Attorneys: Vicarious Disqualification and the Model Rules of Professional Conduct

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NOTES

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In today's mobile society, people often move from one place of work to another. This is true of all occupations, but it creates particular problems for attorneys. Because of the nature of their work, attorneys are exposed to clients' confidential information. This exposure results in "imputed disqualification" problems for both individual attorneys and law firms.

The doctrine of imputed disqualification grants the courts the power to disqualify a whole law firm where a single member of the firm would be disqualified for a conflict of interest. The doctrine recognizes that lawyers form law firms in order to combine their skill and expertise. As a result of this pooling of skills, client confidences within the knowledge of one attorney are often revealed to another. The exposure may be inadvertent; nevertheless, when an attorney leaves one law firm to join another, he takes with him all client confidences disclosed to him in his prior employment. By joining a law firm that represents an interest adverse to any of the attorney's previous clients, the potential exists for the attorney to use the confidences of a former client against that client.

The "infected" attorney cannot always cure the problem by allowing a coworker to handle the project. Confidences can be used just as easily by an informed coworker as by the original recipient of the information. The doctrine of imputed disqualification is designed to prevent this potential misuse of information.

This note analyzes the law concerning imputed disqualification as it has developed to its present-day form. The following situation is examined. A is an attorney for law firm #1. During his employment, A is the primary contact for client X. A leaves law firm #1 and goes to work for law firm #2. Law firm #2 represents client Y, the opposing party to X. First, the note focuses on the problem of successive representation as a basis for primary disqualification. Second, the development of the imputed disqualification doc-

1. Note, An Equitable Alternative to the Discriminatory Imposition of Vicarious Firm Disqualification, 31 Wayne L. Rev. 1031 (1985). The doctrine is also known as the "vicarious disqualification doctrine." The term "vicarious" is used because the disqualification arises from the conduct of the individual attorney and not that of the entire law firm. The term "imputed" is used by the 1983 Model Rules of Professional Conduct.

2. See generally LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252, 258 (7th Cir. 1983) (attorneys that possess previous client confidences that may be used against the same client who revealed the information referred to as "Typhoid Marys"). The court stated that an entire law firm may be disqualified as a result of "infection." Id.
trine is examined as it has changed from the Code of Professional Responsibility to the Model Rules. Third, the "Chinese Wall" or screening defense is discussed as a method of avoiding an imputed disqualification. Fourth, the Model Rules of Professional Conduct are examined. Because Oklahoma has little case law in this area, a Delaware case will be considered for its persuasive value. The case involves a fact pattern similar to the hypothetical situation presented above and interprets rules identical to the Oklahoma Model Rules of Professional Conduct. The Oklahoma Bar Association has accepted the Model Rules of Professional Conduct; however, the rules are not binding until they are adopted by the Oklahoma Supreme Court. Finally, the note suggests possible solutions to the problems presented by the doctrine of imputed disqualification.

Imputed disqualification is a two-step process involving both primary and secondary disqualifications. The primary disqualification occurs when an individual member of a law firm is disqualified or required to withdraw from representation because of a conflict of interest. The primary disqualification typically results in the secondary disqualification, that is, the disqualification of the entire law firm.

In determining whether to disqualify an attorney or a law firm, the courts have looked to the Model Code of Professional Responsibility for guidance. Although the Code has been used as a guide to determine whether a disqualification motion should be allowed, it has some significant problems. First, the ABA overlooked the problems associated with successive representation. A successive representation conflict of interest occurs when an attorney represents a client whose interest is adverse to a previous client. Second, although the imputed disqualification rule, DR 5-105(D), was initially drafted too narrowly, a 1974 amendment resulted in an overly broad rule. Finally, the rules appear to ignore the inequities that result from their implementation.

In an attempt to resolve some of the problems associated with the Code, the ABA presented the legal community with the Model Rules of Profes-

3. The term "Chinese Wall" refers to any set of physical and procedural barriers intended to prevent one member of an organization from being exposed to information relating to a matter currently or formerly handled by one of his colleagues. Amoco Chem. v. MacArthur, 568 F. Supp. 42, 47 n.9 (N.D. Ga. 1983).
6. C. WOLFRAM, MODERN LEGAL ETHICS § 7.6, at 393 (1986).
8. The rule was limited to disqualifications arising "under DR 5-105" only (emphasis added). MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D) (1980).
9. See infra note 33 and accompanying text.
sional Conduct.\textsuperscript{10} The House of Delegates for the Oklahoma Bar Association adopted its own version of the rules at the November 1986 bar convention.\textsuperscript{11}

The Primary Disqualification

The actual disqualification of an individual attorney must occur before an imputed disqualification occurs.\textsuperscript{12} The Code provides no guidance to attorneys facing the problem of successive representation. As a result, most courts have adopted the "substantial relationship" test to determine if successive representation conflicts of interest exist.\textsuperscript{13}

The Judicially Created Substantial Relationship Test

The substantial relationship test was first used in the case of \textit{T. C. Theater Corp. v. Warner Brothers Pictures, Inc.}\textsuperscript{14} In this case, the court held that "where any substantial relationship can be shown between the subject matter of the former representation and that of a subsequent adverse representation, the latter will be prohibited."\textsuperscript{15} Once such a relationship is shown, the court will presume that client confidences were divulged to the attorney during the former representation.\textsuperscript{16}

In \textit{Westinghouse Electric Corp. v. Gulf Oil Corp.},\textsuperscript{17} the Seventh Circuit modified this test to provide guidelines to determine what constitutes a "substantial relationship." A judge must make a three-level inquiry to determine if such a relationship exists. The judge must (1) reconstruct the scope of the prior legal representation; (2) determine whether a reasonable inference can be made that the confidential information allegedly given would have been given to a lawyer representing a client in those matters; and (3) determine whether the information is relevant to the issues raised in the litigation pending against the former client.\textsuperscript{18}

Once the substantial relationship is proved, a presumption arises that the attorney has been exposed to the client confidences and should be disqualified. Some courts hold that this presumption is irrebuttable.\textsuperscript{19} This rule

\begin{itemize}
\item \textsuperscript{10} \textit{Model Rules of Professional Conduct} (1983).
\item \textsuperscript{11} \textit{Proposed Oklahoma Model Rules of Professional Conduct, 57 Okla. B.J. 1997} (Sept. 6, 1988).
\item \textsuperscript{12} See infra note 30.
\item \textsuperscript{13} \textit{E.g., Smith v. Whatcott, 757 F.2d 1098 (10th Cir. 1985), rev'd on other grounds, 774 F.2d 1032 (10th Cir. 1983); Trone v. Smith, 621 F.2d 994 (9th Cir. 1980); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975); Simmon's, Inc. v. Pinkerton's, Inc., 555 F. Supp. 300 (N.D. Ind. 1983).}
\item \textsuperscript{14} 113 F. Supp. 265 (S.D.N.Y. 1953).
\item \textsuperscript{15} \textit{Id.} at 268.
\item \textsuperscript{16} \textit{Id.}
\item \textsuperscript{17} 588 F.2d 221 (7th Cir. 1978).
\item \textsuperscript{18} \textit{Id.} at 225.
\item \textsuperscript{19} Analytical, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1268 (7th Cir. 1983); Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 646 F.2d 1020, 1028 (5th Cir. 1981); \textit{In re Yarn Processing Patent Validity Litig.}, 530 F.2d 83, 89 (5th Cir. 1976); Hughes v. Paine, Webber, Jackson & Curtis, Inc., 565 F. Supp. 663, 669 (N.D. Ill. 1983).}
\end{itemize}
is consistent with the language of *T. C. Theater*, which states that the court may not inquire into the nature and extent of the disclosure. Other courts, however, have modified the test to allow the presumption to be rebutted if "there was no realistic chance" that the former client confidences were disclosed.

**Model Rule 1.9’s Codification of Substantial Relationship Test**

The Model Rules of Professional Conduct, unlike the Model Code, have a provision specifically designed to address the successive representation problem. Rule 1.9 adopts the substantial relationship test and, thus, reflects the majority view. Rule 1.9 also incorporates rule 1.6. This allows an attorney to use confidential information given by a former client if such use is in accord with rule 1.6; that is, the former client must consent to the attorney's representation of an adverse client. This waiver provision is consistent with DR 5-105(C), which states that "a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."27


21. Cheng v. GAF Corp., 631 F.2d 1052, 1056 (2d Cir. 1980), vacated, 450 U.S. 903 (1981); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 757 (2d Cir. 1975) Accord, LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252, 256 (7th Cir. 1983); Freeman v. Chicago Musical Instr. Co., 689 F.2d 715, 722 (7th Cir. 1982); Simon's, Inc. v. Pinkerton's, Inc., 555 F. Supp. 300 (N.D. Ind. 1983) (The author of this note calls to attention that both *LaSalle* and *Freeman* cite incorrectly Novo Terapeutik, Etc. v. Baxter Travenol Lab., 607 F.2d 186, 197 (7th Cir. 1979). In that case, the court allowed a presumption to be rebutted that an attorney shared confidences of a former client with his new firm. Both *LaSalle* and *Freeman* cite the case for the proposition that the individual attorney can rebut the presumption that confidential information was received by the attorney while employed with the previous firm).


23. See cases cited supra note 13.

24. Model Rules of Professional Conduct Rule 1.9 (1983) provides:

**CONFLICT OF INTEREST: FORMER CLIENT**

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

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

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

25. *Id*. Rule 1.6(a) provides in part: "(a) a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation."

26. "Disqualification from subsequent representation is for the protection of clients and can be waived by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's intended role in behalf of the new client." *Id*. Rule 1.9 comment 4.

27. Model Code of Professional Responsibility DR 5-105(C) (1980).
Rule 1.9 codifies the previous judicial tests. However, when determining whether a substantial relationship exists, one must keep in mind the question of "whether the lawyer was so involved in the [previous] matter that the subsequent representation can be justly regarded as changing sides in the matter." The rule provides stability by emphasizing the concept of loyalty.

The Secondary Disqualification

Once an attorney is disqualified as a result of a conflict of interest, the entire law firm where the individual is employed may also be disqualified under DR 5-105(D).

28. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 comment [2] (1983) provides: The scope of a "matter" for purposes of Rule 1.9(a) may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

29. Lawyers who participate in office-sharing arrangements may be treated as partners under the imputed disqualification rule. In re Opinion No. 415, 81 N.J. 318, 407 A.2d 1197 (1979). But see ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1486 (1982) (lawyers with conflicting interests may share office space if reasonable care is taken to protect confidential information, and all affected clients consent).

30. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1980) provides:
Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer
(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.
(D) 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 Code of Professional Responsibility

The American Bar Association first implemented the rule of imputed disqualification in 1969. As a result of poor drafting, the rule was limited to only disqualifications arising "under DR 5-105." DR 5-105 directs an attorney to decline employment or to discontinue multiple employment where the "exercise of his independent professional judgment on behalf of a client will be or is likely to be adversely affected by his representation of another." Other conflicts, such as successive representation problems, were not covered. In 1974 the ABA added an amendment that made the rule overly broad. As amended, the rule states: "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 associated with him or his firm may accept or continue such employment."

The language of DR 5-105(D) mandates a disqualification, but the courts are reluctant to apply the rule in this manner. Imputed disqualification is viewed as a harsh measure to be implemented only as a last resort. The view results from the inequities that occur when an imputed disqualification takes place. The party that wins a disqualification motion gains an extreme tactical advantage. The client whose lawyer is disqualified is denied the counsel of choice and risks the loss of the attorney's work product. The client also is significantly delayed while searching for replacement counsel and waiting for new counsel to become familiar with the case. After an imputed disqualification has occurred, a client may be forced to settle because of a lack of resources. As a result, the imputed disqualification rules are subject to manipulation in order to obtain a tactical advantage.

The imputed disqualification rule, DR 5-105(D), gives rise to a presumption that an attorney who has been exposed to a former client's confidences has shared them with his present associates. Some courts have held this


32. Id. (emphasis added).

33. Model Code of Professional Responsibility amend. 246 (1979) (emphasis added). The Oklahoma Supreme Court has not adopted this amendment. However, when interpreting the statute, the courts have kept in mind that the purpose of the amendment was to bring all conflict of interest disqualifications under the imputed disqualification rule.

34. Freeman v. Chicago Musical Instr. Co., 689 F.2d 715, 721 (7th Cir. 1982); Kesselhaut v. United States, 555 F.2d 791, 794 (Ct. Cl. 1977) (en banc).

35. One extreme of manipulation of the vicarious disqualification doctrine is for a shrewd client to disclose his particular case to an attorney of every major law firm in town before deciding which firm to retain. After doing so, the client chooses one firm to undertake his representation. Once the client enters into a retainer agreement with one firm, the other law firms to whom the client exposed his case may be subject to a vicarious disqualification motion if they attempt to represent the opposition because of the confidential nature of the prior disclosures. Lindgren, Toward a New Standard of Attorney Disqualification. 1982 AM. B. FOUND. RES. J. 419, 435.
presumption to be irrebuttable. This interpretation is consistent with the per
se language of the statute. However, in an effort to avoid the harsh results of
DR 5-105(D), other courts have held that this presumption is rebuttable.7

Throughout this note references are made to irrebuttable and rebuttable
presumptions. These presumptions may be present in both primary and sec-
ondary disqualifications. In the primary disqualification, the presumption
is that the individual attorney has been exposed to confidences of the client.
In the secondary disqualification, the presumption is that the attorney who
has been exposed to the confidences of the client shared the information with
his new law firm. One should take care not to confuse these secondary
presumptions with primary presumptions.

When a court decides whether a presumption has been rebutted, it must
consider evidence in light of two objectives. First, the court must balance the
interest in protecting client confidentiality and loyalty against the interest in
providing free access to lawyers. Second, the rebuttal attempt should not
force either party to divulge confidential information.8

The rebuttable presumption has been explored most frequently by the
Seventh and Second circuits. The Seventh Circuit, in Freeman v. Chicago
Musical Instrument Co.,9 held that the challenged firm had to rebut the
presumption by “clear and effective” proof.10 The court held that to resolve
the issue there must be an evidentiary hearing where the court may rely “on
any of a number of factors, among them being the size of the law firm, the
area of specialization of the attorney, the attorney’s position in the firm, and
the demeanor and credibility of witnesses.” The burden rests upon the at-
tacked firm to produce the evidence that is sufficient to rebut the pre-
sumption.12 Any doubts as to the existence of an asserted conflict must be resolved
in favor of disqualification.13

Scope of Imputed Disqualification Under Model Rule 1.10

Rule 1.10 provides a stable approach to resolve questions of imputed dis-
qualification.14 The first paragraph of rule 1.10 prohibits a lawyer who is

36. Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 224 n.3 (7th Cir. 1978); Emle
38. C. Wolfram, supra note 6, § 7.6, at 399.
39. 689 F.2d 715 (7th Cir. 1982).
40. Id. at 723.
41. Id.
42. LaSalle Nat’l Bank v. County of Lake, 703 F.2d 252, 257 (7th Cir. 1983).
43. Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 225 (7th Cir. 1978).
44. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1983) provides:
   (a) While lawyers are associated in a firm, none of them shall knowingly repre-
   sent a client when any one of them practicing alone would be prohibited from do-
   ing so under the provisions regarding conflicts of interests stated in Rules 1.7,
   1.8(c), 1.9, and 2.2.
   (b) When a lawyer becomes associated with a firm, the firm may not knowingly
associated with a firm from representing a client if any other lawyer in the firm is ineligible as a result of rules 1.7, 1.8(c), 1.9, or 2.2. Rule 1.7 deals with a present-client conflict of interest. Rule 1.9 prohibits a lawyer from representing an interest adverse to that of a former client. Rule 2.2 prevents a lawyer from representing one client against another when that lawyer had served both clients as an intermediary. The result is that rule 1.10 sets out the conflict of interest problems that may be used as a basis for an imputed disqualification. The scope of the imputed disqualification rule is substantially changed from the narrow construction of the 1969 Code as well as the overly broad construction of the 1974 amendment.

The second paragraph provides that a law firm may not represent a client where a newly associated attorney would be prohibited from doing so. This paragraph is applicable to a conflict that results from a successive representation.

Paragraph 1.10(c) provides that the law firm may undertake the representation of a new client, who would be rejected earlier, if the infected attorney has terminated employment with the firm. The representation may not be undertaken, however, if: (1) the matter is “substantially related” to a matter in which the formerly associated lawyer previously represented a client and (2) the confidential information has been revealed to any attorney remaining with the firm. This provision prevents a law firm that has received the confidential representation from defeating an imputed disqualification motion simply by firing the infected attorney. However, the rule could adversely affect the ethical attorney who has not disclosed the information. When faced

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represent a person in the same or a substantially related matter in which that lawyer, or a firm with which that lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.

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

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

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

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

Oklahoma’s Rule is identical with one exception. Paragraph (a) does not limit rule 1.8 to paragraph (c). Proposed Oklahoma Rule Model Rules of Professional Conduct, 57 OKLA. B.J. 1997, 2018 (Sept. 6, 1986).

45. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10(a) (1983).
46. Id. Rule 1.7.
47. Id. Rule 1.9.
48. Id. Rule 2.2.
49. See supra note 33 and accompanying text.
50. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10(b) (1983).
51. Id. Rule 1.10(c).
52. Id.
with the possibility of losing a major client, the law firm may simply fire the ethical attorney and avoid the disqualification. The last paragraph allows the former client to waive the opportunity to make a disqualification motion. This is consistent with rule 1.9 as well as the former provision of DR 5-105(C).\textsuperscript{53}

Rule 1.10 is not as strict as DR 5-105(D). The corresponding comment advocates a functional analysis rather than a strict application.\textsuperscript{54} The comment states that the disqualification inquiry must be made in light of two considerations: preservation of client confidentiality and avoidance of positions adverse to the client.\textsuperscript{55} Also, the court is given factors to consider when deciding a motion for an imputed disqualification. First, the former client must be reasonably assured that the principle of loyalty is not compromised. Clients should not feel that an attorney once trusted is no longer trustworthy. Second, the rule should not be interpreted so broadly as to deny persons from having reasonable choice of counsel. Finally, the rule should not unreasonably hamper lawyers from forming new associations or taking on new clients.\textsuperscript{56}

The comments do not go so far as to suggest that invocation of the rule creates a rebuttable presumption.\textsuperscript{57} In the interim between the proposed version and the final draft, the confidentiality comment was altered significantly.\textsuperscript{58} The proposed comment gave factors for the court to use to decide if

\textsuperscript{53} See supra note 28.

\textsuperscript{54} MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 comment [10] (1983) (Lawyers Moving Between Firms) provides: "[10] A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client."

\textsuperscript{55} Id.

\textsuperscript{56} Id. at comment [7] provides:

[7] When lawyers have been associated in a firm but then end their association, however, the problem is more complicated. The fiction that the law firm is the same as a single lawyer is no longer wholly realistic. There are several competing considerations. First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many to some degree limit their practices to one field or another, and that many move from one association to another several times in their careers. If the concept of imputed disqualification were defined with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

\textsuperscript{57} See cases cited supra note 37.

\textsuperscript{58} MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 comments [11]-[14] (1983). This draft represents a combination of the proposed comment and the final version. Portions deleted are represented here by being struck out. Portions added are underlined.

Confidentiality

[11] Preserving confidentiality is a question of access to information. Access to
an imputed disqualification was appropriate, while the final version has deleted these factors entirely. Arguably, deletion of the factors from the final version indicates that the ABA does not favor a rebuttable presumption. However, the comment also indicates that a mandatory disqualification is not the answer to every case. Instead, the comment recommends an ad hoc determination in each case.

The "Chinese Wall" Defense

The law firm opposing disqualification may try isolating the infected attorney from the remainder of the firm. This defense has been referred to as the "Chinese Wall," the "cone of silence," or "screening."

Screening of Government Attorneys: Formal Opinion 342

In 1975 the ABA published Formal Opinion 342 in apparent response to the amendment of DR 5-105(D). This opinion advocated screening as a

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information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

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 law firm or other association involved, the sensitivity of the information and its relevance to the affairs of the affected clients, the nature and probable effectiveness of screening measures.

[12] Application of this rule can, therefore, paragraphs (b) and (c) depends on a situation's particular facts. In any such inquiry, the burden of proof should rest upon the lawyer firm whose disqualification is sought.

[13] Paragraphs (b) and (c) operate to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rule 1.6 and 1.9(b). Thus, if a lawyer while with one firm acquired no knowledge of information relating to a particular client of the firm, and that lawyer later joined another firm, neither client in the same or a related matter even though the interest of the two clients conflict.

[14] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9.

59. Id.
60. See supra note 3.
62. LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252, 257 (7th Cir. 1983).
defense to an imputed disqualification motion. The ABA’s concern was that the amended version of DR 5-105(D) would cause problems for the government in hiring attorneys. DR 5-105(D) would limit the mobility of attorneys leaving government employment to work in private practice. The concern was that the government would not be able to recruit talented attorneys if those attorneys would later have limited employment opportunities in private practice.64 To combat the problem, the ABA concluded that screening procedures would keep the former government attorney from sharing confidences with his new associates.65 The screening arrangement, however, must be approved by the attorney’s former government agency.66

The theory of Formal Opinion 342 was adopted by the Court of Claims in Kesselhaut v. United States.67 The Kesselhaut law firm had represented the Federal Housing Administration. The law firm was suing to recover fees as a result of this representation. Kesselhaut hired the firm of Krooth and Altman as counsel. One of the attorneys who worked at the Krooth firm had been general counsel of the FHA while the agency had been Kesselhaut’s client. As a result, the attorney was disqualified from representing Kesselhaut in the action. The trial judge applied the amended DR 5-105(D) and disqualified the whole firm.68

The Court of Claims took note of the fact that the firm had erected a screen and found that the attorney in question had been effectively isolated from the case.69 The court relied on the reasoning of Formal Opinion 342, and with the isolation procedures in mind, found that the entire law firm should not have been disqualified.70 The court, however, went beyond the formal opinion in that it allowed the screen to rebut the presumption despite the government’s opposition. Formal Opinion 342 indicated that “[the screening procedure must be implemented] to the satisfaction of the government agency concerned.”71

The Kesselhaut decision has been cited with approval in several cases.72 Screening seemed to be an answer to the problem the government was facing

64. "[T]he ability of government to recruit young professionals and competent lawyers should not be interfered with by imposition of harsh restraints upon future practice nor should too great a sacrifice be demanded of the lawyers willing to enter government service." ABA Formal Op. 342, supra note 63, at 518.

65. Id. at 521.

66. See infra text accompanying note 71.

67. 555 F.2d 791 (Cl. Ct. 1977) (en banc).

68. Id. at 792.

69. The attorney “is to continue to have no connection with the case, all other attorneys are not allowed to discuss it with him and are to prevent any case documents from reaching him; the files are to be kept in a locked file cabinet, the keys controlled by Mesrs. Altman and Krug and issued to other attorneys, clerks, and secretaries, only on a ‘need to know’ basis.” Id. at 793.

70. Id.

71. ABA Formal Op. 342, supra note 63.

as a result of DR 5-105(D). The interest of the government in acquiring
talented legal counsel seemed to outweigh the problems involved with suc-
cessive representation. The former government attorney cases were im-
plemented as an exception to the imputed disqualification rule stated in DR
5-105(D). However, in subsequent decisions, the courts began to lose sight
of the context in which the rule was to be applied. Arguments began to arise
that allowing screening to be used as a defense by government attorneys and
not by private attorneys was both illogical and unjust. The hardship im-
posed on the client and the private attorney seemed to justify screening.

Screening of Private Attorneys

The Seventh Circuit was the first to allow the use of a screening device to
rebut the presumption of imputed confidences within the realm of private
practice. Following the decision of Kesselhaut, the Seventh Circuit
delineated several elements to be considered in order to determine if a screen
is effective. These elements are (1) the size and structure of the law firm, (2)
the existence of intrafirm safeguards or rules that ensure the infected at-
torney is denied access to relevant files or other case information, (3) the
degree of contact between the infected attorney and the attorneys handling
the case, and (4) the assurance that the infected attorney will receive no part
of the legal fees derived from the case. Although these measures attempt to
provide a practical framework, their effectiveness is questionable. Even if
screening procedures are in place, they will not work unless the attorney who
has the information does not reveal it and/or the attorney who will benefit
from the information does not seek it. The danger lies in the reality that these
are the only two persons who need know about a breach in the screening pro-
cedures.

The Tenth Circuit discussed imputed disqualification and screening in
Smith v. Whatcott. The plaintiff, Leon Smith, moved to disqualify the
defendant’s counsel because the attorney who had previously represented him
in a related matter was subsequently employed by the defendant’s firm. First,

unavailable remedy unless the individually disqualified attorney is a former government employee).
74. Note, supra note 1, at 1048.
75. See Schlesse v. Stephens, 717 F.2d 417 (7th Cir. 1983); LaSalle Nat’l Bank v. County of
Lake, 703 F.2d 252 (7th Cir. 1983). Accord, Panduit Corp. v. All States Mfg. Co., 744 F.2d
1564, 1581 (7th Cir. 1984) (dicta).
76. “A screen must be in place before a conflict arises. If a screen is put into place after a
conflict is realized, client confidences of the primarily disqualified attorney are imputed to the
remainder of the firm. Cf. LaSalle Nat’l Bank, 703 F.2d at 259 n.3 (screen must be timely).
77. Schlesse, 717 F.2d at 421 (citing LaSalle Nat’l Bank, 703 F.2d at 259).
78. G. HAZAARD, ETHICS IN THE PRACTICE OF LAW 81 (1978). “[W]alling off is thus like the
New England practice of bundling, having neither the credibility of real prophylaxis nor the
dignity of self control.” These types of walls also bring to mind the tents used at summer camp
to segregate the sexes. The dividing line only worked when both parties wanted it to. Id.
79. 757 F.2d 1098 (10th Cir. 1985), rev’d on other grounds, 774 F.2d 1032 (10th Cir. 1985).
the court applied the substantial relationship test and concluded that the former representation was "similar and related" to the present one. Smith's former attorney was irrebuttable presumed to have been privileged with confidences that required disqualification.

To determine whether the confidences should be imputed to the attorney's law firm, the court reviewed the history of screening and concluded that screening was an effective mechanism to prevent a law firm from being disqualified as a result of employing a former government attorney. The history of the test was traced as it was implemented to the realm of private practice. However, the court announced that "[w]e need not decide whether to adopt this [screening] exception in an appropriate case. The factors listed [that constitute an effective screen] . . . are not present here."

Although the Tenth Circuit took special care to announce that screening was neither rejected nor accepted, the foundation was laid for eventual acceptance. The court's consideration of screening procedures represented implicit approval of the rebuttable presumption standard. Thus, when the case came back to the same court on a different issue, Judge Seymour stated: "The disqualification there [Smith I] was based on a presumed firm-wide disclosure of confidential information substantially related to the present appeal in the absence of effective screening procedures at Neilson and Senior."

The disciplinary rules do not make reference to the screening defense. The judiciary, however, has treated Formal Opinion 342 as a de facto amendment to the Code. Although the opinion expressly applied only to the former government attorneys, the concept has been extended to private practitioners. Through the comments to rule 1.10, the ABA has indicated that screening does not have a place in private practice.

The Model Rules and Screening

The comments to rule 1.10 indicate that the scope of the rule should be limited. The original comment to rule 1.10 stated in part, "[r]elevant fac-

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80. See supra notes 13-18 and accompanying text.
81. Smith, 757 F.2d at 1100.
82. See cases cited supra note 19.
83. Smith, 757 F.2d at 1100.
84. Id.
85. Id. (citing Schiessle v. Stephens, 717 F.2d 417, 421 (7th Cir. 1983); LaSalle Nat'l Bank v. County of Lake, 703 F.2d 253, 259 (7th Cir. 1983)).
86. Id.
87. See cases cited supra note 37.
88. Smith, 774 F.2d 1032 (10th Cir. 1985) (court considered whether confidences imputed from the attorney to the law firm should be imputed from the law firm to subsequent co-counsel).
89. Id. at 1033. (emphasis added).
90. See supra note 69.
91. Id.
92. See supra note 58.
tors [to be used] in determining the likelihood of actual access to information relating to representation of a client include . . . nature and probable effectiveness of screening procedures." In the final version, however, these factors were deleted.

In the final version, the comment explains why government and private attorneys are treated differently in the context of rules 1.10 and 1.11. If the extensive disqualification of rule 1.10 were applied to former government lawyers, the potential effect would be unduly burdensome on the government. The government would be seriously impaired in its ability to recruit lawyers. With these two changes to the comments, the ABA has indicated that screening is not proper in private practice.93

Application of Rule 1.10

The Model Rules of Professional Conduct are not binding until they are adopted by the Oklahoma Supreme Court. If and when the rules are adopted, how will the court interpret them? There is no Oklahoma law on the subject. However, the state of Delaware has adopted the Model Rules of Professional Conduct and those rules were interpreted in Nemours Foundation v. Gilbane, Aetna, Federal Insurance Co.96 In Nemours, the plaintiff moved to disqualify the defendant's law firm. Bradley, an associate who had previously worked for the plaintiff's law firm, was subsequently employed by the defendant's law firm. This was the basis for the plaintiff's motion to disqualify defendant's counsel. The attorney who had caused the conflict decided not to discuss the case in any way with anyone at the law firm as soon as he discovered the conflict of interest.97

The court addressed a number of critical areas. At the outset it was decided that under rule 1.9, Bradley could not represent a client whose interests

93. Id. (emphasis added).
94. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 comments [4]-[5] (1983) (Definition of Firm) provides:

[4] Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11(a) and (b); where a lawyer represents the government after having served private clients, the situation is governed by Rule 1.11(c)(1). The individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7, and 1.9.

[5] Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences, and therefore to the protections provided in Rules 1.6, 1.9, and 1.11. However, if the more extensive disqualification in Rule 1.10 were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations, and thus has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in Rule 1.11.

95. Id.
97. At this point, it is too late to set up screening procedures. See supra note 76.
were “materially adverse” to the interests of a former client.99 Several requirements must have been present in order to satisfy the requirements of rule 1.9. First, an attorney-client relationship must have existed with a former client. Second, the present client’s matter must be the same matter the attorney had worked on for a previous client or be “substantially related” to the previous matter. Third, the interests of the second client must be materially adverse to the former client’s interests. Fourth, the former client must not have consented to the representation after consultation.99

Rule 1.7,100 which is referenced to by rule 1.9, was used to reach the conclusion that the interests of the client were adverse.101 The court reasoned that a “[d]isqualification of counsel] cannot be accomplished mechanically, but requires a balance between the goals and objectives of professional conduct.”102 Consequently, “[t]he Third Circuit has long refused to adopt a per se rule in questions of disqualification.”103

Disqualification of the defendant’s law firm was next considered. Rule 1.10 was applied,104 but screening was recognized as an acceptable alternative to imputed disqualification in the context of rule 1.11.105 Combining this with the “functional analysis” approach advocated in the comment to rule 1.10,106 the court held that screening, under the proper circumstances, was an appropriate alternative to imputed disqualification of the entire law firm.

When Delaware adopted the Model Rules, the comments to the rules were also adopted. The comment to rule 1.10 makes it clear that screening should not be allowed to shelter the movement of a private attorney. Delaware had the opportunity, but elected not to adopt the comment to the draft rules that represents the opposite position.107 The court overlooked this fact. Moreover,

99. Id. at 423.
100. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983) (Conflicts of Interest: General Rule) provides in part:
    (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
        (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
        (2) each client consents to consultation.
    (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or a third person, or by the lawyer’s own interests unless:
        (1) the lawyer reasonably believes the representation will not be adversely affected; and
        (2) the client consents after consultation.
101. Id.
104. Id. at 424.
105. The court acknowledged that the rule was to be used for former government attorneys, but then ignored this conclusion.
107. Id. (confidentiality).
the following question was neglected. If a rule dealing with government attorneys explicitly advocates screening, why does the rule dealing with private attorneys leave it out? The obvious answer is that screening procedures were purposely left out. If a rule is put to the court for interpretation, the court should look to the intent of the body that adopted the rule and interpret the rule according to its plain language. In *Nemours* the court ignores the manifest intent of the framers.

*Practical Considerations and Solutions to Imputed Disqualification*

The general problem with this area of the law is that the focus has been shifted from protecting the client to protecting the mobility of lawyers. The most obvious solution is to avoid the problem. By sifting through a potential employee's background before hiring, a firm can largely avoid the failure to discover conflicts of interest. Many larger firms require clerks to fill out extensive memos once they begin work to determine if any conflicts exist. When completed, these memos should indicate the firms for which clerks have worked, what attorneys the clerks have worked with, and the identity of the clients whose project they have worked on.108 Perhaps the bar should require attorneys as well as clerks to keep a record of the clients for whom they have worked and when. This record could be reviewed by a law firm and any conflicts could be recognized quickly. This may not reveal all conflicts, but it will decrease the number that are discovered too late.

Another solution condoned by the Model Rules is to seek the client's waiver. Law firms could establish screening procedures to discover conflicts and ask for the client's consent in writing. This consent should be contingent on the screening procedures being in place and adequate. Although the rules do not advocate screening procedures, there are no limitations on what agreements may be made in connection with the consent provision.

Lawyers working together on such problems may be the only practical solution. The judiciary has demonstrated hostility toward imputed disqualification motions. If an attorney moves for disqualification several months after the other side has proposed a solution, the judge may refuse to grant the motion altogether. At this point the firm that made the motion is in a worse position than it would have been had it agreed to screening. Not only has the disqualification motion been lost, but the other side is not bound to screen at all.

The judiciary could also propose a solution. District courts could adopt local rules whereby all disqualification motions must be made within fifteen days of the time the conflict is discovered or reasonably should have been discovered. If the time is allowed to lapse, the failure to make the motion should act as a bar to any subsequent disqualification motions. A policy such as this would prevent disqualification motions from being made in order to gain a tactical advantage. Such a policy would also minimize the inequities that fall upon the clients.109

108. The identity of clients is not confidential information.
109. The focus of this note has been on vicarious disqualification motions. Courts are un-
Costs

One area that has received no discussion by the courts or commentators is the cost of defending a disqualification motion. The client should not have to pay for any litigation that is the result of a conflict of interest within the firm. Costs attributable to a disqualification are a major reason that such motions are denied. If a law firm is disqualified as a result of one of its attorneys having a major conflict of interest problem, why should the client have to pay another attorney to become familiar with the facts of the case? This cost should be paid by the law firm. The measure is harsh, but the end result is that conflict problems will receive more attention at the start of representation. Even if a law firm does successfully defeat a motion for disqualification, the time spent on that portion of the lawsuit should not be billed to the client.

It may be argued that this is merely a cost of the client obtaining the counsel of choice, that if clients want a law firm to represent them, they should pay extra to keep the law firm as counsel. However, all conflicts that a law firm may encounter while representing a client can be discovered before representation has begun or before the conflict occurs. Once a conflict is recognized a law firm has a duty to refuse employment. If the law firm accepts the employment with knowledge of a potential conflict or negligently fails to discover the conflict, the cost of defending against a subsequent disqualification motion should not be billed to the client.

Employees

Another area not frequently discussed is the problem that nonattorney employees present when changing from one law firm to another. Secretaries as well as summer clerks could present conflict of interest problems. Although there is little authority in the area, the law seems to be that liability for disqualification extends to an attorney's employees and former employees who have been privy to client communications.\textsuperscript{110}

\textsuperscript{110} Silver Chrysler Plymouth, Inc. v. Chrysler Motor Corp., 518 F.2d 751, 757 (2d Cir. 1975) (no basis for distinguishing among partners and associates on title alone); American Can Co. v. Citrus Feed Co., 436 F.2d 1125, 1128 (5th Cir. 1971) (disqualification did not extend to an attorney who was not an employee, but attorney was liable for all employees privy to client confidences); Williams v. Trans World Airlines, Inc., 588 F. Supp. 1037, 1043 (W.D. Mo. 1984) (that an individual is not an attorney does not make it less likely that confidential information will be revealed, but more likely). \textit{But see In re Grand Jury Proceedings}, 786 F.2d 3, 6 (1st Cir. 1986) (agents or employees do not stand in the attorney's shoes). \textit{Cf.} Kapco Mfg. Co. v. C & O Enter., Inc., 637 F. Supp. 1231, 1238-39 (N.D. Ill. 1985) (secretary, a key employee, switched sides, but attorney proved that no information was shared).