permitted

65. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 90-358 (1990) [hereinafter Formal Op. 90-358].

66. Lindgren, cited at note 4, at 435.

67. Formal Op. 90-358, cited at note 65, at 6-7.

68. 40 How. Pr. 492 (N.Y. Super. 1871).

> to be concerned on one side of proceedings in which he was originally in a different interest."[69]

In *Hatch*, the court disqualified the attorney because the attorney had obtained confidential information about the former client's case.[70]

Although attorneys were not permitted to switch sides on a case if they had confidential information, the former client actually had the burden to show that the attorney had acquired such information. In *Watson v. Watson*,[71] the court again faced the problem of an attorney switching sides. In quoting a popular treatise the court noted:

> When an attorney has been employed in a cause, and is afterward discharged by his client, not on the ground of misconduct, the court will not restrain him from acting for the opposing party, unless it clearly and distinctly appears that he has obtained information in his former character which would be prejudicial to the cause of his former client to communicate.[72]

The court in *Watson*, however, found that the attorney had actually acquired confidential information and disqualified him.[73]

The "Substantially Related" Test

Courts realized that the rule requiring the party moving for disqualification to prove that the attorney had obtained confidential information was not realistic. As the District Court of the Southern District of New York indicated, the effort to prove the transfer of confidential information required the court to delve into the very matters that the former client wished to keep confidential.[74] Because of these concerns, the courts decided that a better approach was to assume that the client had revealed confidences to the attorney.[75] This view was developed in *T. C.*

69. *Hatch*, 40 How. Pr. at 503 (citations omitted).

70. *Id.*

71. 11 N.Y.S.2d 537 (Sup. Ct. 1939).

72. *Watson*, 11 N.Y.S.2d at 538 (quoting WEEKS ON ATTORNEYS AT LAW, § 271 at 455, § 279 at 466).

73. *Watson*, 11 N.Y.S.2d at 539-40.

74. *See* T. C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265, 268 (S.D.N.Y. 1953).

75. *See T. C. Theatre*, 113 F. Supp. at 268; *see also* Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 722 (7th Cir. 1982); Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Lab., 607 F.2d 186, 196 (7th Cir. 1979) (en banc); Melamed v. ITT Continental Baking Co., 592 F.2d 290, 292 (6th Cir. 1979); Government of India v. Cook Industries, Inc., 569 F.2d 737, 739 (2d Cir. 1978); Allegaert v. Perot, 565 F.2d 246, 250 (2d Cir. 1977); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 754 (2d Cir. 1974); Emle Industries, Inc. v.

Theatre Corp. v. Warner Brothers Pictures, Inc.[76]

The decision in *T. C. Theatre* was based on Canon 6 of the Canons of Professional Ethics.[77] The court noted that Canon 6 imposed upon attorneys a duty of confidentiality to their clients.[78] Representing an adverse client in a subsequent matter that was "substantially related" to the original representation would cause the former client to fear that his (or her) confidences were being betrayed.[79] Because this amounted to a violation of the ethics rules, it appeared that the attorney would be disqualified.

Unlike the previous cases, however, the court in *T. C. Theatre* refused to place the burden of proof upon the moving party. Instead, the court established a sweeping change now referred to as the "substantially related" test.[80] The doctrine required only that the former client show that the "matters embraced within the pending suit . . . are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client."[81]

The court's opinion in *T. C. Theatre* further adopted a presumption of shared confidences. The court noted:

> The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent. Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained.[82]

Thus, the court applied an irrebuttable presumption that the attorney had acquired confidential information from his former client, and accordingly, had to be disqualified.

The "substantially related" test of *T. C. Theatre*, although modified, has been widely adopted.[83] At present, the majority of

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Patentex, Inc., 478 F.2d 562, 570 (2d Cir. 1973). Initially, most courts presume shared confidences; the differences between jurisdictions is whether this presumption is rebuttable. See notes 91-102 and accompanying text for cases holding that the presumption is rebuttable.

76. *T. C. Theatre*, 113 F. Supp. at 268.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *T. C. Theatre*, 113 F. Supp. at 268.

82. *Id.* at 268-69.

83. *See, e.g.*, Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 722 (7th Cir. 1982); Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Lab., 607 F.2d 186, 196 (7th Cir. 1979) (en banc); Melamed v. ITT Continental Baking Co., 592 F.2d 290, 292 (6th Cir. 1979); Allegaert v. Perot, 565 F.2d 246, 250 (2d Cir.

courts follow modifications of the test much like the one adopted by the Seventh Circuit in *Westinghouse Electric Corp. v. Gulf Oil Corp.*[84]

In *Gulf Oil*, the Court of Appeals for the Seventh Circuit modified the "substantially related" test in order to make its application more workable. The court formulated a three part inquiry to determine whether a confidential relationship existed.[85] First, the judge would reconstruct the scope of the prior legal representation.[86] Then the judge would determine whether a reasonable inference could be drawn to indicate that the confidential information allegedly given would have been given to a lawyer representing a client in those matters.[87] Finally, the judge would determine if the information was relevant to the issues raised in the litigation against the former client.[88] If so, the court was to presume that the attorney was privy to confidential information.[89] As discussed previously, this kind of presumption has traditionally been irrebuttable. Thus, if the two representations were substantially related, the attorney would automatically be disqualified.

In reaching its decision, the *Gulf Oil* court made it clear that the attorney's disqualification was based upon a violation of Canons 4 and 9 of the Code of Professional Responsibility.[90] As previously indicated, however, the courts were not exclusively relying on the ethics rules to decide disqualification motions.

Primary Disqualification

The first blow to the irrebuttable presumption at the "primary" stage came from the Second Circuit.[91] In *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*,[92] the Second Circuit held that if the attorney could show that there was no realistic chance

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1977); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 754 (2d Cir. 1974); Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 570 (2d Cir. 1973); *see also* Tobin, cited at note 3, at 220-21 nn.11-12.

84. 588 F.2d 221 (7th Cir. 1978).

85. *Westinghouse Elec. Corp.*, 588 F.2d at 225.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Westinghouse Elec. Corp.*, 588 F.2d at 224, 228. Canon 4 provides, "[a] Lawyer Should Preserve the Confidences and Secrets of a Client." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1969). Canon 9 provides, "[a] Lawyer Should Avoid Even the Appearance of Professional Impropriety." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1969).

91. Goldberg, cited at note 1, at 243-47.

92. 518 F.2d 751 (2d Cir. 1975).

that client confidences were obtained, the presumption would be rebutted.[93] In practical application, however, the standard varies little from the substantial relationship test of *T. C. Theatre*.[94]

As with the substantially related test, "the Court must ask whether it can reasonably be said that in the course of the former representation the attorney might have acquired information related to the subject of the subsequent representation."[95] Logically, if there is no realistic chance that the attorney obtained client confidences, the court could not reasonably find that the attorney might have acquired information related to the representation. The decision in *Silver* was essentially a finding that the attorney involved did not fall within the confines of the substantially related test. However, by holding that the attorney's limited involvement rebutted the presumption of shared confidences, the court opened the way for the view that the presumption of shared confidences is truly rebuttable.

The next major break from the application of an irrebuttable presumption in primary disqualification cases occurred five years after *Silver Chrysler Plymouth*.[96] In 1980, in *Cheng v. GAF Corp.*,[97] the Second Circuit Court of Appeals made it clear that the standard of proof to rebut the presumption of shared confidences should not be "unattainably high."[98] Even if an attorney could have obtained confidential information from the client, he or she could rebut the presumption by a reasonable showing that such confidences had not, in fact, been obtained. Therefore, the motion to disqualify need not be automatically granted.

A further blow to the irrebuttable presumption came in *Freeman v. Chicago Musical Instrument Co.*[99] In *Freeman*, the Seventh Circuit recognized that disqualification could create numerous hardships for the client, embarrassment for the attorney, and a potential for abuse by those seeking a tactical advantage.[100] Because of these concerns, the court refused to apply an irrebuttable presumption.[101] Instead, the court remanded the case for a hearing on whether the presumption that the attorney had ac-

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93. *Silver Chrysler*, 518 F.2d at 757.

94. See notes 76-83 and accompanying text for a discussion of *T. C. Theatre*.

95. *Silver Chrysler*, 518 F.2d at 757.

96. *See* Fields, cited at note 21, at 234 (citing cases holding the primary presumption to be rebuttable, but noting that several were based on misapplied precedent).

97. 631 F.2d 1052 (2d Cir.), *vacated on other grounds*, 450 U.S. 903 (1981).

98. *Cheng*, 631 F.2d at 1056-57.

99. 689 F.2d 715 (7th Cir. 1982).

100. *Freeman*, 689 F.2d at 719-20.

101. *Id.* at 722 (citing Novo Terapeutisk v. Baxter Travenol Lab., 607 F.2d 186, 197 (7th Cir. 1979) (en banc)).

quired confidential information had been successfully rebutted.[102]

Despite *Silver Chrysler*, *Cheng* and *Freeman*, the general rule still seems to be that the presumption of shared confidences at the primary level is irrebuttable.[103] Although an irrebuttable presumption seems too restrictive, a sufficiently high standard should be applied to an attorney attempting to represent the opponent of a former client in a "substantially related" matter. An attorney who is dishonest could put former clients at a great disadvantage by using their confidences against them.

Imputed Disqualification

The secondary presumption, that a firm should be disqualified whenever an attorney within the firm is disqualified, has also been moved out of the irrebuttable category. Logically, if an attorney can rebut the presumption that he or she obtained confidential information from a client, the firm should be able to show that its members did not receive confidential information from an "infected" attorney.

Though secondary disqualification emerged from an ethics opinion[104] rather than the ethics rules themselves, the courts have applied it with equal vigor. Until recently, most courts had held that this secondary disqualification was irrebuttable.[105]

The first refusal to apply an irrebuttable presumption to the situation of an attorney sharing client confidences with the firm arose in the Seventh Circuit.[106] In *Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories*,[107] the court asserted that a disqualification based on an irrebuttable presumption created a great amount of unnecessary hardship for clients and attorneys.[108] In order to balance the interests of the present and former clients, the court recognized that a more flexible approach was necessary to reach a "just and sensible ruling on ethics matters."[109] While recognizing that the presumption of shared confi-

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102. *Freeman*, 689 F.2d at 723.

103. *See* Winslow, cited at 37, at 870.

104. Formal Op. 33, cited at note 41.

105. *See* Marc Steinberg & Timothy Sharpe, *Attorney Conflicts of Interest: The Need for a Coherent Framework*, 66 NOTRE DAME L. REV. 1, 11 (1987).

106. Peterson, cited at note 33, at 402.

107. 607 F.2d 186 (7th Cir. 1979) (en banc).

108. *Baxter Travenol*, 607 F.2d at 196-97.

109. *Id.* at 197. The facts in the case are unusual. The attorney moving for disqualification had been a member of the opposing firm and began discussing the potential suit with the defendants shortly before he left. *Id* at 194-95. A year and a half later, due to a transfer from another district court, his former firm was re-

dences should "generally" be irrebuttable at the level of the attorney, the court took a much more lenient view toward rebutting the presumption at the level of the firm.[110] Because the presumption had been "clearly and effectively rebutted" in *Baxter Travenol,* the court allowed the firm to continue the representation.[111]

Several years later, in *Schiessle v. Stephens,*[112] the Seventh Circuit again led the way by allowing the use of screening procedures and devices to rebut the secondary presumption of shared confidences where an attorney moved from one private firm to another.[113] The *Schiessle* court held that the presumption of shared confidences is rebuttable:

> [B]y demonstrating that "specific institutional mechanisms" (e.g., "Chinese Walls") had been implemented to effectively insulate against any flow of confidential information from the "infected" attorney to any other member of his present firm. Such a determination can be based on objective and verifiable evidence presented to the trial court and must be made on a case-by-case basis.[114]

The court, however, disqualified the firm because it had failed to show that any such mechanisms had been in place when the attorney joined the firm.[115]

Since *Schiessle,* the majority of courts have moved away from an irrebuttable presumption and about half have formally approved of the use of screening.[116] Accordingly, imputed disquali-

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tained as counsel for the plaintiffs. *Id.* at 195. Thus, the attorney moving for disqualification was actually arguing that the presumption of shared confidences should be applied to his own conduct at his former firm. *Id.* at 196. As the court noted, however, the attorney never claimed to have shared any confidential information with his former firm. *Id.* at 196 n.4.

110. *Id.* at 197.

111. *Id.*

112. 717 F.2d 417 (7th Cir. 1983).

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

114. *Id.* at 421 (citing LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252, 259 (7th Cir. 1983)).

115. *Schiessle*, 717 F.2d at 421.

116. Courts in the Second, Third, Sixth, Seventh and Eleventh Circuits have approved screening, while courts in the First, Fourth, Fifth, Ninth and Tenth Circuits have either rejected screening or failed to approve it when given the opportunity. *Compare* Manning v. Waring, Cox, James, Sklar & Allen, 849 F.2d 222, 226 (6th Cir. 1988); Cox v. American Cast Iron Pipe Co., 847 F.2d 725, 731-32 (11th Cir. 1988); Schiessle v. Stephens, 717 F.2d 417, 421 (7th Cir. 1983); Cheng v. GAF Corp., 631 F.2d 1052, 1057-58 (2d Cir. 1980), *vacated on other grounds*, 450 U.S. 903 (1981); Nemours Found. v. Gilbane, Aetna, Fed. Ins. Co., 632 F. Supp. 418, 428 (D. Del. 1986); *with* Smith v. Whatcott, 757 F.2d 1098, 1102 (10th Cir. 1985); Kevlik v. Goldstein, 724 F.2d 844 (1st Cir. 1984); Doe v. A Corp., 709 F.2d 1043 (5th Cir. 1983). *See also* McMinn, cited at note 27, at 1264 (discussing those circuits that have yet to review the issue).

fication is now generally viewed as a presumption instead of a rule. If a firm can show that its members did not receive any confidential information from the "infected" attorney, the firm should be permitted to continue its representation.

THE STATUS OF SCREENING IN THE FEDERAL COURTS

In order to properly view the need for consistency, it is important to examine the disparities which have developed in the way the federal circuit courts have addressed, or in some cases avoided, the screening issue. Several of the courts have yet to rule on the issue. Those that have ruled, generally allow the screening defense. The end result is four separate situations leaving resolution of the issue dependent upon the circuit in which the case is heard.

Approach A: No Cases on Point

While most of the circuit courts have at least addressed the issue, two have yet to deal with a case based on the screening of a private attorney. In the Fourth Circuit, the use of screening as a defense to disqualification has not reached the appellate level.[117] One district in the Fourth Circuit has expressed skepticism of the Chinese wall defense.[118] The Fifth Circuit, in contrast, has reached the screening issue, but all of the screening cases involve former government attorneys and involved the type of screening sanctioned by Formal Opinion 342.[119] Thus, these cases are of little help in determining whether the Fifth Circuit will permit the use of screening as a defense for private attorneys. In order for the availability of the screening defense to be binding on lower courts, the circuit court in that jurisdiction must hold that it is available. Because these courts have not expressly approved of screening for private attorneys, the presumption must be that the screening or Chinese wall defense is unavailable in these jurisdictions.

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117. *See* McMinn, cited at note 27, at 1264.

118. *See* Tessier v. Plastics Surgery Specialists, Inc., 731 F. Supp. 724, 734 (E.D. Va. 1990).

119. See notes 50-56 and accompanying text.

Approach B: The Decision Not to Decide

The second group of courts has refused to decide whether to allow the screening defense. This approach has been followed by the Courts of Appeals for the First,[120] Third,[121] Ninth[122] and Tenth[123] Circuits. Apparently, these courts are waiting to see what the consequences will be in those circuits that have decided to allow screening.

In *Kevlik v. Goldstein*,[124] the First Circuit declined to resolve whether screening could be used as a defense to the presumption that the confidential information obtained from a former client had been shared with a firm.[125] The court determined that because there was evidence of actual disclosure, a resolution of whether the presumption could be rebutted was not necessary.[126] Likewise, in *United States v. Miller*,[127] the Third Circuit Court of Appeals declined to decide the screening question because it had insufficient data as to how the screening would proceed.[128] The lower courts in the circuit, however, seem to view *Miller* as permitting the use of screening if the court is comfortable that it will work. In *INA Underwriters Insurance Co. v. Rubin*,[129] and *Nemours Foundation v. Gilbane, Aetna, Federal Insurance Co.*,[130] two district courts in the Third Circuit allowed the use of screening because the screening process to be employed by the firms was effective at isolating the "infected" attorney.[131] These cases indicate that screening is currently permitted in the Third Circuit.

In *Trone v. Smith*,[132] the Ninth Circuit relied heavily on the

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

121. *See* United States v. Miller, 624 F.2d 1198 (3d Cir. 1980).

122. *See* Paul E. Iacono Structural Eng'r, Inc. v. Humphrey, 722 F.2d 435 (9th Cir.), *cert. denied*, 464 U.S. 851 (1983); Trone v. Smith, 621 F.2d 994 (9th Cir. 1980).

123. *See* Smith v. Whatcott, 757 F.2d 1098 (10th Cir. 1985).

124. 724 F.2d 844 (1st Cir. 1984).

125. *Kevlik*, 724 F.2d at 849 n.5. The court stated, "[w]e do not reach this issue for two reasons: first Wiggin & Nourie is a firm of approximately twenty-five members; second, it has not suggested that information received from [the former client] was not transmitted to or learned by other members of the firm." *Id.*

126. *Id.* at 849.

127. 624 F.2d 1198 (3d Cir. 1980).

128. *Miller*, 624 F.2d at 1204.

129. 635 F. Supp. 1 (E.D. Pa. 1983).

130. 632 F. Supp. 418 (D. Del. 1986).

131. *Nemours Foundation*, 632 F. Supp. at 429; *INA Underwriters*, 635 F. Supp. at 5.

132. 621 F.2d 994 (9th Cir. 1980).

Code of Professional Responsibility in disqualifying a law firm.[133] Because the court was able to reach a decision on disqualification without considering a Chinese walls defense, the court refrained from addressing the acceptability of such a defense.[134] Three years later, the court again avoided addressing the issue. In *Paul E. Iacono Structural Engineer, Inc. v. Humphrey*,[135] the Ninth Circuit noted, "[i]n *Trone v. Smith*, we left open the question of whether firmwide disqualification would be necessary if such a 'Chinese wall' screening procedure was used . . . . Again we need not resolve this issue."[136]

The screening defense, however, will probably be accepted by the Ninth Circuit. In *United States ex rel. Lord Electric Co. v. Titan Pacific Construction Corp.*,[137] and *Haagen-Dazs Co. v. Persche No! Gelato, Inc.*,[138] two district courts in the Ninth Circuit allowed the Chinese wall defense.[139] The district courts in the Ninth Circuit, like those in the Third Circuit, indicate a willingness to accept effective attorney screening.

The Tenth Circuit, in *Smith v. Whatcott*,[140] noted that courts had extended the screening beyond government lawyers, but decided not to rule on the permissibility of screening private attorneys.[141] The court examined the decisions of the Seventh Circuit that analyzed the mechanisms used to screen the infected attorney.[142] The court then noted that because there was no evidence that screening had taken place, a ruling on the availability of the screening defense was unnecessary.[143] Based on *Smith*, it is unclear whether the Tenth Circuit would permit the screening defense in an appropriate case.

The decision by the courts of appeals in these circuits to avoid the issue may prevent them from deciding the issue at a later time. In *Richardson-Merrell, Inc. v. Koller*,[144] the Supreme Court ruled that a district court decision granting a motion to disqualify in a civil case is not an order subject to an interlocutory appeal.[145] Thus, the disqualified firm is precluded from ap-

133. *Trone*, 621 F.2d at 998.
134. *Id.* at 999 n.4.
135. 722 F.2d 435 (9th Cir.), *cert. denied*, 464 U.S. 851 (1983).
136. *Iacono*, 722 F.2d at 442 (citing *Trone*, 621 F.2d at 999).
137. 637 F. Supp. 1556 (W.D. Wash. 1986).
138. 639 F. Supp. 282 (N.D. Cal. 1986).
139. *Lord Electric*, 637 F. Supp. at 1564; *Haagen-Dazs*, 638 F. Supp. at 287.
140. 757 F.2d 1098 (10th Cir. 1985).
141. *Smith*, 757 F.2d at 1101-02.
142. *Smith*, 757 F.2d at 1101.
143. *Id.*
144. 472 U.S. 424 (1985).
145. *Koller*, 472 U.S. at 426.

pealing and has little choice but to turn over the litigation to another firm. Once the case has been decided, it is unlikely that many firms will want to litigate their disqualification because of both the client's and the firm's limited resources.

There are two situations, however, in which a disqualification might be litigated after the fact. The first arises when the client strongly desires the original firm's representation and there is a possibility that a similar disqualification motion will be filed in future litigation. The other possible situation may occur when a law firm that believes it has been wrongly disqualified due to misrepresentations of adverse counsel, appeals the disqualification ruling. While the appeal in the first situation would likely address the merits of a Chinese wall defense, the second situation would focus on the actions of adverse counsel rather than on the use of screening. The odds of the first type of case coming before those circuits who have yet to decide the availability of Chinese walls is relatively small. Thus, the nondecision may effectively prevent the courts from ever affirmatively addressing the issue. When a particular circuit has not approved the use of screening, other courts applying that circuit's law should not permit the screening defense.[146]

Approach C: A Conservative Approach to Screening

The Eleventh Circuit has carved its own niche by applying a very conservative approach to screening. This approach permits screening to be used to help rebut the presumption of shared confidences. In *Cox v. American Cast Iron Pipe Co.*,[147] the court refused to disqualify a firm even though it would have been disqualified under the "substantially related" test.[148] The court commented that it had the responsibility to keep a balance between regulating ethical conduct and permitting the parties to have counsel of their own choosing.[149]

The court considered several factors. The attorney that was disqualified had left his former firm five years before the alleged conflict, and had only recently joined the firm representing the plaintiffs.[150] In addition, the disqualification would require the plaintiffs to seek new counsel and would further delay the

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146. *See, e.g.*, Atasi Corp. v. Seagate Tech., 847 F.2d 826, 829 (Fed. Cir. 1988).
147. 847 F.2d 725 (11th Cir. 1988).
148. *Cox*, 847 F.2d at 731.
149. *Id.* (quoting Woods v. Covington County Bank, 537 F.2d 804, 810 (5th Cir. 1976)).
150. *Cox*, 847 F.2d at 727.

case.[151] Finally, the attorney had been screened from all meetings and other communications regarding the case, and was not permitted to share in any fees generated from the case.[152] Because of all of these factors, the firm was permitted to continue its representation. In a footnote, the court made it clear that it was not holding that the erection of a Chinese wall alone was sufficient to overcome a motion for disqualification.[153] Instead, the use of screening was one of many factors to be considered.

Approach D: Screening Jurisdictions

The largest group of circuits is made up of those that appear to permit the use of a Chinese wall defense to a motion for disqualification. Following the lead of the Seventh[154] and Second[155] Circuits, the Courts of Appeals for the Sixth,[156] and Federal[157] Circuits have also permitted the use of screening. Each of these courts has recognized that the changes in the legal profession, and the use of disqualification as a tactical device, require that the courts utilize a more flexible approach to disqualification.[158] The screening defense allows courts the flexibility to permit representation where there is little risk of revealed confidences.

While the Seventh Circuit has led the other circuits away from irrebuttable presumptions, it originally adopted a different view. As late as 1978, the Seventh Circuit considered the ethics rules as the sole criterion for disqualification. In *Westinghouse Electric Corp. v. Kerr-McGee Corp.*,[159] the Seventh Circuit stated, "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

151. *Id.* at 731-32.

152. *Id.*

153. *Id.* at 732 n.11. "In light of our holding, we decline to discuss the plaintiff's argument that the erection of a 'Chinese Wall' is sufficient in and of itself to prevent the disqualification of [the attorney]." *Id.*

154. *See* Schiessle v. Stephens, 717 F.2d 417 (7th Cir. 1983). See notes 111-14 and accompanying text for a discussion of *Schiessle*.

155. In *Cheng*, the Second Circuit implied that it would accept the screening defense when a firm could show that the defense had been implemented in an effective manner. Cheng v. GAF Corp., 631 F.2d 1052, 1058 (2d Cir. 1980), *vacated on other grounds*, 450 U.S. 903 (1981).

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

157. *See* EZ Paintr Corp. v. Padco, Inc., 746 F.2d 1459 (Fed. Cir. 1984) (applying Eighth Circuit law). See notes 166-71 and accompanying text.

158. *Manning*, 849 F.2d at 225; *EZ Paintr Corp.*, 746 F.2d at 1461; *Schiessle*, 717 F.2d at 421; *Cheng*, 631 F.2d at 1058 n.7.

159. 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978).

each member of that firm."[160] However, as was discussed in the previous section, the Seventh Circuit modified this view in *Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories*,[161] a year later. The Seventh Circuit further modified its approach in *Freeman v. Chicago Musical Instrument Co.*[162] and finally approved the screening defense in *Schiessle v. Stephens*.[163]

In addition to the Seventh Circuit, the Second Circuit was one of the early trend-setters in the move away from irrebuttable presumptions. In *Cheng v. GAF Corp.*,[164] the Second Circuit implied that it would accept the screening defense when a firm could show that the defense had been implemented in an effective manner, and the firm was large enough to prevent inadvertent disclosure.[165]

In the same year, the Second Circuit decided *Armstrong v. McAlpin*,[166] which liberalized the approach to disqualification by applying a functional analysis.[167] However, the court also ruled that the denial of a disqualification motion was not appealable.[168] Given the decision in *Armstrong* and the Supreme Court's holding in *Koller*,[169] the Second Circuit may not have the opportunity to formally adopt the screening defense.

In *Manning v. Waring, Cox, James, Sklar & Allen*,[170] the Sixth Circuit adopted the Seventh Circuit's approach to Chinese walls. The Sixth Circuit acknowledged that the Seventh had "taken the most realistic view of the methodology to be followed in resolving competing interests raised by such a disqualification motion."[171] The court accepted the use of the Chinese wall defense and remanded the case for a determination of whether the attorney had been properly screened.[172]

In *EZ Paintr Corp. v. Padco, Inc.*,[173] the Federal Circuit, applying Eighth Circuit law, permitted the use of screening. The

160. *Kerr-McGee*, 580 F.2d at 1321.

161. 607 F.2d 186 (7th Cir. 1979). See notes 105-09 and accompanying text.

162. 689 F.2d 715 (7th Cir. 1982).

163. *Schiessle*, 717 F.2d at 421 (citing LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252, 259 (7th. Cir. 1983)).

164. 631 F.2d 1052 (2d Cir. 1980), *vacated on other grounds*, 450 U.S. 903 (1981).

165. *Cheng*, 631 F.2d at 1058.

166. 625 F.2d 433 (2d Cir. 1980).

167. *Armstrong*, 625 F.2d at 444.

168. *Id.*

169. See notes 143-44 and accompanying text.

170. 849 F.2d 222 (6th Cir. 1988).

171. *Manning*, 849 F.2d at 225.

172. *Id.*

173. 746 F.2d 1459 (Fed. Cir. 1984).

Federal Circuit asserted that the Eighth Circuit would follow the "great weight of authority" that an attorney is presumed to have divulged confidences to the firm "but that presumption is rebuttable."[174] The Federal Circuit has yet to address screening applying its own law. However, the court's holdings in several cases, particularly in *EZ Paintr*, indicate that is likely to permit the screening defense.[175]

In *Panduit Corp. v. All States Plastic Manufacturing Co.*,[176] the Federal Circuit, deciding a case based on Seventh Circuit law, held that the presumption was rebutted even though no formal screening procedures had been in place.[177] Because it did not even require the firm to prove the existence of an effective Chinese wall, the Federal Circuit, applying the law of other circuits has taken the most liberal approach to the use of screening.

With the wide disparity in the circuit courts as to the availability of screening, some consistency is needed. Presently, the identical facts could produce three very different results depending on which circuit had jurisdiction over the matter. The changes in the legal profession and the use of disqualification as a tactical device must be balanced against the former client's right to preserve confidences. If implemented properly, Chinese walls are the most practical solution to the problem.

PROPOSED STANDARDS FOR CONSISTENCY

By employing a combination of factors discussed in disqualification cases, courts would be able to balance the right to confidentiality and the right to counsel of choice. In addition, the consistent application of a definitive group of factors would decrease the need for disqualification motions. If an attorney could more accurately predict what representations the court will allow, a considerable amount of delay and court time could be saved. Additionally, the clients would be better served by avoiding the cost in both money and time that disqualification motions cause.

174. *EZ Paintr*, 746 F.2d at 1461.

175. *Id.* at 1459 (asserting that "one possible way of dealing with the presumption is to fully 'screen off' the attorney changing sides as soon as he joins the new firm").

176. 744 F.2d 1564 (Fed. Cir. 1984).

177. *Panduit Corp.*, 744 F.2d at 1580-81.

The Amended Rule 1.10

In light of the inconsistency between the courts, Rule 1.10 should be changed to create guidelines for the use of screening, and to minimize the problems inherent in disqualification motions.

A proposal for an Amended Rule 1.10 follows.[178]

> Rule 1.10 Imputed Disqualification and Screening:
> (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, unless the attorney with the conflict of interest is screened.
> (b) To determine if screening is appropriate, the following factors should be considered:
> (1) The degree and relationship between the representations and the likelihood that the attorney acquired confidential information;
> (2) The position of the attorney at the time of the prior representation;
> (3) The amount of time between the two representations;
> (4) The amount of time between the discovery of a conflict and the erection of screening devices;
> (5) The probable effectiveness of the screening devices put in place;
> (6) Whether the attorney to be screened will share in the profits from the case; and
> (7) The timing of a motion for disqualification, if any.
>
> (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 and not currently represented by the firm, 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(c) that is material to the matter and that lawyer has not been screened.
>
> (d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

Many of these changes are similar to the approach recommended in the original draft of the Comment to Rule 1.10.[179] Had it been adopted then, much of the confusion over disqualification could have been avoided.

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178. The information added to the original rule has been underlined.

179. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10, cmt. 11 (1983) [hereinafter Comment 11].

Application of the Changes

The impact of the amended rule is best demonstrated through examples of its application. The following are rationales for each change, and situations that demonstrate the benefit of the new rule.

The Degree of Relation Between Representations

The first factor in determining whether disqualification is appropriate is the degree of relation between the former and current representation and the likelihood of acquired confidential information.[180] The most workable version in use right now is the Seventh Circuit's modification of the substantially related test.[181] Even within the substantially related test, however, there are varying degrees. For example, a new associate in a large firm may have worked extensively on one question of law, such as jurisdiction. In the process of working on this issue, it is unlikely that the new associate acquired any confidential information about the client that would prejudice the client's rights after the jurisdictional issue was resolved. Under the traditional application of the substantially related test, however, the attorney would be immediately disqualified if the former firm's representation of the client was substantially related to a matter being handled by the attorney's new firm.

In contrast, consider the situation where a senior associate worked briefly on a revocable living trust for a client. After the attorney moves to a new firm, the new firm is retained for a case which involves attaching the assets owned by the attorney's former client. While the case may not be substantially related to the former representation, the attorney could do much more harm by telling the firm what assets the former client has and where to find them, than could the new associate who is an expert on the intricacies of diversity jurisdiction. Thus, the representation must be weighed against the likelihood that the attorney acquired confidential information that could harm the client.

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180. This was included in the original draft of the Comment to Rule 1.10, but was rejected by the committee. *See* Comment 11, cited at note 178.

181. *See* Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221 (7th Cir. 1978). See notes 84-90 and accompanying text for a discussion of the *Westinghouse* decision.

The Attorney's Position

Closely related to the first factor is the attorney's professional position at the time of the former representation.[182] Under the traditional application of the substantially related test, an associate who prepared a memorandum on a point of law is viewed in the same light as a partner who coordinated the case. The end result could be that an attorney with little knowledge of the case would be treated in the same manner as the case's lead counsel. Before a disqualification decision is made, the court should consider the attorney's position at the time of the prior representation; the more senior the attorney, the more likely that disqualification is appropriate.

Furthermore, an attorney may have acquired confidential information about a client or its legal affairs even though he or she was not formally "representing" the client. For example, a senior partner at a firm may not be handling a particular case, but is likely to be consulted and kept informed of developments if the case is substantial. In contrast, a first-year associate might know very little about any case outside the area in which he or she has been assigned to work. In such a situation, court approved screening of the partner would probably better protect the former client than would screening the first-year associate. The partner probably has more of a direct interest in the outcome of the litigation, both monetarily and professionally, than the new associate.

The Time Between the Representations

The third factor is the length of time that has elapsed since the representation of the former client.[183] Even if a matter is substantially related, it is unlikely that an attorney could do much damage if he or she worked on the case as an associate fifteen years ago. Memories fade and many things that may have been client confidences have either changed or become public record. Obviously, there are situations when even the passage of time does not make the confidence useless; antitrust cases can last up to twenty years. However, the court is likely to be aware

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182. The original Comment to Rule 1.10 referred to the lawyer's professional experience. *See* Comment 11, cited at note 178.

183. *See* United States ex rel. Lord Elec. Co. v. Titan Pac. Constr. Co., 637 F. Supp. 1556, 1565-66 (W.D. Wash. 1986) (considering not only the nature of the representation, but the amount of time since the representation).

if the case is of this nature and can account for that factor.

As an example, the scenario involving the attorney who worked on the living trust is applicable here also. If the firm is hired to find and attach assets fifteen years after the attorney helped with the trust, there is little chance that the attorney could harm the former client. The attorney would likely have forgotten what assets the former client had, and the former client's assets have probably changed dramatically.

When the Chinese Wall was Erected

Another consideration is the speed with which screening procedures are implemented. If the wall or screening measures are not implemented within a very short time after a conflict is discovered, the defense should not be allowed. A wall is meaningless if the other attorneys in the office have had time to obtain information from the attorney having the conflict. In contrast, a wall established immediately after the conflict arises should be presumptively valid.

For example, if Attorney *Y* of the firm takes on a new client and Attorney *X* of the firm formerly represented the client's adversary in a similar matter, efforts must be made to prevent *X* and *Y* from relaying information. As soon as the conflict is discovered, the office coordinator should be notified. The office coordinator should then inform the rest of the office that no one is to speak with Attorney *X* about the case. Files on the case should be immediately placed where Attorney *X* does not have access to them, and any files in the possession of Attorney *X* which might have confidential information about the former client should be placed where those handling the case cannot access them. Further, Attorneys *X* and *Y* should not continue to work on any cases together.

The courts that do permit screening have taken a close look at similar factors. In *EZ Paintr*, the Federal Circuit affirmed the disqualification of a firm because the firm had waited three months to erect Chinese walls.[184] The courts realize that if the screening procedures are not implemented quickly, there is little guarantee that information has not been passed, if even only by accident. Therefore, it is important that the screening be implemented as soon as is reasonably possible.

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184. *See* EZ Paintr Corp. v. Padco, Inc., 746 F.2d 1459, 1462 (Fed. Cir. 1984).

The Practical Effectiveness of the Wall

Another factor is the effectiveness of the wall. Here the court should look at the size of the firm and the screening procedures used.[185] A large firm will likely be more structured and have less contact between any two given attorneys than will a smaller firm. A large firm is also more likely to have separate departments that can assist in isolating one attorney from another. In contrast, a small firm is less likely to be able to sever all working relationships between two of its attorneys.

These considerations will usually make it easier for large firms to show that screening was implemented properly.[186] While superficially this apparent favoritism may seem unfair, closer examination reveals that it is not. Large firms have a much greater need for screening than do smaller firms.[187] Thus, allowing large firms to use screening more often is balanced by their increased need for the screening defense.

A court should also consider exactly what constitutes the wall. Even a small firm with screening measures that totally isolate the two attorneys is more likely to keep the client's confidences intact than a large firm that simply has a policy that the attorneys involved are not to discuss the case. Some commentators have suggested that the use of limited access filing cabinets and computer programs should be required to achieve the most effective screening.[188]

The Attorney's Potential Profit

Many of the courts that allow screening prohibit the attorney from sharing in the fees generated by the case.[189] If the screened attorney is a salaried associate, he or she probably has much less of a financial interest in revealing secrets than does a partner who gets a significant percentage of the firm's profits. Even though the screened partner cannot receive any fees from the case, the partner will indirectly benefit from the overall prof-

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185. *See Cheng*, 631 F.2d at 1058; *see also* Winslow, cited at note 37, at 884-85.

186. *See* Winslow, cited at note 37, at 884-85.

187. *See* GEOFFREY HAZARD, ETHICS IN THE PRACTICE OF LAW 81 (1978). "The risk of conflict rises exponentially with the size of the firm." *Id.*

188. *See* Winslow, cited at note 37, at 884.

189. *See, e.g.,* Cox v. American Cast Iron Pipe Co., 847 F.2d 725 (11th Cir. 1988); United States ex rel. Lord Elec. Co. v. Titan Pac. Constr. Co., 637 F. Supp. 1556, 1565-66 (W.D. Wash. 1986).

itability of the firm. The partner will have a much greater incentive to circumvent the screening. Thus, the court should also look at what the indirect profit will be to the attorney.[190]

Timing of the Motion for Disqualification

Both firms and courts should also consider the timing of the motion for disqualification.[191] The harm caused to a client by the disqualification of counsel is much less if the disqualification occurs shortly after the initial pleading. With the exception of the party's loss of its choice of counsel, the most significant harm comes after the firm has put a large amount of work into researching the case and developing case strategy. The harm increases exponentially in the short time before trial. If the firm is disqualified then, the cost to the client in time, money and aggravation may be enormous. While an early motion for disqualification should be weighed in favor of the former client, a court should be reluctant to grant a motion for disqualification shortly before trial. In fact, the only situation in which such a late motion should be granted is where there is a significant risk of confidential information being disclosed and the moving party can prove that it did not know of, nor have reason to know of opposing counsel's conflict of interest until shortly before the motion was filed.

If a motion is timely made, i.e. shortly after initial pleadings, the firm must consider its duty to the client. If there is a likelihood that the motion will be granted, the firm should withdraw, unless the client consents after full disclosure of both the conflict and the potential consequences of litigating the motion. It is a conflict of interest for a firm to spend the client's money trying to avoid disqualification unless it would be more costly for the client to retain new counsel. By fighting disqualification, the firm may be putting its own interests above those of the client. Thus, before challenging the motion, the firm should obtain the client's informed consent.

If a motion is made shortly before trial, the firm would be acting in the client's best interest by challenging the motion instead of allowing the motion to waste more time and money than that already expended in litigating the case. Therefore, while the firm should still obtain the informed consent of the

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190. *See Lord Electric*, 637 F. Supp. at 1565-66.

191. *See generally* Tobin, cited at note 4, at 219 (arguing that courts should readily grant motions to disqualify at the beginning of representation, but rarely when the trial is near).

client, the required disclosure would seemingly be less controversial, and the firm would be more justified in presenting a screening defense.

CONCLUSION

The changes in the legal profession have necessitated a change in the way courts decide motions for disqualification. Because of the hardships that disqualification can impose both on law firms and their clients, many courts have moved away from the rigidity of the ethics rules and toward the flexibility of rebuttable presumptions. This shift has led a slight majority of the circuit courts to recognize the use of screening procedures as a defense to the presumption of shared confidences and imputed disqualification.

Instead of rejecting the use of the screening defense, the ABA should amend the Model Rules to help the courts administer screening in a manner that will balance the protection of client confidences and the freedom to counsel of choice. If the ABA were to amend the Model Rules, it would have the twofold benefit of allowing the ABA to guide the use of screening to reach the fairest result, while enabling the courts to take a unified stand on the acceptability of screening.