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FEDERAL COURTS AND ATTORNEY DISQUALIFICATION MOTIONS: A REALISTIC APPROACH TO CONFLICTS OF INTEREST

The motion to disqualify an adversary’s attorney has become the newest weapon in a litigator’s motion arsenal. The disqualification motions alleging conflicts of interest can result in a great advantage to the movant by denying the opposition their choice of counsel, or by delaying the proceedings for several weeks or months. The attractiveness of the attorney disqualification motion as a strategic weapon is enhanced by the failure of the courts to impose sanctions against attorneys who bring frivolous disqualification motions.

This Comment examines the treatment in federal courts of motions made to disqualify an adversary attorney and the relevant rules of professional responsibility. The examination reveals that disproportionate weight is given to the possibility of divulgence of client confidences as compared to the harms suffered by the party whose attorney is disqualified. This disproportionate weighing results from the restrictiveness of the present rules of professional responsibility. The present imbalance of interests would be lessened by stricter requirements for standing and greater consideration of the good faith of motions. In some instances, modification of the rules of professional responsibility and increased sanctions by the courts are needed. In lieu of changes in the rules of professional responsibility or


2. See Judge Coffey’s dissent in *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1275 (7th Cir. 1983) (Coffey, J. dissenting) (noting that disqualification of a party’s attorney deprives the individual of representation of the attorney of his choice; it may be difficult if not impossible for a new attorney to master “the nuances of the legal and factual matters” late in the litigation of a complex case).

3. E.g., *Bottaro v. Hatton Assoc.*, 680 F.2d 895, 896 (2d Cir. 1982) (an unsuccessful disqualification motion caused a nine-month delay); *INA Underwriters Ins. v. Nalibotsky*, 594 F. Supp. 1199, 1201 (E.D. Pa. 1984) (the motion was made June 15, 1984, and after numerous briefs and affidavits and two days of evidentiary hearings, the decision was made August 27, 1984).


5. Interpreting federal court cases is sometimes difficult because while the district courts tend to adopt the rules of professional responsibility applicable to the state courts, such adoption is not required. See O’Dea, *The Lawyer-Client Relationship Reconsidered: Methods for Avoiding Conflicts of Interest, Malpractice Liability, and Disqualification*, 48 Geo. Wash. L. Rev. 693, 696–97 (1980).

6. This article concerns only attorney disqualification in the federal courts, however, because in every state except Maine and Mississippi the Model Code of Professional Responsibility or the Model Rules of Professional Conduct have been given the force of law, the vast majority of federal district courts refer to the code either as promulgated by the American Bar Association or as adopted in their state. See Comment, *supra* note 4, at 1248–49.
the federal courts' treatment of disqualification motions, law firms must take steps to lessen exposure to allegations of conflicts of interest. In addition to avoiding conflicts of interest by careful scrutiny of potential clients and employees, the implementation of screening mechanisms may prevent vicarious disqualification of the entire firm if a single attorney within the firm is disqualified. Without action by the law firm to limit its exposure to conflicts of interest, disqualification motions can be used to impede the firm's effectiveness.

I. DISQUALIFICATION FOR CONFLICTS OF INTEREST IN THE FEDERAL COURTS

A. Federal Courts and Rules of Professional Responsibility

Historically, the bases for disqualification motions in the federal courts have been violations of the American Bar Association (ABA) Canons of Professional Ethics, the Model Code of Professional Responsibility ("Model Code"), and most recently the ABA Model Rules of Professional Conduct ("RPC"). Federal courts generally adopt local state court rules governing professional conduct. However, they are not bound to follow those rules. While the Canons of Professional Ethics were the original code for professional conduct, the majority of decisions on disqualification motions now refer to either the Model Code or the newer RPC.

Under the Model Code, disqualification motions may claim a violation of any one or a combination of three specific canons: Canon 4, requiring

7. CANONS OF PROFESSIONAL ETHICS adopted in 1908.
8. MODEL CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter MODEL CODE]. The canons are statements of axiomatic norms according to the Model Code’s Preamble. The word “canon,” however, is commonly used to stand for the headline, the corresponding Ethical Considerations and the Disciplinary Rules that follow the headline. The Disciplinary Rules are considered the teeth of the Model Code.
9. MODEL RULES OF PROFESSIONAL CONDUCT [hereinafter RPC]. The Model Code and the RPC have no authority themselves until adopted by the court specifically. The highest state court adopts the rules for that state’s judiciary. The rules adopted by each state court seldom follow the RPC or Model Code exactly. The following states have adopted, usually with some changes, the RPC: Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Minnesota, Montana, Nevada, New Jersey, New Mexico, and Washington. NATIONAL REPORT ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY (April 1987). Also, the Board of Governors of the District of Columbia Bar to the District of Columbia Court of Appeals has petitioned the high court to adopt the RPC with some changes.
10. See, e.g., Richardson v. Hamilton Int’l Corp., 469 F.2d 1382 (3rd Cir. 1972), cert. denied, 411 U.S. 986 (1973). It is the duty of the district court to examine charges of violation of an attorney’s ethical responsibility because it is that court which is authorized to supervise the conduct of the members of its bar. Such regulation of attorneys appearing before the district court will be disturbed only when the court has abused its discretion. Id. at 1385–86.
11. In Disciplinary Rule 4-101(A) confidences and secrets are specifically defined. “Confidence” refers to information protected by the attorney-client privilege under applicable law, and “secret” refers to other information that would be likely to be detrimental to the client. MODEL CODE, DR 4-101(A).

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attorneys to preserve the confidences of their clients; Canon 5, concerning the loyalty attorneys owe their clients; and Canon 9, admonishing the attorney to avoid even the appearance of impropriety. Motions brought under the RPC generally address its corresponding sections, Rule 1.6, Rule 1.7, and Rule 1.9.

The Model Code and the RPC differ in two significant ways that impact disqualification motions. First, the provision relating to vicarious disqualification in the Model Code, DR 5-101(D), is narrower in scope than the comparable provision in the newer RPC, Rule 1.10. Second, the RPC

Disciplinary Rule 4-101(B) adds that a lawyer shall not reveal, use to client’s disadvantage or use for advantage to himself or of a third person any confidences or secrets, unless the client consents after full disclosure. MODEL CODE, DR 4-101(B).

12. Canon 5 reads, “[a] lawyer should exercise independent professional judgment on behalf of a client.” MODEL CODE, Canon 5. The Canon’s Disciplinary Rule 5-105(A) states that a lawyer shall decline employment if his independent professional judgment will be or is likely to be adversely affected by the acceptance of the employment. MODEL CODE, DR 5-105(A).

13. The disciplinary rules under Canon 9 state that a lawyer shall not accept employment in a matter he has acted on in a judicial capacity, or employment in a matter in which he had substantial responsibility as a public employee. MODEL CODE, DR 9-101(A)-(C).

14. The framers of the RPC abandoned Canon 9 after it had been denounced by academic commentators and found to be “simply too slender a reed on which to rest a disqualification order except in the rarest cases.” Board of Educ. v. Nyquist, 590 E2d 1241, 1247 (2d Cir. 1979).

15. There is no RPC rule corresponding to Canon 9.

16. “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 . . . .” RPC Rule 1.6.

17. RPC Rule 1.7 states that a lawyer shall not represent a client if such representation will be adverse to another client unless he believes that the representation will not adversely affect the other client and each client consents. It adds that a lawyer shall not represent a client if the representation may be limited by responsibilities to another unless the lawyer believes the representation will not be adversely affected and the client consents after a consultation that explains the implications of common representation. RPC Rule 1.7.

18. RPC Rule 1.9 states that a lawyer who has represented a client in a matter shall not thereafter represent, in the same or a substantially related matter, a person whose interests are adverse to the former client’s unless the former client consents after consultation. Nor shall the lawyer use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit or when the information has become generally known. RPC Rule 1.9.

19. Disciplinary Rule 5-105(D) notes that 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, DR 5-105(D).

20. Much more detailed and, therefore, possibly more restrictive than the Model Code Rule, RPC Rule 1.10 starts with the basic premise of DR 5-101(D) that while lawyers are associated in a firm, none of them shall represent a client when any one of them practicing alone would be prohibited from doing so. But it adds that when a lawyer becomes associated with a firm, the firm may not represent a person whose interests are adverse to any of the new attorney’s or new attorney’s former firm’s clients if the representation involves the same or a substantially related matter and the new lawyer had acquired information protected by Rules 1.6 and 1.9(b). Wanting to provide for all contingencies, Rule 1.10 adds that when a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person adverse to a client represented by the former lawyer unless: One, The matter is the same or substantially related to the former representation; and two, any lawyer remaining in the firm has
has a section which allows screening of government attorneys, RPC Rule 1.11.\textsuperscript{21}

The framers of the RPC included Rule 1.11, Successive Government and Private Employment, which authorized the limited use of screening mechanisms.\textsuperscript{22} RPC 1.11 begins with an overall restriction that an attorney cannot represent a private client in a matter in which that attorney "personally and substantially" participated as a public officer unless the government agency consents.\textsuperscript{23} The entire firm, however, need not necessarily be disqualified if the conflicted attorney is screened from participation in the matter, receives no fee from it, and written notice is given the government agency.\textsuperscript{24} It is not required that the government agency approve such representation.\textsuperscript{25}

B. Disqualification Based on Conflicts of Interest

The proof of violations based on an alleged conflict of interest begins by establishing that a prior attorney-client relationship existed which is the basis of the present conflict of interest.\textsuperscript{26} A movant can then establish a violation by showing concurrent representation by a single firm, a firm representing a client with interests adverse to a former client, or a single attorney changing employment.

\textsuperscript{21} See infra note 23.
\textsuperscript{22} Screening mechanisms are also known as Chinese Walls.
\textsuperscript{23} RPC Rule 1.11 begins with an admonition that, except as the law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in that lawyer's firm may undertake or continue representation in such a matter unless the disqualified lawyer is screened from any participation in the matter, is apportioned no part of the fee, and written notice is given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule. The rule also covers cases involving former representation noting that a lawyer having confidential government information about a person may not represent a private client whose interests are adverse to that person in matters in which the information could be used against him. Neither may anyone in the lawyer's firm undertake such representation unless the former government attorney is screened from any participation in the matter and is apportioned no part of the fee. RPC Rule 1.11.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{26} In Westinghouse Electric Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1311–21 (7th Cir.), cert. denied, 439 U.S. 955 (1978), Westinghouse alleged that no conflict could exist because there was no attorney-client relationship between the Westinghouse attorneys and the appellants. The court found that an attorney-client relationship did exist because the Westinghouse firm represented an association which included several of the appellants in its membership.
1. **Concurrent Representation**

The concurrent representation of two adversaries, a violation of Canons 5 and 9 or RPC 1.6 and 1.7, presents the strongest case for disqualification. All courts consider the simultaneous representation of adverse parties as constituting a conflict of interest worthy of disqualification. The possibility of divided loyalty is so abhorrent to most courts that even though the parties have agreed to the concurrent representation, the court may not allow it. When faced with the possibility of divided loyalty the court will disqualify a conflicted attorney on a motion brought by an adversary even if the conflict is between co-parties who have consented to the joint representation. Standing can be granted to any party associated with the case. The moving party need not show that he or she is adversely affected by the joint representation.

2. **Representation of a Client Whose Interests Are Adverse to a Former Client**

Second only to concurrent representation of adversary parties as a basis for granting disqualification is the case where the entire firm has switched sides. A firm that previously represented one party now seeks to represent

27. C. WOLFRAM, MODERN LEGAL ETHICS 351-52 (1986). In Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386 (2d Cir. 1976), the court stated that even when the relationship between the litigations is remote, the relevant test is one of *prima facie* impropriety instead of the substantial relationship test employed in former client conflict cases.


In determining whether Canon 5 loyalty issues are involved, the court looks to the status of the attorney and the adversaries at the time the complaint was filed. To do otherwise would mean that the firm could convert a present client into a former client merely by seeking to withdraw as counsel after the complaint is filed. Ransburg Corp. v. Champion Spark Plug Co., No. 86-C-103, slip op. at 12 (N.D. Ill. July 1, 1986).

29. See, e.g., United States v. Flanagan, 679 F.2d 1072 (3d Cir. 1982), rev'd on other grounds, 465 U.S. 259 (1984). The trial court did not abuse its discretion in disqualifying joint counsel for criminal defendants where conflict of interest was likely to arise even though it found that each defendant was completely aware of potential conflicts of joint representation and had chosen to waive any claim of conflict of interest. *Id.* at 1073, 1076.

30. See, e.g., Shadid v. Jackson, 521 F. Supp. 87, 89 (E.D. Tex. 1981) (co-defendants who had consented to joint representation were ordered to obtain separate counsel upon motion by the plaintiff).


33. See, e.g., Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1267 (7th Cir. 1983);
the former client's adversary. The entire firm switching sides is considered to be in violation of Canon 4, which states that an attorney shall not use the confidences of his clients against that client,34 and Canon 9, which forbids the appearance of impropriety.35 Under the RPC such actions by the firm violate Rule 1.6,36 which is similar to Canon 4, and Rule 1.9, which protects former clients.37

The only successful defense to this type of motion is a finding that the two representations are not "substantially related."38 While federal courts vary in their definitions of substantially related,39 the majority look to both the purpose of the representation40 and the underlying facts that necessitated such representation.41 If either the present factual pattern is substantially related to a previous representation or the purpose for the representation is the same, disqualification is frequently granted.42 It is not necessary for the movant to show specifically what confidences were divulged during the previous representation.43 The courts presume that an attorney receives

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34. See supra note 11.

35. Disqualification cases involving government attorneys are often dealt with exclusively under Canon 9 because Canons 4 and 5 are premised upon the existence of an attorney-client relationship. See, e.g., Armstrong v. McAlpin, 625 F.2d 433, 435, 442 (2d Cir. 1980) (en banc), vacated on other grounds, 449 U.S. 1106 (1981); Wagner v. Lehman Bros., Kuhn Loeb, Inc., 646 F. Supp. 643, 645, 655, 663 (N.D. Ill. 1986) (a former attorney for the SEC signed off a file on the defendant, three days later joined a firm representing the plaintiff and called up his contacts at the SEC to get the file on the defendant re-opened).

36. See supra note 16.

37. See supra notes 11, 18.


39. The Seventh Circuit uses a three-step test formulated in Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 225 (7th Cir. 1978):

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

Id.


41. See, e.g., LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252, 256 (7th Cir. 1983).

42. See, e.g., Smith v. Whatcott, 757 F.2d 1098, 1100 (10th Cir. 1985) (a substantial relationship warranting disqualification exists if factual contexts are related).


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confidences as part of the attorney-client relationship. In the case where
an entire firm has switched sides and the present litigation is substantially
related to the previous representation, the party seeking to defeat the
disqualification motion is not allowed to rebut the presumption that the
attorneys received confidences in their former employment. Federal
courts have concluded that if the attorney-client relationship existed the
firm must have received confidential information.


The disqualification decision most likely to be appealed is of a third type,
a single attorney changing employment. Again parties allege violations
of Canons 4 and 9 or RPC 1.6 and 1.7 because the attorney possesses
confidential information gained in an attorney-client relationship and is
now in a position to use that information against the former firm’s client.
As in the case of a firm representing an adversary of a former client, the
court determines whether the present litigation involves a matter substan-
tially related to the prior representation. Unlike an instance where the
entire firm has switched sides, some federal courts have allowed rebuttal of
the presumption that the attorney who changed employment received a
particular client’s confidences during his former employment. The larger
and more departmentalized the attorney’s former firm, the greater the
likelihood that the presumption of received confidences will be suc-
cessfully rebutted and the disqualification motion denied. Many federal

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44. See Smith, 757 F.2d at 1100. The court agreed with the Fifth, Ninth, Eighth, Second and First
Circuits that the presumption that the client revealed facts to his attorney is irrebuttable. Id.
45. See Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1267 (7th Cir. 1983). Even if there is
a substantial relationship between the two matters, the lawyer can avoid disqualification by showing that
effective measures were taken to prevent confidences from being received by whichever lawyers in the
new firm were handling the new matter. “The exception is applicable here; the firm itself changed
sides.” Id.
47. E.g., Smith v. Whatcott, 757 F.2d 1098, 1099 (10th Cir. 1985); EJ Paint Corp. v. Padco, Inc.,
746 F.2d 1459, 1460–61 (Fed. Cir. 1984); Paul E. Iacono Structural Eng., Inc. v. Humphrey, 722 F.2d
435, 437–38 (9th Cir. 1983); Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 716–17 (7th
Cir. 1982); Sierra Vista Hosp., Inc. v. United States, 639 F.2d 749, 750–51 (Ct. Cl. 1981); Armstrong v.
McAlpin, 625 F.2d 433, 434–36 (2d Cir. 1980) (en banc), vacated on other grounds, 449 U.S. 1106
48. Under the RPC this would potentially violate Rule 1.9. For the text of this rule, see supra
note 18.
49. See supra notes 38–41 and accompanying text.
50. E.g., Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 723 (7th Cir. 1982).
51. See, e.g., Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 753 (2d Cir.
1975). In Silver Chrysler Plymouth, the court denied disqualification of an attorney who was formerly
with the firm that represented Chrysler. This firm had 30 partners and 50 associates. The court said it
courts, however, do not allow rebuttal of the presumption of received confidences, even when the attorney in question did not work directly with the adverse party at the old firm.

If a court finds a single attorney within a firm should be disqualified, a movant may obtain vicarious disqualification of the entire firm by applying DR 5-105(D) of the Model Code or RPC Rule 1.10. The reasoning behind these rules is that the conflicted attorney will share potentially damaging information, received in confidence during the previous employment, with new co-workers. Most federal courts have held that a movant does not have to prove that any sharing of information actually occurred. Any other position would conceivably make the movant’s task impossible since the moving party is not privy to the communications of his adversary’s attorney.

Even in federal courts where, as a general rule, the presumption of shared confidences is not rebuttable, in cases involving a government attorney moving to the private sector, these courts have sometimes allowed rebuttal of the presumption. Rebuttal is possible if the conflicted attorney was screened from the attorneys involved in the present litigation. Courts would be absurd to conclude that upon entry to the firm the new associates became recipients of knowledge as to the names of all the firm’s clients and the contents of the files relating to them. See also note 19. See supra note 20. This presumption is different from the presumption that an attorney who represents a client acquires actual knowledge of the client's confidences discussed in notes 51-53 and accompanying text. The courts often refer to actual knowledge because of the nearly universal view that the presumption is irrebuttable. See, e.g., Novo Terapeutisk Lab. A/S v. Baxter Travenol Labs, Inc., 607 F.2d 186, 197 (7th Cir. 1979) (en banc).

The second presumption holds that an attorney having “actual knowledge” of a client’s confidences shares that knowledge with all the other lawyers in his or her firm. See Arkansas v. Dean Foods Prods. Co., 603 F.2d 380, 386 (8th Cir. 1979), overruled in part on other grounds, In re Multi-Piece Rim Prods. Liab. Litig., 612 F.2d 377 (8th Cir. 1980) (en banc).

Courts deduce from their knowledge of the working relationship of attorneys within a firm that the free flow of information is encouraged and no limits are put on the sharing of client confidences within the firm. Disqualification is required to guard against the possibility of inadvertent use of confidential information. See In Re Asbestos Cases, 514 F. Supp. 914, 922 (E.D. Va. 1981).


Kesselhaut v. United States, 555 F.2d 791 (Cl. Ct. 1977). One of the attorneys representing
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have been persuaded by the public policy concerns underlying ABA Formal Opinion 342 and the adoption of RPC Rule 1.11 that screening to prevent vicarious disqualification of firms hiring former government attorneys is justified. The ABA has argued that if such screening were not allowed, it would be nearly impossible to recruit attorneys into government service. Government attorneys seeking to move to the private sector would be greatly constricted in their choice of employment by potential conflicts of interest and would be unable to use the specialized knowledge gained during government employment.

Beginning with the Seventh Circuit in 1983, federal courts have extended this reasoning to allow rebuttal of the presumption of shared confidences through screening when a private attorney changes from one private firm to another. A screening defense, however, has been limited to cases involving successive representation, rather than simultaneous representation of adverse interests. Furthermore, whether the movement involves government-to-private or private-to-private employment changes, courts have required that stringent timing requirements for the screening

Kesselhaut once served as a general counsel to the Federal Housing Authority (FHA). The United States, therefore, sought to disqualify both this particular attorney and his law firm after Kesselhaut brought suit regarding FHA related taxes. Although disqualifying the conflicted attorney, the court refused to disqualify the other members of the firm. Id. at 792; see also Armstrong v. McAlpin, 625 F.2d 433, 436 (2d Cir. 1980) (en banc), vacated on other grounds, 449 U.S. 1106 (1981).

61. See supra note 23 for the text of Rule 1.11.


63. Id. at 518.

64. Id. at 518-19.


66. See Schiessle v. Stephens, 717 F.2d 417 (7th Cir. 1983) (an individual lawyer allegedly received confidential communications from the defendant and later joined the firm representing the plaintiff but was not involved in the litigation). The Seventh Circuit held that the district court erroneously applied an irrebuttable presumption but upheld the disqualification of the entire firm because “no evidence exists in the record establishing that the [challenged firm] has ‘institutional mechanisms’ in effect insulating [the conflicted attorney] from all participation in and information about [the] case.” Id. at 421.

See also Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1579 (Fed. Cir. 1984) (applying Seventh Circuit law the court refused to recognize secondary imputation of confidences and allowed representation to continue if the conflicted attorney was screened); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 757 (2d Cir. 1975); Lemaire v. Texaco, Inc., 496 F. Supp. 1308, 1310 (E.D. Tex. 1980) (the presumption of sharing, if one arises under these facts in the Fifth Circuit, “has been clearly and effectively rebutted”).

process be met. If the conflicted attorney has not been screened from the very beginning of the association with the new firm, successful rebuttal of the presumption of shared confidences is unlikely. If the timing requirement is met and the screening is adequate, the court may allow continued representation even when a member of a firm currently involved in litigation joins the opposing party’s firm.

II. PROBLEMS IN THE DISQUALIFICATION PROCESS

A. Harms Created by Disqualification

The major problem with the current conflict of interest rules is that the alleged conflict of interest may not merit the hardship created by disqualification of chosen counsel. Having been denied their choice of counsel, the parties to the litigation must find competent replacement counsel. New counsel must attempt to attain the same level of knowledge in the litigation as the prior counsel. If the litigation has progressed for a lengthy period of time, it could take several months before the counsel is competent. In cases involving a long term relationship, complex litigation or a series of on-going litigations and settlements, a standard of proficiency equal to that of the disqualified counsel may never be attained.

68. See, e.g., Schiessle v. Stevens, 717 F.2d 417, 421 (7th Cir. 1983) (screening not in place when attorney who actively represented one of the defendants joined the plaintiff’s counsel’s firm); LaSalle Nat’l Bank v. County of Lake, 703 F.2d 252, 259 (7th Cir. 1983) (conflicted attorney joined firm in February, screened in August, entire firm disqualified).


71. Disqualification “is a drastic measure which courts should hesitate to impose except when absolutely necessary.” Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 721 (7th Cir. 1982).

72. See infra note 117.

73. Freeman v. Chicago Musical Instrument Co., 689 F.2d 715 (7th Cir. 1982). The Freeman court stated that:

[W]e also note that disqualification, as a prophylactic device for protecting the attorney-client relationship, is a drastic measure which courts should hesitate to impose except when absolutely necessary. A disqualification of counsel, while protecting the attorney-client relationship, also serves to destroy a relationship by depriving a party of representation of their own choosing. . . . We do not mean to infer [sic] that motions to disqualify counsel may not be legitimate, for there obviously are situations where they are both legitimate and necessary; nonetheless, such motions should be viewed with extreme caution for they can be misused as techniques for harassment. Id. at 721–22.

74. Peterson, supra note 65, at 400–01. “A litigant may impose both psychological hardship, by requiring his opponent to obtain new counsel with whom he has never worked, and financial hardship, by requiring his opponent to incur additional fees to allow his new counsel to become familiar with the litigation.” Id.
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The hardship created by disqualification has only rarely been considered substantial enough to warrant the defeat of a disqualification motion that has even the most insubstantial basis. By making the presumption of received confidences and the presumption of shared confidences irrebuttable, the courts have protected the former client often to the extreme detriment of the present client. If indeed no confidential information is received, or it is so inconsequential as to give rise to little potential harm, the courts by adhering to these irrebuttable presumptions have prevented a minor harm to one side by inflicting a major harm, disqualification of chosen counsel, to the other.

Though a client who loses an action after a firm has been disqualified may bring a malpractice suit against the disqualified firm, the effectiveness of malpractice as a remedy is questionable. Besides proving that the attorney did not perform adequately in his representation, the client must also prove that he or she has suffered harm. To establish harm, the client must prove that but for the attorney's misdeeds, the client would have won the underlying suit. This double burden is often insurmountable.

B. Disqualification Motions as Strategic Tactics

Attorney disqualification motions are often brought primarily as a strategic tactic. The problems associated with granting unmerited disqualification...
tion motions are aggravated by the tremendous increase in the number of motions brought. The increase is due largely to changes in the work place. Attorneys change jobs more often. Greater movement occurs both between private firms and from the government to the private sector. Specialization has, in complex areas of business and litigation, resulted in more individuals being called upon to "represent" a client, thus increasing chances of conflicts of interest. Firms are both growing and merging to provide better service and to increase their competitiveness in the marketplace. This also leads to additional conflicts.

The epidemic of disqualification motions is furthered by law firms that ignore potential conflict problems when the monetary benefits are great enough.

Because the federal courts generally do not sanction attorneys for violations resulting in successful disqualification motions, the potentially inherent risks in ignoring conflicts are significantly lessened. The gamble is that the firm will lose money, not that an attorney with the firm will be disbarred.

Although courts may issue sanctions against extreme abuses of conflicts of interest, courts are likely to label frivolous disqualification motions as

82. A Lexis search in the GENGED library, COURTS file of "disqualif! w/10 counsel or attorney or lawyer and date" from 1960 to 1970 showed 178 cases found. The same search for 1970 to 1980 brought up 612 cases. For the years 1980 to May 15, 1987, the number was 1120. Although some cases brought up by this search are inapplicable, the ratio of inapplicable cases to the total number of cases should remain the same for each time frame. Therefore, the proportional increases from time frame to time frame are unaffected by the inapplicable cases.

83. See generally Heintz, The Economic Future of Law Firms; 1984 and Beyond, 67 A.B.A.J. 446, 446-49 (1981) (detailing changes in the legal profession which necessitated the upsurge in firm size and mergers); Silas, Law Firms Branch Out, 71 A.B.A.J. 44, 44-48 (1985) (detailing the growth of large firms by opening branch offices in other cities).

84. As of October 1979, there were 11 American law firms with more than 200 attorneys and 38 with more than 150. National Law Firm Survey, Nat'l L.J., Oct. 1, 1979, at 28-33. As of September 1986, there were 91 firms with more than 200 attorneys and 137 with more than 150. 9th Annual Survey of Nation's Largest Law Firms, 9 Nat'l L.J., Sept. 22, 1986, at S2-S16.

85. See B. CURRAN, SUPPLEMENT TO THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1985, 4 (1986) (noting that while 11.7% of all attorneys work in firms with 51 or more attorneys, 14.4% of all attorneys under age 39 work in large firms); Adams, Merge? "Why Not?", 8 Nat'l L.J., June 16, 1986, at 2, col. 1 (law firm megamerger).

86. See infra note 161.

87. See Hodes & Gabinet, supra note 81, at 1, col. 5.

88. See Comment, supra note 4. Despite the initiation of significant reforms since the ABA Committee on Disciplinary Enforcement Report, statistics suggest that the disciplinary process fails to address the entire spectrum of attorney misconduct. Id. at 1497.

89. One of the reasons disqualification is so often granted is that disciplinary proceedings have not been an effective sanction. Id. at 1495.

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abusive only if the motion is brought well after the movant was aware of a possible conflict of interest situation or when a series of tactics have already been used to delay the progress of the proceedings.\footnote{91} When courts do recognize abuse, sanctions may include awarding attorneys fees, public censure, and disbarment from the court.\footnote{92} Because such penalties are almost never imposed,\footnote{93} sanctions by the federal courts are not an effective deterrent to unjustified disqualification motions.\footnote{94}

C. Overemphasis on the Attorney-Client Privilege

The absolute sanctity of client confidences has meant that even the most attenuated potential harm caused by divulgence of confidences outweighs the very real harm caused by disqualification.\footnote{95} The courts have disallowed rebuttal of the presumption of shared confidences, strictly following the conflict of interest rules because of the deference given the attorney-client privilege. Courts and the profession in general consider the privilege of paramount importance, to be protected at all costs.\footnote{96} Commentators argue that the absolute sanctity of a client’s secrets should be limited.\footnote{97} Where the

\footnote{91. Some courts have shown concern that the motion to disqualify not be used as a strategic litigation tactic. \textit{See}, e.g., Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985); Smith v. Whatcott, 757 F.2d 1098, 1100 (10th Cir. 1985); Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 722 (7th Cir. 1982); United States ex rel. Lord Elec. Co. v. Titan Pac. Constr., 637 F. Supp. 1556, 1562 (W.D. Wash. 1986).

92. Often the judge recognizes that the motions are being used as a strategic weapon but merely admonishes the movant and does not impose sanctions. \textit{See}, e.g., Melamed v. ITT Continental Baking Co., 592 F.2d 290, 295 (6th Cir. 1979) ("Motions to disqualify an opponent’s counsel can easily be simply disguised harassment.")

93. Moreover, these penalties are likely to be imposed only when a firm knew an extreme conflict of interest existed and went ahead with the representation anyway. \textit{See} Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1270 (7th Cir. 1983) (the court upheld a district court decision ordering a law firm to pay $25,000 in attorney fees and expenses for resisting a disqualification motion where the firm itself changed sides). For a more complete discussion of sanctions surrounding conflict of interest questions, see Comment, supra note 4, at 1470–1503.

94. \textit{See} Smith v. Whatcott, 774 F.2d 1032 (10th Cir. 1985). This was the second motion by plaintiff to disqualify defendants’ trial counsel. After granting the first motion, the court was asked to grant a motion disqualifying the subsequent counsel for having had contact of only one five minute phone call. Although it did not grant the motion, the court only said this “attempt to raise the issue now resembles this kind of strategic litigation tactic we cautioned against in our earlier opinion.” \textit{Id.} at 1035.

95. \textit{See supra} notes 56–58 and accompanying text.

96. The profession goes so far as to say that even human life is not valued greater than the keeping of clients’ secrets. Model Code DR 4-101(C) and RPC Rule 1.6 do not mandate that an attorney reveal his client’s secrets when another’s life is threatened. They merely allow an attorney to reveal client confidences if another’s life is threatened. Model Code DR 4-101(C); RPC Rule 1.6.

danger of actual harm caused by shared confidences is minimal, disqualification allows the shield of confidentiality to be used as a sword, often with the potential for unjust results. 98

D. Restrictiveness of Present Professional Responsibility Rules

Federal courts have been somewhat constrained in resolving disqualification issues by the restrictiveness of both the Model Code and the RPC. 99 When faced with a motion alleging a conflict of interest, the courts’ objective is to prevent the use of secrets gained in an attorney-client relationship to the detriment of the former client. 100 Both DR 5-105(D) of the Model Code and RPC Rule 1.102 adopt hardline positions calling for the disqualification of an entire firm if any single attorney in that firm is disqualified. Courts have interpreted the rules as requiring an irrebuttable presumption of shared confidences except in the case where an attorney has moved from the government to the private sector. 103 Such a presumption may be necessary in small law offices consisting of a few general practitioners working in close association on many legal issues. 104 These same concerns do not necessarily apply to large firms with multiple branch offices and distinct departments of operation. 105

E. Integrity of the Legal System Undermined

Because disqualification motions involve the actions of an attorney alleged to be in violation of the profession’s ethical rules, the integrity of

98. See Trone v. Smith, 621 F.2d 994, 995–1000 (9th Cir. 1980) (despite approval by the court that the firm be appointed as counsel for the trustee in bankruptcy and considerable work done on the case, the circuit court overruled the district court and granted disqualification because the firm had some dealings with one of the creditors); United States v. Uzzi, 549 F. Supp. 979, 981–982 (S.D.N.Y. 1982) (a criminal defense firm was disqualified because one of its attorneys had been a member of the prosecutor’s office at the time the defendant was investigated, even though the attorney was not directly involved in the case and prosecutors have a duty to turn over information favorable to the defense).

99. See supra note 10. From the time they were established by statute in 1789, federal courts had the power to regulate attorneys appearing before them. See Ex parte Burr, 22 U.S. (9 Wheat.) 529, 531 (1824).

100. Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1567 (Fed. Cir. 1984) (“attorney disqualification of counsel is a part of a court’s duty to safeguard the sacrosanct privacy of the attorney-client relationship which is necessary to maintain public confidence in the legal profession and to protect the integrity of the judicial process”).

101. See supra note 19.

102. See supra note 20.

103. See supra notes 61–63 and accompanying text.

104. In small firms the presumption of imputed knowledge is more realistic than in large firms. See, e.g., Gas-A-Tron of Arizona v. Union Oil Co., 534 F.2d 1322, 1324–25 (9th Cir.) (per curiam), cert. denied, 429 U.S. 861 (1976).

the legal system comes under scrutiny. When a disqualification motion is made for strategic reasons, an implication arises that attorneys regard professional ethics as a convenient weapon for litigation rather than as a means to police the profession. The lack of action by the courts and the resulting abuse by attorneys, in making bad faith disqualification motions, further erodes public confidence in a profession with an already tainted public image.

III. PROPOSED REMEDIES FOR PROBLEMS ASSOCIATED WITH DISQUALIFICATION

A. Stricter Requirements for Standing To Bring a Motion

Standing to raise an issue about conflict of interest between other parties where the objecting party cannot demonstrate any resulting harm to its own interests creates a clear danger of tactical use of the motion to disqualify. This tactic impairs the right of jointly represented parties to choose their own counsel. Some courts argue that they have a broad duty to police the legal profession, asserting a cognate duty on the part of all advocates to alert the court to any possible violation of professional rules. Denial of standing, however, merely leaves the general policing of the profession to disciplinary agencies. Thus, denial of standing in the case of third party

106. See Hodes & Gabinet, supra note 81, at 18, col. 1.
108. Special Comm. on Evaluation of Disciplinary Enforcement, ABA, Problems and Recommendations in Disciplinary Enforcement (1970). Headed by former Justice Tom Clark, the committee reported that overall disciplinary efforts have been notoriously inadequate. “With few exceptions, the prevailing attitude of lawyers toward disciplinary enforcement ranges from apathy to outright hostility. Disciplinary action is practically nonexistent in many jurisdictions . . .” Id. at i.
109. See, e.g., Armstrong v. McAlpin, 461 F. Supp. 622, 625 (S.D.N.Y. 1978), vacated on other grounds, 449 U.S. 1106 (1981). The defendant moved to disqualify a former Securities and Exchange Commission (SEC) attorney’s law firm from representing the plaintiff receiver in a lawsuit similar to an SEC enforcement action against the defendant, despite the fact that the SEC had approved the firm’s representation of the plaintiff. No one challenged the defendant’s standing to make the motion (which was ultimately denied). Id.
110. See supra notes 30–32 and accompanying text.

Weighing the needs of efficient judicial administration against the potential advantage of immediate preventive measures, we believe that unless an attorney’s conduct tends to “taint the underlying trial” . . . by [violating Canon 4 or 5], courts should be quite hesitant to disqualify an attorney. Given the availability of both federal and state comprehensive disciplinary machinery,
objections would ensure that judicial and litigant resources are not needlessly expended on behalf of a litigant who, although able to show that a lawyer has violated a rule, has suffered no harm. Denial of third party standing would limit unmerited strategic disqualification motions without permitting violations by attorneys to go unchecked.

B. Revising Factors Considered in Disqualification Motions

1. Weighing the Harm Caused by Disqualification Against the Harm Caused by Divulgence of Confidences

In considering disqualification motions, federal courts often fail to even consider that the possibility of divulged confidences does not produce great harm in every circumstance. In contrast, the courts have not given enough weight to the harm inflicted by disqualification of a party's chosen counsel. The attorney disqualification may cause a party with a meritorious claim or defense to lose a case at trial or to settle on inadequate terms. Courts that downplay such harms when trying to protect relatively minor confidential information overlook the possibility of very unjust results.

2. Greater Consideration Given to the Good Faith of Motions

Courts could give added consideration to whether disqualification motions have been brought in good faith. A factor in determining good faith is the timing of a motion. To some extent courts have recognized a variation...
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of the doctrine of laches in the disqualification context.\textsuperscript{119} The threshold issues are how far into the litigation the movant brought the motion and how long the movant knew of the possible conflict of interest situation.\textsuperscript{120} Once a reasonable time has passed after a movant was aware of a possible conflict and circumstances indicate that the movant merely seeks to gain a tactical advantage rather than eliminate any unfairness at trial,\textsuperscript{121} a presumption favoring the non-movant would shift the emphasis away from protecting the movant's interests and towards protecting the integrity of the trial process.\textsuperscript{122}

Courts could also more readily ascertain whether the judicial process is being subverted by determining whether a party has made a massive number of frivolous motions for the purposes of delay.\textsuperscript{123} If a disqualification motion is just the latest in a long line of motions, the court could more carefully scrutinize the good faith behind the motion. Courts would thereby lessen tactical abuse of disqualification motions.

C. Greater Use of Sanctions for Bad Faith Motions

Another tool the courts could use to alleviate the problem of burgeoning disqualification motions is the greater imposition of sanctions.\textsuperscript{124} Sanctions could include awarding attorney's fees for costs of defending a frivolous motion or for the costs of bringing a motion where a firm knowingly engaged in a conflict of interest.\textsuperscript{125} Other possible sanctions include public censure and disbarment from the court.\textsuperscript{126} Sanctions could be imposed for both blatant conflict of interest violations and the bringing of frivolous

\textsuperscript{119} See Trust Corp. of Montana v. Piper Aircraft Corp., 701 F.2d 85, 86 (9th Cir. 1983) (movant knew of possible conflict of interest two-and-one-half years before bringing the disqualification motion; the court ruled this constituted de facto consent); Redd v. Shell Oil Co., 518 F.2d 311, 315 (10th Cir. 1975); see also Note, supra note 77, at 740. But see Paul E. Iacono Structural Eng., Inc. v. Humphrey, 722 F.2d 435, 438 (9th Cir. 1983) (eight month delay in making the motion was not a waiver of the right to move for disqualification).

\textsuperscript{120} See Redd v. Shell Oil Co., 518 F.2d 311, 316 (10th Cir. 1975).

\textsuperscript{121} See Comment, supra note 118, at 239.

\textsuperscript{122} Certain rights are often lost because a motion was not brought in a timely fashion, including the right to appeal. This prevents a party from continuing litigation indefinitely. Id. at 240.


\textsuperscript{124} See Note, Sanctions for Attorney's Representation of Conflicting Interests, 57 COLUM. L. REV. 994, 994 (1957).

\textsuperscript{125} See, e.g., Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1270 (7th Cir. 1983).

\textsuperscript{126} While disqualification itself could be considered a sanction because of the resultant loss of fees, if the new firm is able to use the work product of the former firm, or the client has agreed to the representation despite the possible conflict of interest problems, the firm could retain all its fees up to the actual disqualification.
disqualification motions. If more attorneys were sanctioned for their disregard of violations of the conflict of interest rules, firms would be less inclined to attempt the representation or create the situation that caused the conflict. Additionally, the greater likelihood of sanctions, the less likely that a party will risk bringing a frivolous disqualification motion. Recently courts have given real teeth to Rule 11 of the Federal Rules of Civil Procedure by imposing monetary sanctions against attorneys who disregard the integrity of the judicial process by bringing frivolous claims.\textsuperscript{127} Rule 11 could be extended to frivolous disqualification motions.

D. \textit{Modifying the Model Rules of Professional Responsibility}

Court approval of new professional responsibility rules which would better balance the interests of the old and new client would go a long way toward alleviating the injustices in the present state of attorney disqualification motions. Because the federal courts are not bound by the local rules of the jurisdictions in which they sit,\textsuperscript{128} they are free to look beyond the enacted rules for guidance.

The initial ABA proposal for conflict of interest rules was not nearly as restrictive as that which was finally adopted.\textsuperscript{129} The discussion draft on vicarious disqualification differed in two ways from the Model Code\textsuperscript{130} and RPC.\textsuperscript{131} First, the rules would have allowed courts to inquire not only into whether matters were substantially related, as in RPC Rule 1.10, but also whether there was a "risk of disclosing confidences."\textsuperscript{132} In addition, the courts could inquire whether the lawyer "previously participated in a

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{127} Advance Transformer Co. v. Levinson, No. 79-C-557, slip op. at 8 (N.D. Ill. April 3, 1987) (an attorney and his client were ordered to pay $100,000 each in attorneys fees and costs for a violation of Rule 11); see also Comment, \textit{Ask Questions First and Shoot Later: Constraining Frivolity in Litigation Under Rule 11}, 40 U. MIAMI L. REV. 1267 (1986).
\item\textsuperscript{128} See supra note 99.
\item\textsuperscript{129} Proposed Rule 7.1 states:
(a) A law firm shall not represent multiple clients when a lawyer practicing alone would be prohibited from doing so.
(b) When lawyers terminate an association in a firm, neither a lawyer remaining in the firm nor one who has left it, nor any other lawyer with whom either lawyer subsequently becomes associated, shall undertake representation that involves:
(1) A significant risk of disclosing confidences of a client in violation of Rule 1.7, or making use of information to the disadvantage of a former client in violation of Rule 1.10; or
(2) A lawyer's assuming significant participation in representing a person in the same or a substantially related matter if the interest of that person is adverse in any material respect to that of a client in whose representation the lawyer had previously participated in a significant way.
\item\textsuperscript{130} See supra note 19 for the text of the MODEL CODE provision.
\item\textsuperscript{131} See supra note 20.
\item\textsuperscript{132} \textit{Id.}.
\end{enumerate}
\end{footnotesize}
significant way" in a substantially related matter. With these two provi-
sions, the courts could more carefully balance the potential harm of
disclosed confidences against the harm created by the disqualification of
counsel. Such balancing would prevent unnecessary harm created by
attorney disqualification where the possibility of the use of client con-
fidences to the client's detriment is minute.

E. Recognizing Conflict of Interest Management by the Firm: The
Implementation of Screening Mechanisms

Although changing the disciplinary rules and imposing sanctions upon
attorneys abusing the system by bringing frivolous motions would solve
many of the problems caused by disqualification motions, realistically such
action is not likely to occur in the immediate future. Since these changes
in the court process have not been made, federal courts have begun to
recognize precautions taken by firms to avoid conflict of interest prob-
lems. The utility of screening as an adequate defense to vicarious
disqualification requires recognition by the federal courts that such action
taken by the firm to insulate itself from liability is effective in preventing
disqualification. Since some courts have begun to recognize protective
measures taken by a firm when evaluating a disqualification motion, it can
be inferred that the greater the measures taken by the firm, the greater the
likelihood that they will be sufficient to overcome the presumption of
disqualification under the present Model Code or RPC.

Because attorneys change jobs more often, any law firm can assume with
a degree of certainty that it will be faced with a motion to disqualify an
attorney in the firm and subsequent vicarious disqualification of the entire
firm. With this foreknowledge, the managing partners can take action to

133. See Hodes & Gabinet, supra note 81, at 18, col. 1.
134. See generally ABA COMM. ON PROFESSIONAL DISCIPLINE &
CENTER FOR PROFESSIONAL RESPONSIBILITY, THE JUDICIAL RESPONSE TO LAWYER MISCONDUCT IV.8–9
135. See Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1580–81 (Fed. Cir. 1984);
Greitzer & Locks v. Johns-Manville Corp., No. 81-1379 slip op. at 7 (4th Cir. Mar. 5, 1982); Armstrong
136. Several courts have, after disqualifying a firm, noted in dicta that they would consider
preventative measures if the firms could show they had taken them. See Smith v. Whatcott, 757 F.2d
1098, 1102 (10th Cir. 1985) (vicarious disqualification of a firm granted because there was no screening
in place); Paul E. Iacono Structural Eng., Inc. v. Humphrey, 722 F.2d 435, 437–438 (9th Cir. 1983)
(mentions Chinese Walls in dicta but because no screening mechanisms were in place makes no ruling;
disqualifies firm); Schiessle v. Stephens, 717 F.2d 417, 421 (7th Cir. 1983); LaSalle Natl Bank v. County
of Lake, 703 F.2d 252, 259 (7th Cir. 1983).
137. See supra notes 81–82 and accompanying text.
prevent the imposition of vicarious disqualification. The motive for acting to prevent future disqualifications is monetary. If the firm is disqualified, it may not receive the fees the case would have generated and may not be paid for the work that it has already done.\textsuperscript{139} By changing the way a firm handles client confidences and privileges in a way which courts will recognize as effective against disqualification motions, the managing partners can prevent what could be a sizable financial loss and malpractice liability.\textsuperscript{140}

1. \textit{Screening Mechanisms as a Defense Against Vicarious Disqualification}

The first step in the prevention of disqualification is the institution of systems from simple card indexes\textsuperscript{141} to complex computer programs\textsuperscript{142} that allow the firm to check new clients and new personnel for potential conflicts of interest. The theory behind these systems is that most conflict of interest problems can be avoided if potential clients or employees are scrutinized carefully. There will be times, however, when it is in the firm’s best interest that someone be hired who may cause a conflict of interest problem, or when a conflict of interest is not discovered until considerable work has been done on a case. In such circumstances, the best way the firm can avoid being disqualified is to have in place mechanisms designed to protect client confidentiality.\textsuperscript{143}

a. \textit{Chinese Walls: Screening Mechanisms Around Departments}

As a means to eliminate the potential for the sharing of confidences law firms could implement “Chinese Walls” similar to those which originated in investment banking firms. The wall is erected to restrict information flow to specific departments.\textsuperscript{144} In investment firms, departmentalization begins

\textsuperscript{139} See Note, supra note 77, at 739.
\textsuperscript{140} According to professional liability insurers, conflict of interest cases constituted less than five percent in 1977 compared with twenty-two percent in 1979. Stern & Martin, \textit{Mitigating the Risk of Becoming a Defendant in a Malpractice Action by Your Former Client}, 39 ALA. L. W. 258, 260 (1978).
\textsuperscript{141} Wilson, \textit{Conflict of Interest Problems and Solutions}, 5 LEGAL ADMIN., Fall 1986, at 29–32.
\textsuperscript{142} Alder, \textit{Beyond Chinese Walls: Coping with Conflicts}, AM. L. W., May 1984, at 6, 8.
\textsuperscript{143} Many commentators have noted that although by no means a panacea for the many ethical problems presented by contemporary legal practice, the Chinese Wall defense in some cases can rebut the presumption of imputed knowledge and thereby save a law firm from disqualification. It is also asserted Chinese Walls are capable of effectively preventing the disclosure and misuse of confidential information within law firms. See Comment, \textit{The Chinese Wall Defense to Law-Firm Disqualification}, 128 U. Pa. L. REV. 677, 714 (1980).
\textsuperscript{144} In investment banking firms, a potential conflict of interest arises when one division is getting together the financing of a takeover bid and another division is instructing clients where to invest their money in the stock market. Obviously, if the advisors were to learn of the pending takeover of a
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with the division of labor into discrete departments. Organizational separation is supplemented by physical separation to increase the sense of departmental identity. In addition, a strong policy statement from the management against passing information to other departments, accompanied by an educational program for employees, is essential if a Chinese Wall is to be recognized as effective.

b. **Strict Firm Policies To Ensure Screening**

In conjunction with screening mechanisms, in order to ensure that attorneys do not receive confidential information despite departmentalization, firms must adopt strict policies against sharing confidences. Companies whose major assets are trade secrets seek to protect these secrets from competitors by limiting access to information and imposing penalties against employees who reveal trade secrets. The courts in the trade secrets cases, like the courts deciding the disqualification cases, presume that the free flow of information is not regulated by the company. To rebut this presumption the company must show that it has a written policy which is strictly enforced.

As with a high-tech firm protecting against divulgence of trade secrets, a firm trying to protect itself from vicarious disqualification can begin with a written firm-wide policy on information handling. The policy must include sanctions that will be imposed, including dismissal, against attorneys, or

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145. Id.
149. Trade secret cases typically involve not products or processes but ideas involving uses of products and processes. In order to hold an employee liable for damages created by the divulgence of a trade secret, the employee must have known that the information was confidential. Marx & Manela, supra note 148.
151. See supra note 150 and accompanying text; see also Spanner, *Protecting Innovation: How Much Trade Secret Security is Enough?*, Bus. Marketing, Oct. 1984, at 70-90. Secrecy did not even have an independent existence; information was secret "only to the extent that those who possess it choose to treat it so." Spanner, supra, at 70 (quoting an unnamed Michigan court).
other persons, who violate the confidentiality policy. New attorneys and staff must be informed of the firm’s strict policies regarding access to client confidences. These measures would provide a firm foundation for arguing to the court that vicarious disqualification is unwarranted.

c. Mechanisms To Assure Effectiveness of Chinese Walls

To minimize the problem of potential vicarious disqualification of a firm’s entire litigation department, if any member thereof is disqualified, litigation teams could be formed. The formation of teams for litigation has already been initiated in many firms to promote efficiency. These firms could institute a strict policy against sharing confidential information with non-team members. An attorney joining a firm after working for an opposing firm would be segregated from the team which is working on the litigation in the new firm.

So that communication between firm members who seek advice on a specific legal question outside their “team” could be continued, an approach similar to that taken by doctors who wish to protect patient confidentiality while consulting with a specialist could be adopted. Courts have recognized that no client confidences are passed when the attorney consults a co-worker on a specific legal question.

To augment the policies against disclosure of confidential information, litigation files could be locked and access to files limited to specific department or “team” members. Memos and other materials containing client confidences or litigation strategy could be marked to alert every employee of their status. In the case of extremely sensitive documents, special paper could be obtained which cannot be photocopied. Similar

153. See supra notes 68–69 and accompanying text.
155. A doctor during such consultations does not specifically identify the patient but addresses only that aspect of the patient’s condition applicable to the consultation.
156. Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975).
[T]here is reason to differentiate for disqualification purposes between lawyers who become heavily involved in the facts of a particular matter and those who enter briefly on the periphery for a limited and specific purpose relating solely to legal questions. In large firms at least, the former are normally more seasoned lawyers and the latter the more junior.
Id. at 756–57.
158. Suggested markings include actually placing the names of the team members on the document or stating that the document is only to be discussed with the person from whom it was received. Id. at 49.
159. See Syntex Ophthalmics, Inc. v. Novicky, 745 F.2d 1423, 1433 (Fed. Cir. 1984) (on the importance of such measures in a suit alleging misappropriated trade secrets).

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security measures could be employed to protect documents within the firm’s data processing system.\textsuperscript{160}

Although the firms most likely to be able to take advantage of the screening mechanisms are large and already partially departmentalized,\textsuperscript{161} small firms that hire “of counsel” or “contract” attorneys can use screening mechanisms to limit their exposure to conflict of interest problems.\textsuperscript{162} Implementing policies which essentially make the potentially conflicted attorney a separate department handling discrete matters would create a basis for arguing against vicarious disqualification of the entire firm.\textsuperscript{163}

The facts that present the best argument for the screening mechanism defense to disqualification involve double imputations. If an attorney is first imputed to have received confidences and then this imputed knowledge is imputed to the other members of his firm, possible detriment to the former client has reached its most attenuated state.\textsuperscript{164} There clearly are cases, however, where Chinese Walls are not an appropriate means to prevent disqualification, \textit{i.e.} concurrent representation of adversaries.\textsuperscript{165} Additionally, even with efficient screening mechanisms established within a firm, individual attorneys have an ethical duty to avoid representation of a client if such representation results in a scenario whereby an inadvertent disclosure would be extremely harmful to an adversary/former client.\textsuperscript{166}

\textsuperscript{160} See Spanner, supra note 151, at 89 (precautions include using software “keys” and data encryption or putting “fuses” into software that detect unauthorized access and stop or erase a program if unauthorized access occurs).

\textsuperscript{161} “The risk of conflict rises exponentially with the size of the firm . . . .” G. HAZARD, ETHICS IN THE PRACTICE OF LAW 81 (1978).

\textsuperscript{162} See, e.g., United States ex rel. Lord Elec. Co. v. Titan Pac. Constr., 637 F. Supp. 1556 (W.D. Wash. 1986). In considering the disqualification motions, the court looked at the nature of the former representation, the time elapsed since that representation, the nature of the conflicted attorney’s association with the present firm (including work assignments and salary arrangements), the likelihood of contact with the litigation attorneys and the presence and efficiency of “specific institutional mechanisms.” Id. at 1565-66.

\textsuperscript{163} See, e.g., United States ex rel. Lord Elec. Co. v. Titan Pac. Constr., 637 F. Supp. 1556, 1559 (W.D. Wash. 1986) (the conflict involved an “of counsel” attorney who was not active in the litigation portion of the firm; vicarious disqualification was denied).


\textsuperscript{165} See supra notes 28-30 and accompanying text.

\textsuperscript{166} See generally Aronson, Conflict of Interest, 52 WASH. L. REV. 807, 843-48 (1977); Comment, Disqualification of Counsel: Adverse Interests and Revolving Doors, 81 COLUM. L. REV. 199, 212-16 (1981).
2. Assessing Whether Attorneys Have Received and Shared Client Confidences

In the past the courts have given billable hours no weight in determining whether confidential information was received or shared by attorneys in a firm.\textsuperscript{167} The courts reasoned that although an attorney may never have actually billed the client for work on a particular matter, the attorney could easily have learned the client's confidences and secrets.\textsuperscript{168} If the firm's management has initiated a strict system of screening mechanisms whereby information is shared only within the "team" or department, the courts may be more likely to give credence to records of hours billed on a matter.\textsuperscript{169}

The institution of departmentalization, with or without the limitation of the team concept, will restrict the free flow of ideas and information presently enjoyed in most firms. In firms with little exposure to disqualification motions, the loss of informal information sharing may not be worth the protection afforded by the screening mechanisms. However, in firms that are large,\textsuperscript{170} are likely to merge with another firm, or hire a considerable number of experienced attorneys, screening mechanisms may offer a means to prevent both future disqualification and to avoid restrictions on what clients the firm can represent.\textsuperscript{171}

IV. CONCLUSION

The number of disqualification motions will continue to grow because the underlying conditions causing this growth are unlikely to change. Nearly every firm will be faced with an attorney disqualification motion

\textsuperscript{167} See, e.g., EZ Paintr Corp. v. Padco, Inc., 746 F.2d 1459 (Fed. Cir. 1984). The court concluded that despite affidavits showing that no hours had been billed to the client, the party defending against the disqualification motion had not "clearly and effectively" rebutted the presumption that the conflicted attorneys "have knowledge of the confidences of EZ Paintr." \textit{Id.} at 1462.

\textsuperscript{168} Consideration was even given whether members of a firm "regularly had lunch together... at least once a month." Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1569 (Fed. Cir. 1984).

\textsuperscript{169} Presently consideration of hours billed is only given as a reason to disqualify an attorney and submit the firm to vicarious disqualification. Credence is given billable hours to show an attorney must have received confidences, but lack of billable hours cannot rebut the presumption of shared confidences. See \textit{supra} note 167.

\textsuperscript{170} See \textit{supra} note 84.

\textsuperscript{171} An additional advantage to firms that limit the exposure of a client's secrets and confidences is that they may obtain greater client trust. If the client knows that information given his attorney will not be relayed to persons not working on his case, he may feel freer to reveal sensitive information. When a client deals with a small firm, the client can assume that his confidences are shared by a relatively small number of people. A client may not, however, feel comfortable giving a large number of attorneys and support personnel access to confidences of a sensitive nature.
because of its extensive use as a trial tactic. By establishing screening mechanisms against sharing confidential information, firms can limit the impact of future disqualification motions based on conflicts of interest. Courts have already approved mechanisms for preventing the spread of information in the trade secrets area. Federal courts appear willing to extend approval of these mechanisms in the future to the conflicts of interest setting. This approval would signal recognition of the burdens of disqualification and the hardship created by irrebuttable presumptions in the context of vicarious disqualification. By using the methods suggested here to protect client confidences, laws firms can take positive prophylactic action that may prevent future disqualification.

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