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# CONFLICT ABOUT CONFLICTS: THE CONTROVERSY CONCERNING LAW FIRM SCREENS

SUSAN R. MARTYN\*

In thinking about today's panel presentation, I searched for an appropriate analogy that might readily convey what we advisors to the *Restatement of the Law Governing Lawyers*<sup>1</sup> faced in considering the conflict of interest rules. I focus in particular on the drafting of section 204, which addresses the question of whether screens should be allowed to wall off a lawyer tainted by the representation of a former client so the rest of her current law firm can continue to represent clients they otherwise could not. How did we extrapolate black letter from traditional sources while wrestling with the modern realities of law practice?<sup>2</sup>

Finally, just before Christmas, I stumbled across such an analogy in a very unlikely way. After years of lobbying, my eleven-year-old daughter won the "I want a dog" battle. I found a wonderful Christmas puppy at the Humane Society. When I asked, "What is she?" they replied: "We don't know." But, trying to sell her, they added: "We think she is probably a terrier of some sort, combined with cocker spaniel and poodle." Satisfied that I'd found a bit of everything, I brought her home. But my family still wonders — what will she look like when she grows up? When we asked our vet, he answered: "I honestly don't know."

Deliberating the *Restatement* sections as an advisor was like looking at my puppy. We could isolate several distinct genetic strains in the law, but were unable to detect which would become dominant as it matured. Eventually, satisfied that we'd found a bit of everything, we adopted a compromise provision.

Let me set the scene for you. We had already agreed on a series of fairly noncontroversial propositions. First, that absent client consent,<sup>3</sup> confidential client information could not be used against a former client.<sup>4</sup> Second, we agreed to a restatement of the *TC Theatres* substantial relationship test,<sup>5</sup> specifically designed to protect the former client who complains about such misuse of previous confidences.<sup>6</sup> This rule requires a court to reconstruct the legal and factual nature

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1. Charles W. Wolfram, *The Concept of a Restatement of the Law Governing Lawyers*, 1 GEO. J. LEGAL ETHICS 195 (1987).

2. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 204 (Tentative Draft No. 4, 1991) (Removing Imputation).

3. *Spivey v. Bender*, 601 N.E.2d 56 (Ohio Ct. App. 1991).

4. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 202 (Tentative Draft No. 4, 1991).

5. *T.C. Theatres Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265, 268 (S.D.N.Y. 1953).

6. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1989). The rule states: "(a) A lawyer

of the prior representation and to compare it with the current representation of an opposing party. If the matters are substantially related, the court irrebuttably presumes both receipt and use of former client confidences by the lawyer and disqualifies her from any further representation of opposing interests.<sup>7</sup>

The third step was to agree with the courts and professional rules that impute one lawyer's disqualification to the rest of his firm.<sup>8</sup> We then restated the one clear exception to the substantial relationship presumption: the peripheral representation rule of *Silver Chrysler Plymouth*.<sup>9</sup> When a disqualified lawyer is presumed to have confidences due to a vicarious as opposed to an actual representation of the former client, the presumption of receipt of confidential information becomes rebuttable.<sup>10</sup>

We then focused on the final issue requiring a resolution in section 204: What of a lawyer who actually represented the former client in a previous substantially related matter and now moves to a new law firm that represents an adversary? Is it sufficient that the lawyer be screened from participating in the case to prevent use of confidences against the former client? Or, absent the former client's consent, does the tainted newly hired lawyer simply vicariously disqualify the rest of his new firm as well?

Like my puppy, the terrier initially appeared dominant in our *Restatement* debate. The terrier was that tenacious black letter of the Model Rules and majority of the cases which state that screens are not allowed,<sup>11</sup> except in the special situation of

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who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation . . ." *Id.*; see also RESTATEMENT OF THE LAW GOVERNING LAWYERS § 204 (Preliminary Draft No. 4, 1989). Section 204 states:

A lawyer prohibited from representing a client or otherwise acting solely because of an affiliation described in Sec. 203 may nonetheless so represent or act when:

- (1) The lawyer terminates the affiliation that created the imputed prohibition without receiving confidential information of the client;
- (2) The lawyer remains in the affiliation and the primarily prohibited lawyer terminates the affiliation that created the imputation and has not communicated confidential information of the client to any other lawyer in the affiliation . . .

*Id.*

7. See, e.g., *Schiessle v. Stephens*, 717 F.2d 417 (7th Cir. 1983); *LaSalle Nat'l Bank v. County of Lake*, 703 F.2d 252 (7th Cir. 1983); *Novo Terapeutisk v. Baxter Travenol Lab.*, 607 F.2d 186 (7th Cir. 1979). *But see* *Castillo v. St. Paul Fire & Marine Ins. Co.*, 938 F.2d 776 (7th Cir. 1991); *INA Underwriters Ins. Co. v. Nalibotsky*, 594 F. Supp. 1199 (E.D. Pa. 1984); see also Sandra Mazliah, *Conflicts of Interest: Subsequent Adverse Representation*, 5 GEO. J. LEGAL ETHICS 79, 82 (1991).

8. CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D) (1991); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1991).

9. *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 370 F. Supp. 581 (E.D.N.Y. 1973), *aff'd*, 518 F.2d 751 (2d Cir. 1975).

10. See, e.g., *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715 (7th Cir. 1982); *Gas-A-Tron v. Union Oil Co.*, 534 F.2d 1322 (9th Cir.), *cert. denied*, 429 U.S. 861 (1976).

11. See, e.g., *Cheng v. GAF Corp.*, 631 F.2d 1052 (2d Cir. 1980); *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978); *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 557 F.2d 225 (2d Cir. 1977); *Baxter Diagnostics v. AVL Scientific Corp.*, No. CV 91-4178 RG(Ex), 1992 WL 158745 (C.D. Cal. July 2, 1992); *Koch v. Koch Indus.*, No. 85-1636-C, 1992 WL 156922 (D. Kan. June 11, 1992); *United States v. Davis*, 780 F. Supp. 21 (D.D.C. 1991); SEC

former government lawyers.<sup>12</sup> The first draft of the *Restatement* embodied this rule.<sup>13</sup>

Hiding beneath this wiry, hearty, apparently dominant characteristic of the law was a smaller piece of genetic history: cases that opened the door to screens for private as well as public lawyers.<sup>14</sup> Like the poodle in my puppy, this seductive strain of law appeared very different from the Model Rule approach and seemed to resist shedding in the few jurisdictions that had recognized it.<sup>15</sup> For some of the

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v. ESM Group, 66 B.R. 82 (Bankr. S.D.Fla. 1986); INA Underwriters Ins. Co. v. Nalibotsky, 594 F. Supp. 1199 (E.D. Pa. 1984); Williams v. Trans World Airlines, 588 F. Supp. 1037 (W.D. Mo. 1984); Mallard v. M/V "Germundo," 530 F. Supp. 725 (S.D. Fla. 1982), *aff'd*, 746 F.2d 813 (11th Cir. 1984); W.E. Basset Co. v. H.C. Cook Co., 201 F. Supp. 821, 824 (D. Conn. 1961), *aff'd per curiam*, 302 F.2d 268 (2d Cir. 1962); Edward J. DeBartolo Corp. v. Petrin, 516 So. 2d 6 (Fla. Dist. Ct. App. 1987); Otaka, Inc. v. Klein, 791 P.2d 713 (Haw. 1990); Lansing-Delaware Water Dist. v. Oak Lane Park, Inc., 808 P.2d 1369 (Kan. 1991); Freezer Servs. v. Mullen, 458 N.W.2d 245 (Neb. 1990); People v. Gelbman, 568 N.Y.S.2d 867 (Justice Ct., Rockland County 1991); Petroleum Wholesale v. Marshall, 751 S.W.2d 295 (Tex. Ct. App. 1988); Burkes v. Hales, 478 N.W.2d 37 (Wis. Ct. App. 1991).

12. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11 (1983); see, e.g., Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980) (en banc), *vacated for lack of jurisdiction*, 449 U.S. 1106 (1981); Kesselhaut v. United States, 555 F.2d 791 (Ct. Cl. 1977) (per curiam); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 342 (1976); see also C. Randolph Sullivan, *Building Chinese Walls in Virginia: Should Virginia Recognize the Chinese Wall Defense to Vicarious Disqualification?*, 26 U. RICH. L. REV. 391 (1992); James B. McLaren, Jr., *The Future of the Chinese Wall Defense to Vicarious Disqualification of a Former Government Attorney's Law Firm*, 38 WASH. & LEE L. REV. 151 (1981).

13. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 204 (Preliminary Draft No. 4, 1989).

14. Kennecott Corp. v. Kyocera Int'l, 899 F.2d 1228 (D.C. Cir. 1990); Manning v. Waring, Cox, James, Sklar & Allen, 849 F.2d 222 (6th Cir. 1988); Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564 (D.C. Cir. 1984); Dugar v. Board of Educ. of Chicago, No. 92-C-1621, 1992 WL 142302 (N.D. Ill. June 18, 1992); Lofton v. Brown & Williamson Tobacco Corp., No. 90-C-5796, 1992 WL 3731 (N.D. Ill. Jan. 7, 1992); Rockwell Graphics Sys. v. DEV Indus., No. 84-C-6746, 1991 WL 127592 (N.D. Ill. June 24, 1991); Kearns v. Chrysler Corp., 771 F. Supp. 190 (E.D. Mich. 1991); Margiotta v. McLaren, 115 B.R. 922 (Bankr. N.D. Ohio 1990); Walker v. Sweet Cravings, Inc., No. 89-CV-73084-DT, 1990 WL 300284 (E.D. Mich. Sept. 6, 1990); Geisler v. Wyeth Lab., 716 F. Supp. 520 (D. Kan. 1989); *In re Stamford Color Photo, Inc.*, 98 B.R. 135 (Bankr. D. Conn. 1989); Renz v. Beeman, No. 87-CV-487, 1989 WL 16062 (N.D.N.Y. Feb. 21, 1989); Salamon v. Messina, No. 87-C-2097, 1989 WL 6502 (N.D. Ill. Jan. 25, 1989); Nemours Found. v. Gilbane, Aetna, Fed. Ins. Co., 632 F. Supp. 418 (D. Del. 1986); Kapco Mfg. Co. v. C & O Enters., 637 F. Supp. 1231 (N.D. Ill. 1985); Hughes v. Pain, Webber, Jackson & Curtis Inc., 565 F. Supp. 663 (N.D. Ill. 1983); INA Underwriters Ins. Co. v. Rubin, 635 F. Supp. 1 (E.D. Pa. 1983); Jenson v. Touche Ross & Co., 335 N.W.2d 720 (Minn. 1983); Rowley v. Waterfront Airways, 113 A.D.2d 926 (N.Y. App. Div. 1985).

15. See, e.g., Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564 (D.C. Cir. 1984) (applying 7th Cir. law); Schiessle v. Stephens, 717 F.2d 417 (7th Cir. 1983); Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263 (7th Cir. 1983); LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252 (7th Cir. 1983); Novo Terapeutisk v. Baxter Travenol, Inc., 607 F.2d 186 (7th Cir. 1979); Dugar v. Board of Educ. of Chicago, No. 92-C-1621, 1992 WL 142302 (N.D. Ill. June 18, 1992); Lofton v. Brown & Williamson Tobacco Corp., No. 90-C-5796, 1992 WL 3731 (N.D. Ill. Jan. 7, 1992); Rockwell Graphics Sys., Inc. v. DEV Indus., Inc., No. 84-C-6746, 1991 WL 127592 (N.D. Ill. June 24, 1991); Salamon v. Messina, No. 87-C-2097, 1989 WL 6502 (N.D. Ill. Jan. 25, 1989); Kapco Mfg. Co. v. C & O Enters., Inc., 637 F. Supp. 1231 (N.D. Ill. 1985); Hughes v. Pain, Webber, Jackson & Curtis Inc., 565 F. Supp. 663 (N.D. Ill. 1983). State courts within the Seventh Circuit have followed these federal decisions. See, e.g., Thornton v. Thornton, 486 N.E.2d 1288 (Ill. App. Ct. 1985); Weglarz v. Bruck, 470 N.E.2d 21 (Ill. App.

*Restatement* advisors, it seemed impossible to distinguish the inviting smoothness of this apparently more sophisticated approach from the peripheral representation exception. Both screens and the peripheral representation exception procedurally operate in the same way: They rebut the presumption created by the substantial relationship test.<sup>16</sup>

Others, including me, distinguished the peripheral representation rule from the screens in private firms cases. We argued that, although both procedurally operate to rebut the presumption, the substance of the two rules diverged substantially. The peripheral representation rule allows a lawyer whose initial taint is only vicarious to rebut the receipt of confidential information. This *protects* the prior client because the lawyer is required to prove that she never received any confidential information in the first place. The screen rule, on the other hand, admits receipt of the information. It does not act to rebut the presumption but instead promises protection from *using* these secrets by isolating the tainted lawyer from the rest of her firm.<sup>17</sup> Implicitly recognizing this distinction, most courts correctly hold that in the absence of the former client's consent to the substantially related representation or the former lawyer's peripheral representation, the presumption of both receipt and ability to use confidential information is irrebuttable.<sup>18</sup>

Once these issues surfaced in the *Restatement* debate, a definite split became evident among the *Restatement* advisors. This is where I first began to see the conflict about conflicts. Both groups seemed blinded by self interest. One group (the majority it turned out) — like my Humane Society — pragmatically wanted to sell the dog. They focused less on the settled law, and more on where and why it should change and develop. The other group of advisors — I'll call them the purist minority<sup>19</sup> — seemed (to me at least) more like my vet, valiantly trying to isolate the various genetic strains and admitting the difficulty of accurately predicting the size and shape of the fully grown animal.

I'll bet you can't guess the viewpoint of the majority of practitioners in the group. "Trust us," they argued: the peripheral representation exception and screens are indistinguishable. Screens prevent leaks just as the peripheral representation rule assures that confidential information is not passed to others. This group was joined by Geoffrey Hazard of Yale who pleaded for a pragmatic reality check: Why was the purist minority so blinded by the policy of confidentiality to the former

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Ct. 1984); *Berg v. Marine Trust Co.*, 416 N.W.2d 643 (Wis. Ct. App. 1987); see also Craig A. Peterson, *Rebuttable Presumptions and Intra-Firm Screening: The New Seventh Circuit Approach to Vicarious Disqualifications of Litigation Counsel*, 59 NOTRE DAME L. REV. 399 (1984).

16. See, e.g., M. Peter Moser, *Chinese Walls: A Means of Avoiding Law Firm Disqualification When a Personally Disqualified Lawyer Joins the Firm*, 3 GEO. J. LEGAL ETHICS 399 (1990).

17. See, e.g., Mark Brodeur, *Building Chinese Walls: Current Implementation and a Proposal for Reforming Law Firm Disqualification*, 7 REV. LITIG. 167 (1988); Stephen H. Goldberg, *The Former Client's Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly*, 72 MINN. L. REV. 227, 279 (1987); Donald R. McMinn, *ABA Formal Opinion 88-356: New Justification for Increased Use of Screening Devices to Avert Attorney Disqualification*, 65 N.Y.U. L. REV. 1231, 1254 (1990).

18. See *supra* note 9.

19. This appellation comes from Stephen Gillers, *Conflicts: Risky New Rules*, AM. LAW., Sept. 1989, at 39, 40.

client?<sup>20</sup> Could we not understand the realities of modern practice and rely on the integrity of the bar? Another practicing lawyer-advisor, Peter Moser, joined this chorus, penning an article in the *Georgetown Journal of Legal Ethics* that same year.<sup>21</sup> I, being completely free of conflict, argued that acceptance of this argument boiled down to a leap of faith in favor of the practitioners. I was initially surprised when they agreed. Surprise turned to understanding, however, when they added that only skeptics who live in ivory towers would fail to trust the bar.

This was a comment aimed not only at me, but also at Thomas Morgan, the associate reporter who drafted the conflicts rules. His first draft took the traditional no-screen approach and he was already on record in a published article as concluding that screens are a "problem because, . . . a client can often never know for sure when or whether his confidence has been abused. That the trustworthy must suffer for the sins of the rest is unfortunate, but client confidence must be the key."<sup>22</sup>

The practitioner's comments were also aimed at Chief Reporter Charles Wolfram, who had summarized his views regarding screens in very colorful language in his hornbook: "In the end there is little but the self-serving assurance of the screening-lawyer foxes that they will carefully guard the screened lawyer chickens."<sup>23</sup> The issue was joined.

Eventually, three other practitioners in the group convinced me I was right after all. The first, a Philadelphia lawyer who practices in a jurisdiction that allows screens, argued, complete with over a dozen pages of written narrative,<sup>24</sup> that even if we trust lawyers, inadvertent leaks in screens were inevitable. Once allowed, screens proliferate. A firm of one hundred lawyers with even a few lateral hires soon has dozens or even hundreds of screens. Unless screened lawyers avoid conversation with the rest of the firm entirely, inadvertent disclosure presents an ever present risk.

This concern was shared by two others. The first was a former large-firm lawyer, now loss prevention counsel to the largest malpractice insurer of large firms in the country, who worried about liability when inevitable leaks occurred.<sup>25</sup> Better to decline representation of the other side than flirt with disaster, he argued. It didn't surprise me to learn that the final practitioner who spoke against screens was from

20. 1 GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 1.10:207, at 334 (2d ed. 1990) (stating that imposing a rule of vicarious disqualification is based on the unwarranted assumption that lawyers will violate professional norms).

21. Moser, *supra* note 16, at 399.

22. Thomas D. Morgan, *Screening the Disqualified Lawyer: The Wrong Solution to the Wrong Problem*, 10 U. ARK. LITTLE ROCK L.J. 37, 54 (1987-88).

23. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 7.6.4, at 402 (1986).

24. Letter and essay from Lawrence Fox, Philadelphia, Pa., for the ABA Section of Litigation, to author (July 27, 1990) (on file with author).

25. Robert E. O'Malley et al., *Preventing Legal Malpractice in Large Law Firms*, 20 U. TOL. L. REV. 325, 358 (1989).

a relatively small town and practices in the smallest firm (about thirty lawyers) represented by the advisors.

The result of this debate? The initial preliminary no-screen rule draft was modified to allow screens, but only in limited cases. The second, third, and fourth drafts that eventually passed both the ALI council and membership provide for screens as long as confidential client information communicated to the personally prohibited lawyer is "not likely to be significant in the later case,"<sup>26</sup> and both timely<sup>27</sup> and adequate screening<sup>28</sup> procedures are followed.

What strikes me as disappointing about this debate and vote is not only that I lost, but also that the entire argument focused on the wrong issues. Instead of balancing the past client's rights against the current law firm's integrity, we should have weighed concern for the past client against regard for the *current* client's right to choose counsel. Had we recognized harm to the current client as the major competing policy, perhaps we also would have noted that, though less often mentioned in the cases, it nevertheless is cited as a central concern in the major decisions that recognize screens.<sup>29</sup>

Have we chosen correctly? We could have elected to outlaw screens because of their dangers. This might, however, have meant an eventual limit on law firm size or lawyer mobility. It also would have meant that ethics controlled the market for legal services, not vice versa.<sup>30</sup> Instead, we chose to open the door to screens and watch carefully.<sup>31</sup>

Our choice bears a striking resemblance to a similar choice made by Investment Bankers nearly thirty years ago. At first, they devised so-called "Chinese Walls" as a separation between their underwriting and brokerage operations.<sup>32</sup> They did so initially as a defense against insider trader liability, just as screens are now touted by law firms as a defense against disqualification.

The next step was to use screens as a defense in suits brought by investors claiming breach of fiduciary duty because their brokers allegedly should have

26. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 204 (Preliminary Draft No. 4A, 1989); RESTATEMENT OF THE LAW GOVERNING LAWYERS § 204 (Council Draft No. 3, 1989); RESTATEMENT OF THE LAW GOVERNING LAWYERS § 204 (Tentative Draft No. 4, 1991). The "not likely to be significant" standard may create interpretive problems.

27. For examples of a timely screen, see *United States v. Goot*, 894 F.2d 231 (7th Cir.), *cert. denied*, 111 S. Ct. 45 (1990). For examples of disqualification for an untimely screen, see *Schiessle v. Stephens*, 717 F.2d 417 (7th Cir. 1983); *Analytica Inc. v. NPD Research, Inc.*, 708 F.2d 1263 (7th Cir. 1983); *Haagen-Dazs Co. v. Perche No! Gelato, Inc.*, 639 F. Supp. 282 (N.D. Cal. 1986).

28. For examples of adequate screens, see *Rockwell Graphics Sys. v. DEV Indus., Inc.*, No. 84-C-6746, 1991 WL 127592 (N.D. Ill. June 24, 1991); *Kovacevic v. Fair Automotive Repair, Inc.*, 641 F. Supp. 237 (N.D. Ill. 1986) (applying Eighth Circuit law).

29. See, e.g., *Nemours Found. v. Gilbane, Aetna, Fed. Ins. Co.*, 632 F. Supp. 418, 427 (D. Del. 1986); see also McMinn, *supra* note 17, at 1249-50; Morgan, *supra* note 22, at 50-51; Comment, *The Chinese Wall Defense to Law-Firm Disqualification*, 128 U. PA. L. REV. 677, 679 (1980).

30. ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 354 (1953).

31. See *Symposium Question and Answer Session*, 46 OKLA. L. REV. 31, 34 (1993).

32. Note, *Unchanged Rules in Changing Times: The Canons of Ethics and Intra-Firm Conflicts of Interest*, 73 YALE L.J. 1058 (1964).

known and then used the investment banker's secrets.<sup>33</sup> This may be the next stage of law firm litigation — breach of fiduciary duty lawsuits by current clients who allege that screens prevented full advocacy of their position or, worse, that a leaky screen cost them a long-term lawyer.<sup>34</sup>

Today brokerage firms seem to "have it all": investment banking services and trading services. The legal quid pro quo, however, is that the SEC has recently moved from permission to use screens to rules that require them.<sup>35</sup> In fact, the absence of proper institutional policies and procedures regarding screens today creates the basis for liability — not only civil but criminal as well.<sup>36</sup>

This may be where the law is headed in jurisdictions that allow screening for lawyers.<sup>37</sup> Consider the consequences. Lawyers will soon be required to have screens, including procedures that establish them, monitor them, and audit firm compliance. If the broker's case history is instructive, these procedures and policies will probably include three categories of requirements.

First, initial procedures to set up screens will have to be established. Second, subsequent monitoring to assure that screens perform their required function will need to be implemented. Finally, law firm policies and procedures that encourage detection and correction of problems will have to be established and maintained.

Initial procedures begin with detection of conflicts by requiring that each newly hired lawyer bring a complete list of former clients, including those not actually represented by the newly hired lawyer but represented by her previous law firm while she was there. An initial conflicts check should then be completed and screens should be established in all cases where current clients of the firm oppose a party formerly represented by the new lawyer's old law firm.<sup>38</sup>

These screens, to be adequate, must include physical separation of files,<sup>39</sup>

33. James R. Doty & David N. Powers, *Chinese Walls: The Transformation of a Good Business Practice*, 26 AM. CRIM. L. REV. 155, 157 (1988) (discussing *Slade v. Shearson, Hammill & Co.*, [1973-1974 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,439 (S.D.N.Y.), *remanded*, 517 F.2d 398 (2d Cir. 1974)).

34. *See, e.g.*, *Dewey v. R.J. Reynolds Tobacco Co.*, 536 A.2d 243 (N.J. 1988); *Padco, Inc. v. Kinney & Lange*, 444 N.W.2d 889 (Minn. Ct. App. 1989).

35. Doty & Powers, *supra* note 33, at 173.

36. *Id.* at 174.

37. For examples of permissible screens with adequate procedures, see *United States v. Goot*, 894 F.2d 231 (7th Cir.), *cert. denied*, 111 S. Ct. 45 (1990); *Rockwell Graphics Sys. v. DEV Indus., Inc.*, No. 87-C-6746, 1991 WL 127592 (N.D. Ill. June 24, 1991); *In re Chicago South Shore & South Bend R.R.*, 101 B.R. 10 (Bankr. N.D. Ill. 1989). For cases identifying institutional mechanisms which were not met, see *Schiessle v. Stephens*, 717 F.2d 417 (7th Cir. 1983) (no screen established); *Analytica, Inc. v. NP Research, Inc.*, 708 F.2d 1263 (7th Cir. 1983) (institutional mechanisms not in place); *LaSalle Nat'l Bank v. County of Lake*, 703 F.2d 252 (7th Cir. 1983) (procedures not established at lawyer's entry into firm); *United States v. Alex*, 788 F. Supp. 359 (N.D. Ill. 1992) (no screen established); *Bridge Prods., Inc. v. Quantum Chem. Corp.*, No. 88-C-10734, 1990 WL 70857 (N.D. Ill. Apr. 27, 1990) (screen not available where law firm, not lawyer, changed sides); *Hutnick v. Inland Steel Co.*, No. 86-C-2567, 1987 WL 9003 (N.D. Ill. Mar. 27, 1987) (screen not established).

38. The former client list should be retained for conflicts checks as new clients seek representation from the firm.

39. *See, e.g.*, *United States v. Goot*, 894 F.2d 231 (7th Cir.), *cert. denied*, 111 S. Ct. 45 (1990); *Cox*

allowing access to screened cases on a "need to know" basis only. Special attention must be paid to secret codes in computer data bases. Further, separate records, billings, and profit statements must be established.<sup>40</sup> Finally, all attorneys and support staff in the firm must be informed of the screens.<sup>41</sup>

Once an adequate screen is established, it will need to be either disassembled or monitored. The former may be appropriate if the former client consents,<sup>42</sup> or if the prior representation is peripheral and the law firm has established that fact.<sup>43</sup> In all other cases, screens will need monitoring for as long as the adverse representation continues, often years. Adequate monitoring may include signs or tags on paper and computer files, as well as on the doors or walls of screened lawyers. To guard against inadvertent leaks of information, informal firm meetings on screened cases may need to be abandoned in favor of formal meetings with attendance noted.<sup>44</sup>

Screened lawyers also should be kept physically separate from the rest of the firm, whether within a unit, or by placing the screened lawyer in one unit (say, health care) separated from another (for example, labor or litigation).<sup>45</sup> Another way to enforce this separation suggested by securities firms is to require that records be kept of all phone calls between screened lawyers and those working on the screened cases. This will remind both groups that contact is appropriate for other purposes, but that complete records must be kept to substantiate the content, date, and duration of the call.<sup>46</sup>

Because these procedures are cumbersome and might not prevent intentional or even inadvertent leaks, law firms may also be required to audit their firm's

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v. American Cast Iron Pipe Co., 847 F.2d 725 (11th Cir. 1988); *Rockwell Graphics Sys. v. DEV Indus., Inc.*, No. 84-C-6746, 1991 WL 127592 (N.D. Ill. June 24, 1991); *Kearns v. Chrysler Corp.*, 771 F. Supp. 190 (E.D. Mich. 1991); *In re Chicago South Shore & South Bend R.R.*, 101 B.R. 10 (Bankr. N.D. Ill. 1989); *Nemours Found. v. Gilbane, Aetna, Fed. Ins. Co.*, 632 F. Supp. 418 (D. Del. 1986); *Rowley v. Waterfront Airways, Inc.*, 113 A.D.2d 926 (App. Div. 1985); *INA Underwriters Ins. Co. v. Rubin*, 635 F. Supp. 1 (E.D. Pa. 1983).

40. *See, e.g., Cox v. American Cast Iron Pipe Co.*, 847 F.2d 725 (11th Cir. 1988); *Dugar v. Board of Educ.*, 1992 WL 142302 (N.D. Ill. June 18, 1992).

41. *See, e.g., Rockwell Graphics Sys. v. DEV Indus., Inc.*, No. 84-C-6746, 1991 WL 127592 (N.D. Ill. June 24, 1991); *Kearns v. Chrysler Corp.*, 771 F. Supp. 190 (E.D. Mich. 1991); *In re Chicago South Shore & South Bend R.R.*, 101 B.R. 10 (Bankr. N.D. Ill. 1989); *Bauunternehmung v. United States*, 8 Cl. Ct. 793 (Cl. Ct. 1985).

42. MODEL RULE OF PROFESSIONAL CONDUCT Rule 1.9 (1991) (allowing the former client to consent to the representation). Of course, this consent could be conditioned on maintaining a screen around the lawyer responsible for the taint.

43. *See, e.g., American Can Co. v. Citrus Food Co.*, 436 F.2d 1125, 1129-30 (5th Cir. 1971); *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 370 F. Supp. 581 (E.D.N.Y. 1973), *aff'd*, 518 F.2d 751 (2d Cir. 1975); *Gas-A-Tron v. Union Oil Co.*, 534 F.2d 1322 (9th Cir. 1976)(*per curiam*), *cert. denied*, 429 U.S. 861 (1976); *Panduit Corp. v. All States Plastic Mfg.*, 744 F.2d 1564, 1578-81 (D.C. Cir. 1984).

44. *Doty & Powers, supra note 33*, at 471-72.

45. *Id.* at 470.

46. *Id.* at 471.

compliance on a periodic basis.<sup>47</sup> This task will require the establishment of a law firm compliance department, perhaps an ethics committee or branch of a management committee.<sup>48</sup> The group should establish policies and procedures that encourage disclosure of leaks and give the committee authority to discipline those who fail to comply with screening mechanisms. The department or committee should also be responsible for continuing professional education that informs firm members of policies regarding conflicts checks, establishing and maintaining screens.<sup>49</sup>

I will end, perhaps appropriately for this topic, with another dog story. About a month before we got our puppy I told my daughter: "Be careful — you might get what you ask for." Dogs are good companions and protectors but they also require care and feeding — all the time. This will seem fine when you're in the mood, but it's no fun when you're tired, disorganized, distracted by TV, or burdened by some other responsibility.

I'll end with a similar admonition to the bar. "Be careful, you might get what you ask for — and the ALI will help you." Then will follow the endless responsibility of detecting, implementing, and monitoring dozens or hundreds of screens at the same time. Remember, if you fail and the screen is inadequate, you will lose only two things: all your fee to the current client because you're now disqualified for conflict of interest,<sup>50</sup> and a malpractice suit by the *former* client based on your breach of fiduciary duty for misusing his confidences.<sup>51</sup>

The alternative? Live without the dog. Your life is full enough. Avoid conflicts by caring for your *current* lawyers. Avoid lateral hires and mergers and strive instead to specialize, develop and split up firms.

Perhaps with all these conflicts about conflicts the pragmatists and purists can at least compromise by agreeing to a relevant inquiry. It is a question we all seemed too afraid to ask and one we probably should have started with: Which rule will better serve the public — the ALI rule allowing screens, or the traditional approach banning them?<sup>52</sup> Will the public be better served by larger law firms with increasingly changing lawyer associates and partners? Or will they be equally or better served by smaller and more stable law firms?

47. *Id.* at 471-72.

48. O'Malley, *supra* note 25, at 361.

49. Doty & Powers, *supra* note 33, at 472.

50. *See supra* note 34.

51. *See, e.g.,* Sherbak v. Doughty, 420 N.Y.S.2d 724 (App. Div. 1979); *see also* 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 13.23, at 803-05 (3d. ed. 1989).

52. Susan R. Martyn, *Professionalism: Behind a Veil of Ignorance*, 24 U. TOL. L. REV. 189 (1992).

