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Thomas D. Morgan

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# SCREENING THE DISQUALIFIED LAWYER: THE WRONG SOLUTION TO THE WRONG PROBLEM\*

Thomas D. Morgan\*\*

## INTRODUCTION

Ann Andrews, an associate at Smith & West, has represented the plaintiff in a personal injury suit. The defendant has been represented by the firm of Davis & Baker. Now, Ann Andrews has left Smith & West and been hired by Davis & Baker. Smith & West will continue to represent the plaintiff in the law suit. May Davis & Baker continue to represent the defendant?

The traditional answer is "no." Ann could not herself "switch sides," *i.e.*, represent the defendant after having represented the plaintiff in the case.<sup>1</sup> Even if Ann is assigned to other work at Davis & Baker, whatever Ann may not do, the argument goes, her partners and associates may not do either.<sup>2</sup> Therefore, because Ann would be "disqualified" from handling the defendant's case, her entire firm must cease the representation of the defendant.

The principle that requires this result is known as the doctrine of "imputed disqualification." The rule is harsh in a world in which lawyers change firms—sometimes frequently—over the course of their careers. It is a rule which some have proposed be modified to reduce its impact on lawyers and clients alike. Until recently, however, the courts have refused to abandon the rule in cases such as the one here described.

Increasingly, however, suggestions are heard that an entire law

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\* This article was the Spring 1987 Alzheimer Lecture at the University of Arkansas at Little Rock School of Law.

\*\* Distinguished Professor of Law, Emory University. B.A. 1962, Northwestern University. J.D. 1965, University of Chicago.

1. The rule was firmly established in *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265, 268 (S.D.N.Y. 1953): "[W]here any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited." This rule has been consistently followed ever since. *E.g.*, *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221 (7th Cir. 1978); *Hull v. Celanese Corp.*, 513 F.2d 568 (2d Cir. 1975); *Chugach Elec. Ass'n v. United States Dist. Court*, 370 F.2d 441 (9th Cir. 1966).

2. See, *e.g.*, *In re Corn Derivatives Antitrust Litig.*, 748 F.2d 157 (3d Cir. 1984); *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602 (8th Cir. 1977); *W.E. Bassett Co. v. H.C. Cook Co.*, 201 F. Supp. 821 (D. Conn. 1961), *aff'd per curiam*, 302 F.2d 268 (2d Cir. 1962).

firm should not be disqualified solely because it would be improper for one partner or associate of the firm to handle a matter.<sup>3</sup> In a case described more fully later in this article, a federal district court has held a firm not disqualified where the "tainted" associate was formally "screened" from participation in the case.<sup>4</sup>

What are we to make of such a case and of the effort generally to modify the heretofore strict rule of imputed disqualification? In this article, I will take what may be an unpopular position. I will suggest that the "screening" or "Chinese Wall" approach is inappropriate in cases where the representation of a former private client is involved.

I will argue that screening misconceives the purposes of imputed disqualification and is not responsive to those purposes. I will go on to suggest that, instead of examining the viability of screening, the courts should examine more carefully whether circumstances justify barring the arguably disqualified lawyer in the first place.

### BACKGROUND

We sometimes naively speak as though lawyer ethics have come down to us from the unknowable past, with broad consensus and extensive precedent. Usually, of course, that is not the case at all.

The rule that an individual lawyer may not switch sides in the same case is of relatively long standing. One hundred fifty years ago, Baltimore lawyer David Hoffman wrote *Fifty Resolutions in Regard to Professional Deportment* as part of a course of study which he offered for young practitioners.<sup>5</sup> Resolution VIII began: "If I have ever had

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3. E.g., Liebman, *The Changing Law of Disqualification: The Role of Presumption and Policy*, 73 NW. U.L. REV. 996 (1979); Note, *Prospective Waiver of the Right to Disqualify Counsel for Conflicts of Interest*, 79 MICH. L. REV. 1074 (1981); Note, *The Chinese Wall Defense to Law Firm Disqualification*, 128 U. PA. L. REV. 677 (1980). Cf. Lindgren, *Toward a New Standard of Attorney Disqualification*, 1982 AM. B. FOUND. RES. J. 419 (argues that disqualification of attorneys should be disfavored as a remedy for violation of ethical standards). Two notable exceptions to this call for a fundamental change in approach to imputed disqualification are C. WOLFRAM, MODERN LEGAL ETHICS § 7.6.4 at 401-04 (1986) and *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1366-73 (1981). Some of the concerns about imputed disqualification have undoubtedly affected courts that have established limits on so-called "double imputation," i.e., disqualification of firms with which a previously vicariously disqualified firm are now associated. E.g., *Arkansas v. Dean Food Products Co.*, 605 F.2d 380 (8th Cir. 1979); *American Can Co. v. Citrus Feed Co.*, 436 F.2d 1125 (5th Cir. 1971).

4. *Nemours Found. v. Gilbane*, 632 F. Supp. 418 (D. Del. 1986), discussed *infra* at text accompanying notes 29-34.

5. A one volume version of this course of study that has come down to us is D. HOFFMAN, A COURSE OF LEGAL STUDY 752-75 (2d ed. 1968). Far more convenient for review of these resolutions are H. DRINKER, LEGAL ETHICS 338-51 (1953), and ALABAMA LAWYERS HANDBOOK 9-23 (1944).

any connection with a cause, I will never permit myself (when that connection is from any reason severed) to be engaged on the side of my former antagonist."<sup>6</sup>

That principle, in turn, became embodied in the third paragraph of Canon VI of the 1908 ABA Canons of Professional Ethics: "The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."<sup>7</sup>

In its Formal Opinion 33,<sup>8</sup> the ABA Committee on Professional Ethics considered the situation of attorney X who had been a member of the firm of X & Y in 1903 when client A retained that firm to annul her marriage. The ground for the annulment was that A was an imbecile. Y had been trial counsel in the case, but X had done work on the decree. Later, the firm of X & Y was dissolved and X formed a partnership with C. Twenty-five years after the original annulment suit, A sought to have a deed cancelled on the ground of her imbecility. A was represented in that suit by a new attorney, and the firm of X & C was hired by the defense.

Should X & C be barred from defense of the deed rescission because of X & Y's representation of A twenty-five years earlier? The ABA Ethics Committee said "yes," the firm was disqualified. X's firm maintained that A was an imbecile in the first suit, so X could not maintain otherwise today. In sweeping language that has been quoted and has controlled thinking about this area ever since, the Committee held that X's law firm was barred as well: "The relations of partners in a law firm are so close," the Committee wrote, "that the firm, and all members thereof, are barred from accepting any employment, that any one member of the firm is prohibited from taking."<sup>9</sup>

## TWO RELATED SITUATIONS

Imputed disqualification is not limited to situations in which a law firm wants to take the same case or a case substantially related to

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6. D. HOFFMAN, *supra* note 5, at 753; H. DRINKER, *supra* note 5, at 339.

7. The Canons of Ethics are reproduced in, e.g., MORGAN & ROTUNDA, 1987 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 410-22 (1987); H. DRINKER, *supra* note 5, at 309-25. An annotated version is contained in AMERICAN BAR ASSOCIATION, OPINIONS ON PROFESSIONAL ETHICS 11-197 (1967) [hereinafter cited as ABA OPINIONS].

8. ABA Comm. on Professional Ethics and Grievances, Formal Op. 33 (1931), *reprinted* in ABA OPINIONS, *supra* note 7, at 277.

9. *Id.*

another in which one of its lawyers had been involved on behalf of a private client. Two other situations present the same kind of issues. The law has sometimes treated them differently—differently from each other and from the former private client situation.

First, imputed disqualification has the effect of disqualifying a law firm from handling a case against someone whom the firm is *presently* representing in another matter.<sup>10</sup> This rule was not part of the Canons of Ethics and was apparently first adopted by the ABA Committee on Professional Ethics in its Formal Opinion 16.<sup>11</sup> The question raised was whether a law firm could handle criminal defense cases which were being prosecuted by a partner in the same firm. The Committee said no, citing the second paragraph of Canon 6: “[A] lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose. . . .” The prosecutor himself cannot represent both the public and the defendant,” the Committee reasoned, “and neither can a law firm serve two masters.”<sup>12</sup>

That kind of case is intuitively easy for most people, but imputed disqualification is now routinely imposed even where the two cases in the firm are wholly unrelated. In *Cinema 5, Ltd. v. Cinerama, Inc.*,<sup>13</sup> for example, an attorney was a partner in two law firms—one in New York City and one in Buffalo. The Buffalo firm represented Cinerama, a distributor of motion pictures and owner of theater chains, as defendant in antitrust suits brought by other theater owners in upstate New York alleging denial of access to popular films. At the same time, the New York firm was representing a client which was suing Cinerama for allegedly trying to acquire control of the client through secret stock acquisitions. Even though the two cases were factually unrelated, and even though the partner common to the two firms was apparently not personally involved in either case, the New York firm was disqualified from handling the suit against Cinerama. “One firm in which attorney Fleischmann is a partner is suing an actively represented client of another firm in which attorney Fleischmann is a partner,”<sup>14</sup> the court reasoned. Thus, attorney Fleischman should be

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10. *E.g.*, *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978); *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1977); *Sapieza v. New York News, Inc.*, 481 F. Supp. 676 (S.D.N.Y. 1979).

11. ABA Comm. on Professional Ethics and Grievances, Formal Op. 16 (1929), *reprinted in* ABA OPINIONS, *supra* note 7, at 254-55.

12. *Id.* (quoting CANONS OF PROFESSIONAL ETHICS Canon 6 (1942), *reprinted in* H. DRINKER, *supra* note 5, at 311).

13. 528 F.2d 1384 (2d Cir. 1976).

14. *Id.* at 1386.

deemed to be on both sides of the same case. The attorney had not sufficiently shown "that there will be no actual or *apparent* conflict in loyalties or diminution in the vigor of his representation,"<sup>15</sup> so disqualification was required.

The second imputed disqualification situation analogous to the case of the former private client is the situation of the government lawyer who has passed through the revolving door into private practice. Imagine that Ann Andrews, the lawyer whose career change began this article, had worked for the SEC prosecuting insider trading cases. She has left the agency to enter private practice and counsel corporate executives on when they may and may not buy and sell their companies' stock. First, may she give this kind of advice in private practice? Second, if not, is any firm which she may join barred from all insider trading work before or against the SEC?

It turns out that the ABA and reviewing courts have been quite liberal in what they have permitted former government lawyers to do in private practice. In the example just posed, even Ann herself would not be barred from giving advice about insider trading the day after she left government service. She would only be barred from representing a private client in a "matter" in which she had had "substantial responsibility" while at the SEC.<sup>16</sup> In this context, "matter" refers to a particular case and not to a general substantive area of the law.<sup>17</sup> Ann would not be barred from giving advice, nor would her firm be disqualified.

Even assuming that the private firm Ann joined had been defending a case actually being prosecuted by Ann, the firm would not now have to withdraw. The ABA Standing Committee on Ethics and Professional Responsibility considered that express issue in its Formal Opinion 342.<sup>18</sup> The government would have a hard time hiring attorneys, the Committee reasoned, if those that it hired could not readily make the transition to private practice. "So long as the individual lawyer is held to be disqualified and is screened from any direct or indirect participation in the matter" (including being excluded from

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15. *Id.* at 1387.

16. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 9-101(B) (1980). The relevant federal statute is 18 U.S.C. § 207 (1982). That provision and the MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(a) (1983) substitute the term "participated personally and substantially" for the term "substantial responsibility" but the meaning is the same.

17. See, e.g., *Allied Realty of St. Paul, Inc. v. Exchange Nat'l Bank of Chicago*, 283 F. Supp. 464 (D. Minn. 1968), *aff'd*, 408 F.2d 1099 (8th Cir. 1969).

18. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975) was first published at 62 A.B.A. J. 517 (1976).

sharing in the fee for the case), the Committee reasoned, "the problem of switching sides is not present."<sup>19</sup> That major qualification of the imputed disqualification principle was later confirmed by the Second Circuit in the case of *Armstrong v. McAlpin*,<sup>20</sup> and seems to represent settled law today.

### THE MODEL RULES' TREATMENT OF THESE ISSUES

The ABA Model Code of Professional Responsibility had been extraordinarily terse in its treatment of imputed disqualification. Disciplinary Rule No. 5-105(D) said only: "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."<sup>21</sup>

That language clearly covered simultaneous representation of opposing sides, but as discussed above, the ABA read a screening possibility into the language in the case of the former government lawyer. The case of the former private client was more ambiguous, because the Model Code nowhere explicitly prohibited switching sides in such a case. The prohibition was developed by the courts from a generous reading of Canons 4 and 9 of the Model Code,<sup>22</sup> and imputed disqualification was applied by analogy.

The ABA Model Rules of Professional Conduct represent an important effort to improve upon the Model Code's formulation and to summarize the case law relative to imputed disqualification. The problem with the Model Rules is that they tend to deal with the various situations in which imputed disqualification is applied as if they were properly seen as different. In so doing, I believe the Model Rules may have missed a chance to fit the disparate rules into a coherent whole.

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19. *Id.* at 521. A similar result was reached by Opinion 889 of the Association of the Bar of the City of New York. 31 THE RECORD 552 (1976). See also, Morgan, *Appropriate Limits on Participation by a Former Agency Official in Matters Before an Agency*, 1980 DUKE L.J. 1.

20. 625 F.2d 433 (2d Cir. 1980)(en banc), *vacated on other grounds*, 449 U.S. 1106 (1981).

21. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D) (1980). Before 1974, the provision imputed disqualification to the attorney's law firm in cases of conflict of interest, but no others. The language "or any other lawyer affiliated with him or his firm" was also added at that time. At the time, these were seen as "housekeeping changes." See C. WOLFRAM, *supra* note 3, at 393-94; ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 246 (O. Maru ed. 1979).

22. See, e.g., *Bd. of Ed. of New York City v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979); *Arkansas v. Dean Food Products Co.*, 605 F.2d 380, 384-86 (8th Cir. 1979); *Schloetter v. Railoc of Indiana, Inc.*, 546 F.2d 706 (7th Cir. 1976).

Model Rule 1.9<sup>23</sup> deals with the problem with which we began—the problem of a lawyer's personally taking cases contrary to the interest of a former private client. Such representation, without the former client's consent, is not proper (1) if the current case is the same or substantially related to the matter in which the lawyer represented the former client, or (2) if the present representation would involve the lawyer's use of confidential information learned in the prior representation.

Rule 1.10(a) then states the imputed disqualification rule absolutely and in a way apparently applicable to all situations: "Where lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so . . . ." <sup>24</sup>

Rule 1.10(b) then goes on to make the point with which we began this article—that a lawyer disqualified by actual knowledge of client confidences gained at a prior firm disqualifies everyone in the new firm which she joins.<sup>25</sup> Conversely, however, a lawyer who would have been only disqualified by imputation while in the prior firm, and who in fact knows no disqualifying client confidences, is not disqualified from taking a case contrary to that client of the prior firm.

Rule 1.10(c) further qualifies imputed disqualification where a personally disqualified person has left a firm. If no lawyer remaining in the firm had in fact received any disqualifying information about the client, *i.e.*, all were disqualified solely by imputation from the person who has now left, the firm's disqualification is thereby lifted.<sup>26</sup>

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23. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1983).

24. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10(a) (1983).

25. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10(b) (1983). The language of the rule is:

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

26. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10(c) (1983). The rule specifically provides:

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.



Finally, Rule 1.11(a) provides that while a former government lawyer may not "represent a private client in connection with a matter in which the lawyer participated personally and substantially" while in government service, the firm in which that lawyer is practicing is not disqualified if "the disqualified lawyer is screened from any participation in the matter and apportioned no part of the fee therefrom."<sup>27</sup>

#### THE EFFORT TO GET JUDICIAL MODERATION OF THESE RULES

Once again, it is easy but misleading to suppose that today's relatively clear rules are the product of many years of development. In fact, however, the first major "former client" imputed disqualification case seems to have been decided in 1954.<sup>28</sup>

The limits of the doctrine have been tested for some time during the over thirty intervening years, but the most straightforward attempt to qualify the rule was the 1986 decision of *Nemours Foundation v. Gilbane*.<sup>29</sup> That case involved a complex dispute surrounding the building of an addition to a hospital. Basically, the prime contractor and a major subcontractor were suing each other, and also the architect and mechanical engineer on the project.

On the lawyer disqualification issue, the facts were not in dispute. Attorney Bradley had been an associate in the law firm which represented the mechanical engineer. That firm had been aligned with the architect in the litigation. In April, 1984, Bradley had been asked by his firm's principal litigating partner on the matter to prepare a set of notebooks to be used by the participants in a "mini-trial" which the parties hoped to use as a settlement device. The case did not settle, and Bradley did nothing more on the case. He testified that he did not even remember what documents he saw or whether any were protected by the attorney-client privilege and not disclosed during the settlement effort.

Sometime within the next year, Bradley left his former firm and was hired by the firm which was local counsel for the subcontractor, *i.e.*, a party on the other side of the case. Bradley himself had nothing to do with the litigation at the new firm, and indeed seems not to have known that his new firm had any part in it until May, 1985.

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27. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(a) (1983).

28. *Consolidated Theaters v. Warner Bros. Circuit Management Corp.*, 216 F.2d 920 (2d Cir. 1954). A particularly important early case seems to have been *W.E. Bassett Co. v. H.C. Cook Co.*, 201 F. Supp. 821 (D. Conn. 1961), *aff'd per curiam*, 302 F.2d 268 (2d Cir. 1962).

29. 632 F. Supp. 418 (D. Del. 1986).

At that time, he met an attorney from the principal counsel for the subcontractor who was visiting his new firm's office and whom he had apparently met in connection with the mini-trial. Senior counsel at Bradley's new firm figured out what happened, and it was agreed that no one at the firm would talk with him about the case. All files were previously and thereafter kept adjacent to the main litigator's office, and not in the firm's file room. Thus, Bradley had no access to them. Nevertheless, in November, 1985, counsel for the architect moved to have Bradley's firm disqualified from further participation in the litigation.

The court held that it had the authority to supervise the conduct of attorneys appearing before it, including the authority to order their disqualification.<sup>30</sup> It also held that the architect had to be deemed to have been a "client" of Bradley, even though Bradley's firm actually represented the mechanical engineer. The two parties were aligned together in the case, they held joint strategy sessions, and some of the architect's documents were part of the "book" which Bradley prepared.<sup>31</sup> Thus, Bradley himself clearly had to be disqualified from taking part in the current phase of the litigation.

Of course, no one was seriously contesting Bradley's disqualification. The question was disqualification of his law firm. As to that point, the court discerned a seeming liberalization of imputed disqualification under the Model Rules of Professional Conduct as compared to the Model Code of Professional Responsibility.

The court cited Rule 1.10(b), which we have seen provides in substance that where an attorney leaves a firm representing one side in a case, but in fact has done nothing on the case and knows nothing about it, the lawyer does not disqualify the firm to which he moves. Second, the court cited Rule 1.11(b) which provides that a former government lawyer's firm is not disqualified if the lawyer is "screened from any participation in the matter and apportioned no part of the fee therefrom." Neither of the above rules was specifically applicable to the facts before the court, of course, but the spirit of the rules seemed to the court to modify the traditional no-exception application of imputed disqualification.

The court was concerned that the case had already consumed several years and that the cost of now switching counsel would be

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30. *Id.* at 421-22 (citing *Richardson v. Hamilton Int'l Corp.*, 469 F.2d 1382 (3d Cir. 1972)).

31. *Id.* at 423-24 (citing *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978)).

great both to the client and the progress of the case.<sup>32</sup> The court concluded that with proper screening the actual prejudice to the former client would be minimal.<sup>33</sup> Thus, the court held that Bradley's firm should not be per se disqualified, provided that Bradley was continuously kept under a "cone of silence" by his firm with respect to all information concerning the case.<sup>34</sup>

#### THE POOR CASE OFTEN MADE FOR IMPUTED DISQUALIFICATION

I am sure that the result in the *Nemours* case seems inherently reasonable to many. It is consistent with what we know of the reality of modern law firms. One advocate for change in the rule has written: "Indiscriminate application of the firm-disqualification rule—a rule fashioned in a day when law firms were small and intrafirm relations informal—is no longer viable in the complex world of large firms."<sup>35</sup> As we all know, large firms today are simply not family-like places in which everybody knows what everyone else is doing, much less what client information each other knows.

The sense of unreality underlying firm disqualification is reinforced by some of the arguments used to justify the rule. It may be argued, for example, that imputed disqualification is the inevitable result of applying agency law to the lawyer-client relation. Partnerships, including law partnerships, are made up of reciprocal principal/agency relations."<sup>36</sup> As Comment 6 to Model Rule 1.10

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32. *Id.* at 430. The court also pointed out that the moving party had known of the possible conflict for five months before filing its motion. The court gently suggested that "mere delay and harassment" might have motivated the motion at this point in the litigation. *Id.* at 431.

33. *Id.* at 429. At least two other cases involving former private clients have reached this same result. See *INA Underwriters Ins. Co. v. Rubin*, 635 F. Supp. 1 (E.D. Pa. 1983); *Lemaire v. Texaco, Inc.*, 496 F. Supp. 1308 (E.D. Tex. 1980).

34. *Id.* at 428. The term "cone of silence" was a conscious invention of the court in this case.

The conical image, a metaphor adopted from popular television, more appropriately describes the responsibility of the *individual* attorney to guard the secrets of his former client. He is commanded by the ethical rules to seal, or encase, these particular confidences within his own conscience. The term 'Chinese Wall' is suggestive of attempts in the context of a large law firm to physically cordon off attorneys possessing information from the other members of the firm who represent clients whose interests are adverse to interests of these former clients. Such an approach tends to cast a shadow of disrepute on attorneys separated in this manner from their professional colleagues.

*Id.* at 428 (citation omitted).

35. Note, *The Chinese Wall Defense to Law-Firm Disqualification*, 128 U. PA. L. REV. 677, 714 (1980).

36. UNIFORM PARTNERSHIP ACT § 9, 6 U.L.A. 132 (1914): "Every partner is an agent of

puts it: "[A] firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client."<sup>37</sup>

Traditionally, what one agent of a firm knows, all members of the firm are presumed to know. From this presumption of vicarious knowledge,<sup>38</sup> then, the case for imputed disqualification may be made. Even a moment's reflection, however, suggests the weakness of this analysis. The Second Circuit has written:

[I]t would be absurd to conclude that immediately upon their entry on duty [lawyers] become the recipients of knowledge as to the names of all the firm's clients, the contents of all files relating to such clients, and all confidential disclosures by client officers or employees to any lawyer in the firm. Obviously, such legal osmosis does not occur.<sup>39</sup>

Indeed, except in the case of simultaneous representation, the argument is not even good partnership law. Partners are not literally assumed to know everything each other knows. Instead, they are charged with knowledge acquired in pursuit of the partnership's affairs.<sup>40</sup> Put another way, in a business firm in which communication of information *should* occur, the legal rule assumes it *has* occurred so as to require the firm to organize itself so that it *will* occur.

This kind of presumption about knowledge certainly does not explain imputed disqualification in a law firm setting, at least not in all settings in which the rule applies. In the former client case, for example, where Ann Andrews moved from Firm A to Firm B, she could not, by definition, have acquired any disqualifying knowledge while in pursuit of Firm B's affairs. The subsequent imputed disqualification of Firm B, then, must depend on something other than the mechanical invocation of agency or partnership law.<sup>41</sup>

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the partnership for the purpose of its business . . . ."; Cf. RESTATEMENT (SECOND) OF AGENCY § 14A (1958).

37. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 Comment 6 (1983).

38. This analysis evolved into what several cases have called a "conclusive presumption" that all lawyers in a firm have shared the confidences and secrets of each other's clients. *E.g.*, *Novo Therapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc.*, 607 F.2d 186, 197-98 (7th Cir. 1979) (en banc) (Swygert, J., dissenting); *Celanese Corp. v. Leesona Corp.* (*In re Yarn Processing Patent Validity Litigation*), 530 F.2d 83, 89 (5th Cir. 1976); *Laskey Bros. of W. Va., Inc. v. Warner Bros. Pictures, Inc.* 224 F.2d 824, 827 (2d Cir. 1955).

39. *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 753-54 (2d Cir. 1975).

40. UNIFORM PARTNERSHIP ACT § 12, 6 U.L.A. 160 (1914): "[T]he knowledge of the partner . . . acquired while a partner . . . [or which the partner] could and should have communicated . . . to the acting partner, operate as knowledge of the partnership . . . ."; Cf. RESTATEMENT (SECOND) OF AGENCY, §§ 272-81 (1958).

41. Yet another incomplete justification for the rule is the American Bar Foundation's

## THE BETTER RATIONALE FOR IMPUTED DISQUALIFICATION

If imputed disqualification of a law firm were, in fact, derived thoughtlessly from agency law, perhaps an equally technical response such as screening could be justified. When disqualification is seen as the measured response to a real problem, however, one must evaluate the response in terms of the reality. I believe that the disqualification of Firm B is required by three realities of life in the modern law firm.

First is the relative informality of information exchange within most law firms. This is not an argument that within a modern firm everyone knows everyone else's business. It is a recognition of the fact that people tend to specialize their work within firms and tend to consult others in the firm who can give them necessary help on areas outside their expertise.

Second is the powerful economic incentive to use information that will help the firm win a case on behalf of a current client. Competition for clients can be fierce today. Clients want to hire winners and a record of being second best is not good enough for most firms to succeed.<sup>42</sup> Indeed, a highly-regarded American Bar Foundation study of Chicago lawyers suggests that the fear of losing clients creates the single most important pressure to engage in less-than-clearly ethical behavior today.<sup>43</sup>

Third and perhaps most important is the fact that no one outside a firm—indeed often leadership inside a firm—can ever be sure what has transpired behind the law firm's closed doors. One need not be an unreformed cynic to see that the success of screening depends almost entirely on the other side's confidence in the good faith and ability to control conduct within the firm purporting to build the "Chinese Wall," honor the "screen," or create the "cone of silence." Professor Wolfram puts the matter well: "In the end there is little but the self-serving assurance of the screening-lawyer foxes that they will care-

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suggestion that imputed disqualification is designed "to prohibit a lawyer from circumventing professional standards through partners, associates, or employees." ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 246-47 (O. Maru ed. 1959). The rule has that effect in part, of course, but that is far from the rule's principal purpose. If affirmative circumvention of specific prohibitions were the only concern, the Model Code would not have needed DR 5-105(D). It already had DR 1-102(A)(2) which prohibits "circumvent[ing] a Disciplinary Rule through actions of another." The rule of imputed disqualification is thus clearly designed as a prophylactic rule. It is not primarily a rule to prohibit premeditated wrongdoing.

42. The pressures within a law firm today are discussed in A.B.A. COMMISSION ON PROFESSIONALISM, "IN THE SPIRIT OF PUBLIC SERVICES: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 8-9 (1986).

43. J. HEINZ & E. LAUMANN, CHICAGO LAWYERS 368-73 (1982).

fully guard the screened-lawyer chickens.”<sup>44</sup>

I respectfully submit that these three observations are realities of today's law firms. They are not necessarily unique to today, of course, but they are concerns that all lawyers can understand. I believe that these are both the concerns that led the courts to the rule of imputed disqualification and that now should dictate the courts' attitudes toward screening.<sup>45</sup>

### SOME “COMPETING VALUES” CONSIDERED

If the arguments in favor of imputed disqualification are not made persuasively, “competing values” which suggest the propriety of screening can seem more important than they should.

First, imputed disqualification is sometimes criticized because it tends to limit attorney mobility.<sup>46</sup> If Ann Andrews, longtime counsel to Litigant, wants to change firms, she will effectively be limited from joining any firm now representing someone in a suit against Litigant. That is clearly a practical limitation on Andrews' mobility, but is it a consideration that should be of ethical significance?

At best, the concern for attorney mobility is a concern for the welfare of attorneys, not clients. To be sure, of course, we often reflect concerns for attorneys' own interests in our ethical standards. Indeed, our own interests sometimes seem to be put ahead of those of our clients, the courts and the public.<sup>47</sup>

But when we are drafting ethics rules that way, at the very least we ought to understand clearly what we are doing. All other things being equal, there is probably no harm in designing ethical rules that

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44. C. WOLFRAM, *supra* note 3, at 402.

45. The attorney-client privilege does not have to be sold to lawyers, but it may be useful to recall that a concern about protecting valuable information is not unique to the legal profession. When trade secrets are disclosed to persons for specific, limited purposes, the law protects the disclosing person's rights in such information. The law recognizes that it is often important for persons to be able to make disclosures with the assurance that the recipient of the information will not then use it for his own benefit or to the detriment of the disclosing party. In addition, the law of agency has treated as an implied term of the principal-agent relationship that the agent would similarly respect the principal's right to information. I believe that this recognition of property rights in information is a useful way to think about the lawyer's duty to protect the confidences and secrets of a client. We often like to think the rules that apply to lawyers are “different” from the rules governing other mortals, but I believe that it is properly humbling for us to see that lawyer ethic rules are neither unique to us nor matters over which we have complete control.

46. *E.g.*, *Developments in the Law: Conflicts of Interest*, 94 HARV. L. REV. 1244, 1365-67 (1981).

47. This thesis is developed in Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977).

permit maximum attorney job mobility. It is simply not an objective to be pursued if, in the process, significant client or public concerns—such as client confidences—are potentially compromised.

Second, it is sometimes argued that an imputed disqualification rule works a particular hardship in a city with only a few large firms. The court in *Nemours*, for example, noted that there are only ten large firms in Wilmington. They employ 40% of the county's lawyers, and all but two of the firms were already involved in the case. If one firm had to be disqualified, the court implied, the business of being local counsel might have to go to other than a "top-ten" firm.<sup>48</sup>

Surely, this argument falls of its own weight as well. Encouraging firm growth and protection of local firms should not be independent objectives to be valued in developing rules of ethical conduct. The size and number of firms should evolve from the otherwise-justified rules faced by those firms; the rules should not be driven by a desire to keep firms large or the business local.

Third, and potentially most client centered, is the argument that imputed disqualification tends to reduce clients' free choice of counsel. If Litigant wants to hire Ann Andrews, for example, but Andrews is disqualified because of her prior representation of Opponent, Litigant will have to retain someone other than its first choice of counsel.

Whether or not Litigant's frustration about taking second-best should be something that justifies ethical concern depends in part on why Litigant wants to hire Andrews. Litigant and Andrews or Andrews' firm may have had a longstanding attorney-client relationship, for example, which would be expensive and time-consuming to recreate with another firm. If so, I believe that is a matter for legitimate concern. It goes to the issue of effective and efficient service to the client, and such concerns properly should be considered in design of the ethical rule.

On the other hand, Litigant may have wanted to retain Andrews precisely because Litigant thought Andrews, because of her prior representation of Opponent, would be especially sophisticated about handling a case against Opponent. It seems to me clear that the information on which that sophistication is based should not be Andrews' to sell. What will sometimes be a limitation of Litigant's free choice, may in other cases simply be a restriction of Litigant's criteria for the selection of counsel. The problem, of course, lies in designing

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48. 632 F. Supp. at 429-30. The same concern worried the court in *Lemaire v. Texaco, Inc.*, 496 F. Supp. 1308, 1309 (E.D. Tex. 1980).

an approach which will protect the legitimate concerns of Litigant without infringing on those of her former client.

### A PREFERABLE APPROACH TO DISQUALIFICATION

What, then, should be the proper approach to imputed disqualification? Should the courts adopt a balancing test, for example? Should all relevant factors be placed before the court and the decision on disqualification simply be left to the judge?

I believe that that would be the wrong approach. While there will always be close cases that will require judicial resolution, the best ethics rules are those which are relatively uncomplicated and possible for an attorney to apply in his or her own office. Courts which have been uncomfortable with imputed disqualification are certainly correct that motions to disqualify have been used as tools for delay and harassment.<sup>49</sup> The Supreme Court has reduced the problem somewhat by holding that rulings on such motions may not be the subject of interlocutory appeals.<sup>50</sup> Federal Rule 11 may also provide a remedy for baseless disqualification motions.<sup>51</sup> However, it is essential that the rule of imputed disqualification be no broader and no more ambiguous or flexible than reasonably necessary to achieve its purposes.

Must every firm be disqualified, then, no matter how slight one of its members' connection with a case might have been, and no matter when that contact was? Again, I believe the answer should be no. I believe that the right answer to what is the best disqualification rule can only be found if we ask—not whether one can screen the disqualified lawyer from contact with others in the firm—but whether the lawyer realistically should be said to have received enough of the former client's information that the court's protection is required.

This approach is consistent with that taken in ABA Model Rules 1.10(b) & (c).<sup>52</sup> We saw earlier that those rules deal with the situation of a lawyer who would have been disqualified by imputation had she

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49. See, e.g., *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715 (7th Cir. 1982); *In re Airport Car Rental Antitrust Litig.*, 470 F. Supp. 495 (N.D. Cal. 1979).

50. *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985); *Flanagan v. United States*, 465 U.S. 259 (1984); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981). See also, *United States v. White*, 743 F.2d 488 (7th Cir. 1984).

51. FED. R. CIV. P. 11 was amended in 1983 to provide for the award of attorneys' fees to a litigant burdened by the harassing tactics of an opponent. The rule has spawned a vast number of Rule 11 awards. See, e.g., SHAFFER, *SANCTIONS: RULE 11 AND OTHER POWERS* (1986); Batista, *Amended Rule 11 of the Federal Rules of Civil Procedure: How Go the Best Laid Plans?*, 54 *FORDHAM L. REV.* 1 (1985).

52. See *supra* text accompanying notes 25-26.



remained at her prior firm. However, where she in fact had not received confidential information from a disqualified partner or associate at that prior firm, she would not be disqualified after she left the firm. Nor would she be the cause of disqualification of her new firm.

The approach I am suggesting has the additional virtue of making consistent the rule of imputed disqualification as it applies in the simultaneous representation, former private client, and former government client situations. We have seen that the cases of simultaneous representation require disqualification and should. That is because there is no *de minimus* case of conflicts in simultaneous representation. Information from the client is still being received and could be shared in ways that would be extremely prejudicial.

In the former government lawyer situation, on the other hand, I believe screening is tolerated principally because the kind of information developed by most government lawyers is not "secret" in the sense that private information is. As I have argued elsewhere, statutes such as the Freedom of Information Act give much government information a different character than private information.<sup>53</sup> Screening is imposed and tolerated only where we do not believe the information is likely significant anyway, much as someone washes his hands before eating even when his hands are not really dirty. Indeed, under Model Rule 1.11(a)(2), if the government is concerned that important secrets might be compromised by the way screening is handled in the firm, it has a basis to object and protect those secrets.<sup>54</sup>

Insofar as one can tell from an appellate opinion, the kind of inquiry I am suggesting was properly made in *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*<sup>55</sup> Attorney Schreiber was an associate in a large New York law firm. He had worked there for about thirty months before leaving to form his own small firm. While an associate, he worked on bits and pieces of matters involving Chrysler Corporation. After leaving the large firm, Schreiber filed suit against Chrysler on behalf of a dealer whose rent had been raised, arguably in violation of a written lease. His former employer sought to have him disqualified. The district court refused to do so, and the court of appeals affirmed.

Schreiber's involvement was, at most, limited to brief, informal dis-

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53. This analysis of the cases is suggested in Morgan, *supra* note 19 at 38.

54. Rule 1.11(a)(2) reads: "[W]ritten notice [must be] promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(a)(2) (1983).

55. 518 F.2d 751 (2d Cir. 1975).

cussions on a procedural matter or research on a specific point of law . . . . [W]e do not believe that there is any basis for distinguishing between partners and associates on the basis of title alone—both are members of the bar and are bound by the same Code of Professional Responsibility. But there 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.<sup>56</sup>

The point of *Silver Chrysler Plymouth* is that, if there had been bona fide confidences and secrets at stake, the court would have required disqualification. Minimum contacts with the case at the prior firm, however, were not enough.

Interestingly, under my analysis, the *Nemours* case may well have been rightly decided after all, even if its use of screening as a solution to conflicts problems was wrong. Bradley, the young attorney, had worked on but one part of the lawsuit in question. It was in the settlement phase, and it was not at all clear that confidences of the clients—not disclosed in the “mini-trial”—were involved. Even if they were, his involvement had been so slight and so far removed that he asserted that he remembered nothing.<sup>57</sup> Certainly the burden of proof should be on Bradley to show the client would not be compromised, but the availability of a doctrine of imputed disqualification does not itself require Bradley’s disqualification in the first instance.

My proposed rule would not be without its close cases. Some would require judicial resolution. But I believe the majority of cases would be clear to the reasonable lawyer. The issue would be how much connection the lawyer had with the case at the former firm. Doubts about the degree and importance of prior involvement should be resolved against the lawyer. “Screening” might be appropriate for appearance sake where there would be no real harm if the “Chinese Wall” were breached, but it should not be used where legitimate interests of the client are at stake.<sup>58</sup>

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56. *Id.* at 756 (citations omitted). Another good illustration of this approach is *Novo Therapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc.*, 607 F.2d 186 (7th Cir. 1979)(en banc).

57. 632 F. Supp. at 420-24.

58. This approach seems implicit in *INA Underwriters Ins. Co. v. Rubin*, 635 F. Supp. 1 (E.D. Pa. 1983). The court noted that the “client” had consulted a lawyer in the firm which represented his opponent before that lawyer had time to run a conflicts check. The court did not expressly accuse the client of “setting up” the firm, but it said that on the “peculiar facts” of the case, including even a five month delay in filing the motion to disqualify, that “screening,” not disqualification, was the appropriate remedy. *Id.* at 5-6.

An alternative approach, of course, would be not to disqualify lawyers and their firms at all in these cases, but rather to trust the integrity possessed by the majority of lawyers and rely on the attorney discipline process to deal with those lawyers who abuse their clients' confidences.<sup>59</sup> The problem with such a solution, however, is simply that a client can often never know for sure when or whether his confidence has been abused. That the trustworthy must suffer for the sins of the rest is unfortunate, but client confidence must be the key. The rules requiring imputed disqualification have been established in order to prevent abuse before it happens. The discipline process is a necessary but not a sufficient remedy for lawyer violation of professional standards. A remedy which can only be invoked after the fact is often no remedy at all.

In short, I submit that the proposed screening of disqualified lawyers in order to permit their firms to continue representation in a case—whether under the name of “screening,” the “Chinese Wall” or the “cone of silence”—represents the wrong answer to the wrong question. It seeks to serve the interest of today's client, and today's interest of law firms. It does so, however, at the expense of former clients whose confidences the lawyer is every bit as obligated to protect.

The *right* question is whether legitimate interests are at stake in a case which require protection. The approach to imputed disqualification proposed here will tend to focus the lawyer in the first instance, and if necessary later a court, on that right question. If the burden of proof is properly placed on the lawyer and the firm who are the subjects of the disqualification motion, we ought to come as close as possible to sound decisions in these cases.

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59. Such an approach is vigorously advocated in Lindgren, *supra* note 3.