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## Screen Verité: Do Rules About Ethical Screens Reflect the Truth About Real-Life Law Firm Practice?

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# Screen Verité: Do Rules About Ethical Screens Reflect the Truth About Real-Life Law Firm Practice?

LEE A. PIZZIMENTI\*

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## I. PROLOGUE

As law firms have grown markedly through mergers and lateral hiring, the probability of disqualifying conflicts of interest has exponentially increased. To avoid disqualification of an entire firm where a newly-hired lawyer's past clients' interests diverge from those of the firm's present clients, firms increasingly attempt to "screen" the lawyer from providing information to or receiving information from her new partners.

Screening is generally accepted in the case of government lawyers entering private practice, but it is more controversial where applied to lawyers leaving one private law firm to join another. Most states have rejected the practice; federal courts are split on the issue. Some commentators hail the practice as the only way to assure lawyer mobility and

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client choice, while others assail the screen as being inevitably subject to breach, either intentional or inadvertent. The American Law Institute (ALI), when drafting the Restatement (Third) of The Law, The Law Governing Lawyers (Restatement), engaged in great debate concerning the appropriateness of screening lawyers leaving private firms. An initial draft of section 204 did not allow any use of a screen in that context. The council charged with promulgating the Restatement and presenting it to the full ALI membership instructed the Reporter to draft an alternative. Although the draft adopted by the full membership allows screening in limited circumstances, member opinions vary greatly on the topic. Of all topics currently being discussed concerning the Restatement, section 204 is among the most controversial. It has received mixed reviews by those courts that consider it.

Much recent discussion about the efficacy of screens has generated more heat than light, with courts and law review article authors engaging in a fair amount of fact-free analysis regarding the character and competence of lawyers attempting to erect screens. This article was conceived with the notion that it might be worthwhile to ask questions of lawyers actually in the business of constructing and maintaining screens in order to determine how well screens work in practice.

To investigate the issue, I sent a questionnaire to large law firms in states that allow screens in the private firm context. While the responses suggest only a starting point for discussion, interesting insights were gained from reviewing them. It appears that law firms are (mostly) attempting in good faith to "do the right thing," but further rules regarding screens are necessary to assure that appropriate precautions are taken and so lawyers' natural adversarial instincts do not serve as a basis to defend the use of screens that ought not be erected in the first place.

In the sections that follow, general rules about conflicts of interest and screens are explained. Then, the law firm responses to the questionnaires regarding these issues are reported and evaluated. A proposed rule suggested by the responses is then made. Finally, sanctions designed to reduce incentives for intentional breach are considered.

## II. EXPOSITION: GENERAL RULES CONCERNING CONFLICTS OF INTEREST

The lawyer, as a fiduciary, owes her client<sup>1</sup> the duty of undiluted

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1. An attorney-client relationship exists not when the attorney believes it does, but when a client reasonably believes it does. *See, e.g., Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978) (disqualifying a law firm from suit against various members of a trade group because of earlier, substantially related representation of the trade group where members reasonably believed law firm would maintain confidentiality); *DeVaux v. American Home*

loyalty.<sup>2</sup> As a result, she may not concurrently represent conflicting interests<sup>3</sup> absent the client's informed consent.<sup>4</sup>

Assurance Co., 444 N.E.2d 355, 357 (Mass. 1983) (holding a lawyer who does not actually undertake representation could be liable if person seeking legal services reasonably and detrimentally relies upon a belief that representation was undertaken and attorney does nothing to negate reliance). See generally ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 note (3d ed. 1996) (When Is a Lawyer-Client Relationship Formed?) [hereinafter ANNOTATED MODEL RULES]; Lee A. Pizzimenti, *A Post Conference Reflection: In Defense of Fuzzy Rules and Simple Truths*, 37 S. TEX. L. REV. 1263, 1271-75 (1996) [hereinafter Pizzimenti, *Fuzzy Rules*]; Nancy J. Moore, *Expanding Duties of Attorneys to "Non-Clients": Reconceptualizing the Attorney-Client Relationship in Entity Representation and Other Inherently Ambiguous Situations*, 45 S.C. L. REV. 659, 687-89 (1994).

2. For a discussion of the lawyer's fiduciary responsibilities, see *infra* notes 173-206 and accompanying text.

3. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1980) [hereinafter MODEL CODE]; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983) [hereinafter MODEL RULES]; Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 232-33 (2d Cir. 1977). See generally Thomas D. Morgan, *Suing a Current Client*, 9 GEO. J. LEGAL ETHICS 1157 (1997); Nathan M. Crystal, *Disqualification of Counsel for Unrelated Matter Conflicts of Interest*, 4 GEO. J. LEGAL ETHICS 273 (1990); *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1292-1315 (1981); Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211 (1982). Professor Crystal has observed that disqualification is not a proper remedy in all cases of unrelated matter conflicts because it deprives the new client of counsel and disrupts proceedings. Crystal, *supra*, at 276. He has advocated that there be no disqualification if the firm is no longer representing the moving party if the firm still represents the client, he suggests use of a balancing test to determine if disqualification is necessary. See *id.* Disqualification should be used only when a trial will be tainted by use of confidences, reduced zealotry, or disharmony. See *id.* at 291-95. Otherwise, the court should award damages such as fee disgorgement or discipline. See *id.* at 311-12. See also Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 FORDHAM L. REV. 71 (1996) (courts should not disqualify based on conflict of interest rules). For further discussion of such remedies see *infra* text accompanying notes 124-205. Professor Morgan surveyed literature regarding simultaneous conflicts rules and has advocated a rule prohibiting dual representation only where the lawyer is materially limited by the conflict. Morgan, *supra*. Although Rule 1.7 generally contemplates only concurrent representation where clients are antagonists in a specific matter, courts are beginning to recognize that in extreme circumstances problems may also arise where a law firm represents competitors. See *Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1282 (Pa. 1992). Problems may also arise where the attorney undertakes to argue conflicting rules of law on behalf of separate clients, so-called "positional conflicts." See generally ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-377 (1993); John S. Dzienkowski, *Positional Conflicts of Interest*, 71 TEX. L. REV. 457 (1993).

4. The lawyer has a duty to assure that the client has all information material to the client's decision-making. See MODEL RULES, Rule 1.4. See generally Lee A. Pizzimenti, *The Lawyer's Duty to Warn Clients About Limits on Confidentiality*, 39 CATH. U. L. REV. 441, 471-81 (1990) [hereinafter Pizzimenti, *Duty to Warn*]. Some conflicts are viewed as so serious that the lawyer may not ask for consent and must withdraw. See MODEL RULES, Rule 1.7(a)(1) (lawyer must reasonably believe representation will not adversely affect relationship with client); MODEL CODE, DR 5-105(C) (must be obvious that lawyer can represent both); RESTATEMENT (THIRD) OF THE LAW, THE LAW GOVERNING LAWYERS § 202 (Final Draft 1996) (conflict non-consentable if prohibited by law, if one client asserts claim against another in same litigation, or circumstances are such that it is not reasonably likely the lawyer can provide adequate representation). See generally ANNOTATED MODEL RULES, Rule 1.7 (lawyer must reasonably believe that client will not be adversely affected); Nancy J. Moore, *Conflicts of Interests in the Representation of*

In addition, she is required to keep inviolate the confidences of her client.<sup>5</sup> That duty continues long after the representation terminates.<sup>6</sup> As a result, a lawyer will be disqualified for representing any interest materially adverse to a former client if the subject matter of the new representation is "substantially related" to the previous representation.<sup>7</sup> Disqualification is appropriate in such a scenario regardless of whether confidences are actually shared, because the client might have to elaborate on what confidences were disclosed in order to protect against their disclosure.<sup>8</sup> Thus, an irrebuttable presumption that confidences have

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*Children*, 64 FORDHAM L. REV. 1819, 1834-35 (1996) (identifying non-consentable conflicts). Professor Moore has observed that the Model Code does not provide much guidance regarding adequacy of representation as a trigger for non-consentable conflicts. The balancing of client autonomy and the lawyer's view of the client's best interest implied in the Model Rules does not produce clear and consistent guidelines. Moore, *Simultaneous Representation*, *supra* note 3, at 220-32. Moreover, neither standard adequately protects client autonomy. *See id.* at 233-40. She has proposed a standard providing that client waiver should be prohibited and decision-making power transferred to the lawyer only when she can "reasonabl[y] assume that the clients are incapable of rendering informed and voluntary consent." *Id.* at 240. To determine client capability, clients should be asked whether they are likely to have a clear understanding of advantages and risks of the representation, and whether the client's ability to assess the risks is limited by psychological or economic stress. *See id.* For applications of her standard, *see id.* at 241-86.

5. *See* MODEL CODE, DR 4-101; MODEL RULES, Rule 1.9. There is no extended discussion of this topic in this article since there is an extraordinary amount of scholarship in this area. *See, e.g., Developments in the Law*, *supra* note 3, at 1315-34. In addition, much attention has been paid to limitations on the responsibility of maintaining confidences in the face of conflicting policies. *See, e.g., Pizzimenti, Duty to Warn*, *supra* note 4; Nancy J. Moore, *Limits to Attorney-Client Confidentiality: A "Philosophically Informed" and Comparative Approach to Legal and Medical Ethics*, 36 CASE W. RES. L. REV. 177 (1985-86); Harry I. Subin, *The Lawyer as Superego; Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091 (1985); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989).

6. *See* *David Welch Co. v. Erskine & Tully*, 250 Cal. Rptr. 339 (Cal. Ct. App. 1988); MODEL RULES, Rule 1.9; ANNOTATED MODEL RULES, Rule 1.9 note (Legal Background).

7. *See, e.g.,* MODEL RULES, Rule 1.7. Rule 1.7 essentially restates the rule developed under Canon 4, then Canon 6, in *T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265 (S.D.N.Y. 1953):

[T]he former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears . . . are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The court will assume that during the course of the former representation confidences were disclosed. . . . Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule . . . maintained.

*Id.* at 268-69 (quoted in *Fund of Funds*, 567 F.2d at 235. *See generally* *Developments in the Law*, *supra* note 3, at 1315-21.

8. As the court explained in *Government of India v. Cook Industries*, 569 F.2d 737 (2d Cir. 1978):

On this branch of our inquiry we start with the well established principle that, in order to grant a disqualification motion, a court should not require proof that an attorney actually had access to or received privileged information while representing the client in a prior case. Such a requirement would put the former client to the Hobson's choice of either having to disclose his privileged information in order to

been shared arises where the matters are substantially related.<sup>9</sup>

Courts consistently have recognized that a substantial relationship between two cases can still exist when legal claims are dissimilar, so long as the factual issues raised by the first representation "would be helpful in establishing . . . allegations [made in the second matter]."<sup>10</sup> The Seventh Circuit has attempted to refine the standard by requiring the court to undertake a "factual reconstruction of the scope of the prior legal representation . . . [and determine] whether it is reasonable to infer that [a client] would have . . . given [confidential information] . . . [that] is relevant to the issues raised in the litigation pending against the former client."<sup>11</sup>

A general familiarity with a former client's financial and business background alone is not a basis for disqualification.<sup>12</sup> However, courts have recognized "the unique role that access to business thinking plays in the context of antitrust litigation,"<sup>13</sup> especially where counsel had an

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disqualify his former attorney or having to refrain from the disqualification motion altogether.

*Id.* at 740.

9. *See, e.g., Emle Indus., Inc. v. Patentex, Inc.*, 478 F.2d 562, 570 (2d Cir. 1973) (quoting *T.C. Theatre Corp.*, 113 F. Supp. at 268-69); *Trone v. Smith*, 621 F.2d 994, 998-99 (9th Cir. 1980); *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 608 (8th Cir. 1977). *See generally* GEOFFREY C. HAZARD, JR. & SUSAN P. KONIAK, *THE LAW AND ETHICS OF LAWYERING* 651 (David L. Shapiro et al. eds., 1990); CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 368-72 (1986); ANNOTATED MODEL RULES, Rule 1.9 note (Presumption That Confidential Information Acquired During the Prior Representation).

10. *Trone*, 621 F.2d at 1000. *See also Kraft, Inc. v. Alton Box Bd. Co.*, 659 F.2d 1341, 1346 (5th Cir. 1981) (holding a substantial relationship exists where a reasonable person would find issues "akin" in an important manner); *Government of India*, 569 F.2d at 739-40 & n.1 (stating that connection between issues must be "patently clear" but expressly affirming vitality of *T.C. Theatre*); *USFL v. NFL*, 605 F. Supp. 1448, 1459 (S.D.N.Y. 1985) (holding a substantial relationship exists where facts necessary to the original representation are necessary to the subsequent litigation). *See generally* ANNOTATED MODEL RULES, Rule 1.9 note (Substantial-Relationship Test). *But see* *Crystal*, *supra* note 3, at 315 n.3 (most courts look to whether facts are similar, but the Second Circuit requires the relationship be "patently clear" and the Seventh Circuit combines the approaches).

11. *LaSalle Nat'l Bank v. County of Lake*, 703 F.2d 252, 255-56 (7th Cir. 1983). The lawyer in *La Salle* was not involved in the earlier creation of the municipal sewer agreement being challenged, but as an assistant state attorney, he was likely privy to relevant discussions about the validity of other similar agreements. *Id.* at 255-57.

12. *See, e.g., USFL*, 605 F. Supp. at 1460. *See* *Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339, 1351 (9th Cir. 1981) (no evidence that prior representation of prime contractor gave lawyer special insight or advantage in unrelated case brought by subcontractors against prime); *Merle Norman Cosmetics, Inc. v. United States Dist. Court*, 856 F.2d 98, 100-01 (9th Cir. 1988) (lawyer had no confidential information regarding subject matter of suit; general, publicly known information regarding distribution policies not enough).

13. *Haagen-Dazs Co. v. Perche No! Gelato, Inc.*, 639 F. Supp. 282, 286 (N.D. Cal. 1986). *See also USFL*, 605 F. Supp. at 1460 (holding knowledge of business plans, economic organizations, prospective market position, and other such background information is particularly relevant to antitrust litigation).

extended relationship with the past client.<sup>14</sup> Thus, the possibility of disqualification exists in a situation involving a close and extended relationship because a lawyer has a "greater insight and understanding of the significance of subsequent events . . . and . . . a promising source of discovery."<sup>15</sup>

Because lawyers in law firms are presumed to talk to one another, have access to client files, and share a financial interest, most courts have also created an irrebuttable presumption that a lawyer shares client confidences with others in the firm.<sup>16</sup> Thus, all lawyers associated with the disqualified lawyer are automatically subject to vicarious disqualification.<sup>17</sup>

Because a duty to protect confidences continues after the representation ends, lawyers changing firms remain vulnerable to disqualification motions that will potentially disqualify not only the lawyer, but also her new firm. That is, all the former clients of the lawyer's old firm, even those never represented personally by the lawyer, would potentially be viewed as former clients of the new firm. Non-lawyer employees who have changed firms can also trigger disqualification of a new firm.

This scenario exponentially increases the likelihood of disqualification for conflicts of interest and could result in decreased mobility for lawyers desiring to leave large firms. In an effort to reduce the "possible harshness" of the rule without compromising client confidences,<sup>18</sup> courts, following a rule articulated in *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*,<sup>19</sup> have determined that the presumption that

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14. See *Haagen-Dazs*, 639 F. Supp. at 286-82; *In re Corroged Container Antitrust Litig.*, 659 F. Supp. 1337, 1345-46 (5th Cir. 1981).

15. *Chugach Elec. Assoc. v. United States Dist. Court*, 370 F.2d 441, 443 (9th Cir. 1966). Although *Chugach* did not use the term "substantial relationship," it referred to the standard for disqualifying lawyers for subsequent representation. See *id.* at 443. One of the earlier articulations of the rule, *Chugach* is often cited as an example of a substantial relationship test. See, e.g., *Evans v. Artek Sys. Corp.*, 715 F.2d 788, 792 (2d Cir. 1983); *United States v. Catalanotto*, 468 F. Supp. 503, 506 (D. Ariz. 1978). But see *HAZARD & KONIAK*, *supra* note 9, at 650-51 (expressing the view that *Chugach* is no longer the Ninth Circuit view).

16. See, e.g., *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1321 (7th Cir. 1978). See also MODEL CODE, DR 5-105(D); MODEL RULES, Rule 1.10(a); ANNOTATED MODEL RULES, Rule 1.10 (Legal Background); *Imputed Disqualification*, Lawyer's Manual on Professional Conduct (ABA/BNA) ¶¶ 51:2005-06 (July 28, 1993). See generally WOLFRAM, *supra* note 9, at 391-97, 400; Lee E. Hejmanowski, *An Ethical Treatment of Attorneys' Personal Conflicts of Interest*, 66 S. CAL. L. REV. 881, 902 (1993). The Model Rules distinguish between attorneys still at the firm and attorneys that have left the firm. Compare MODEL RULES, Rule 1.10(a) (if one attorney still at firm is disqualified then all attorneys still at firm are disqualified without regard to whether secrets actually shared by attorneys at the firm) with *id.* Rule 1.9(b) (lawyer who has left firm can rebut presumption that secrets shared) and *id.* Rule 1.10(b) (firm can rebut presumption after lawyer has left firm).

17. See *infra* note 79.

18. *Trone v. Smith*, 621 F.2d 994, 998 n.3 (9th Cir. 1980).

19. 518 F.2d 751 (2d Cir. 1975).

partners share information should become rebuttable after a lawyer has left a firm.<sup>20</sup> That is, if the lawyer can show she actually received no secrets of a client during her previous employment, but was only vicariously disqualified because of her former partners' representation, then the new firm may continue representing a client whose interests diverge from those of a client of the lawyer's former firm. The Model Rules have adopted this point of view, finding a rigid rule to be unrealistic in this context.<sup>21</sup>

As an example of how a lawyer might rebut the presumption, the lawyer in *Silver Chrysler* showed that he was a relatively junior associate in the litigation department who did only peripheral research on some procedural matters for Chrysler, while the case then pending involved leases.<sup>22</sup> Similarly, in *Gas-A-Tron*, the lawyer showed that during his prior representation he performed the normal research tasks "commonly handled by young associates in large law firms," but had not received confidential information.<sup>23</sup>

An attorney who worked in a department distinct from lawyers who had represented a client might also rebut the presumption.<sup>24</sup> If a lawyer cannot rebut the presumption of shared confidences, both she and her new firm generally are disqualified.<sup>25</sup> Such a rule has an especially strong impact upon lateral hires from private firms or from the government who are hired for their expertise. The more experience a lawyer has, especially when the attorney specializes in a unique area of law, the more likely her past activities will exempt the firm from representing clients. The result is that an experienced lawyer is more likely to be viewed as a "Typhoid Mary"—unattractive as a new hire because of fear her previous past client contacts will "infect," and thereby disqualify, the entire firm.<sup>26</sup>

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20. See, e.g., *Atasi Corp. v. Seagate Tech.*, 847 F.2d 826, 829 (Fed. Cir. 1988); *Gas-A-Tron of Ariz. v. Union Oil Co.*, 534 F.2d 1322, 1325 (9th Cir. 1976). See generally WOLFRAM, *supra* note 9, at 398-401.

21. See MODEL RULES, Rule 1.9(c). See *id.* Rules 1.9(b), 1.10(b) (adopting the rebuttable presumption rule after a lawyer leaves a firm).

22. *Silver Chrysler*, 518 F.2d at 756.

23. *Gas-A-Thon*, 534 F.2d at 1324-5.

24. For further discussion, see ANNOTATED MODEL RULES, Rule 1.10 note (Factors Used in Rebutting the Presumption of Shared Confidences).

25. See, e.g., MODEL RULES, Rules 1.9(b), 1.10(a); *Haagen-Dazs Co., Inc. v. Perche No! Gelato, Inc.*, 639 F. Supp. 282 (N.D. Cal. 1986). See generally ANNOTATED MODEL RULES, Rule 1.10 note (Traditional Rule: The Presumption of Shared Access to Confidential Information).

26. This fear was first expressed regarding government lawyers. See *Kesselhaut v. United States*, 555 F.2d 791, 793 (Ct. Cl. 1977).

### III. THE RISING ACTION: USING SCREENS TO AVOID DISQUALIFICATION

Concern that lawyers would not engage in public service for fear of limiting their mobility, caused courts to allow firms to continue to represent clients even where a former government lawyer was personally disqualified if client confidences could be protected. This was allowable only if the firm immediately "screened" the lawyer from any discussions regarding the clients, kept the lawyer from any relevant files, and did not share any fees from the new representation with the lawyer.<sup>27</sup> Use of a screen in the case of government lawyers is generally accepted and has been sanctioned by the ABA in Model Rule 1.11<sup>28</sup> and by the drafters of the Restatement.<sup>29</sup>

Use of a screen in cases of lawyers switching from one private law firm to another is less accepted. The Model Rules do not allow screening in the case of private firm transfer, and only four states have promulgated rules allowing it under those circumstances.<sup>30</sup> However, there is a more even split of opinion among federal courts,<sup>31</sup> and most commenta-

27. See, e.g., *Armstrong v. McAlpin*, 625 F.2d 433, 442-43 (2d Cir. 1980) (en banc); *Kesselhaut*, 555 F.2d at 793; ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975). See generally James B. McLaren, Jr., *The Future of the Chinese Wall Defense to Vicarious Disqualification of a Former Government Attorney's Law Firm*, 38 WASH. & LEE L. REV. 151 (1981); ANNOTATED MODEL RULES, Rule 1.11 & pp. 180-92.

28. See MODEL RULES, Rule 1.11. But see Monroe Freedman, *The Ethical Illusion of Screening*, LEGAL TIMES, Nov. 20, 1995, at 24 (error to allow government lawyers to be screened).

29. See *supra* text accompanying note 5.

30. Illinois, Michigan and Pennsylvania have promulgated rules allowing such screens. See ILL. RULES OF PROFESSIONAL CONDUCT Rule 1.10; MICH. RULES OF PROFESSIONAL CONDUCT Rule 1.10; PA. RULES OF PROFESSIONAL CONDUCT Rule 1.10. Oregon also allows a firm to screen lawyers leaving firms so long as all lawyers in the firm attest to their knowledge of the screen. See OR. CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(I). See generally Lawyers' Manual on Professional Conduct (ABA/BNA), ¶¶ 51: 2001-14 (July 28, 1993). The American Bar Association allows screens for temporary attorneys, see ABA Comm. on Ethics and Professional Responsibility, Formal Op. 88-356 (1988), and for non-lawyer employees, see ABA Comm. on Ethics and Professional Responsibility, Informal Op. 88-1526 (1988).

31. The Second Circuit has approved screening. See *Cheng v. GAF Corp.*, 631 F.2d 1052 (2d Cir. 1980), judgment vacated and appeal dismissed on jurisdictional grounds, 450 U.S. 903 (1981). *Cheng* appears to accept the notion of screens generally, while considering factors requiring disqualification such as the size of the firm and the lawyer's involvement in the earlier case. Yet, *Cheng* distinguishes *Armstrong* in part because there is a stronger public policy regarding government lawyers' ability to find work outside the government. Compare *id.* at 1056-58, n.7. with *Armstrong*, 625 F.2d at 433.

The district courts in New York appear to read *Cheng* as allowing screens in some circumstances. See, e.g., *Marshall v. New York Div. of State Police*, 952 F. Supp. 103, 111 (N.D.N.Y. 1997); *Decora, Inc. v. DW Wallcovering, Inc.*, 899 F. Supp. 132, 139 (S.D.N.Y. 1995); *Papanicolaou v. Chase Manhattan Bank, N.A.*, 720 F. Supp. 1080, 1086-87 (S.D.N.Y. 1989). The Federal, Sixth, Seventh, and Eleventh Circuits have accepted screening. See, e.g., *Manning v. Waring, Cox, James, Sklar and Allen*, 849 F.2d 222, 225 (6th Cir. 1988); *Cox v. American Cast*

tors discern no reason to distinguish the moral uprightness of government lawyers from that of private ones.<sup>32</sup>

Courts and commentators supporting the use of screens in a solely private firm transfer cite several policies supporting their conclusion. First, they observe that motions to disqualify are often filed for the tactical purposes of depriving the new client of long-term counsel familiar

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Iron Pipe Co., 847 F.2d 725, 732 (11th Cir. 1988); *Schiessle v. Stephens*, 717 F.2d 417, 421 (7th Cir. 1983). The Federal Circuit has accepted the use of screens several times by applying the law of other circuits even where it is inconclusive whether that circuit has adopted screens. *See, e.g.*, *Kennecott Corp. v. Kyocera Int'l, Inc.*, 899 F.2d 1228, 1990 WL 28065, at \*2 (Fed. Cir. Mar. 19, 1990) (presuming the Ninth Circuit law would adopt screens); *EZ Paints Corp. v. Padco, Inc.*, 746 F.2d 1459, 1461-62 (Fed. Cir. 1984) (assuming the Eighth Circuit would accept timely screens); *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1580 (Fed. Cir. 1984) (applying Seventh Circuit law which permits screens).

Courts in the First, Third, and Ninth Circuits have explicitly left the question open. In *Kevlick v. Goldstein*, 724 F.2d 844, 849 n.5 (1st Cir. 1984), the First Circuit did not consider whether a screen would be acceptable because the law firm did not argue that there had been no actual disclosure. In *United States v. Miller*, 624 F.2d 1198, 1204 (3d Cir. 1980), the Third Circuit claimed it had no information enabling it to determine the efficacy of a screen on appeal. One district court in the circuit read this to indicate, especially in light of its comments that disqualification is within the discretion of the judge, that the Third Circuit would allow inferences to be rebutted by use of a screen. *See INA Underwriters Ins. Co. v. Rubin*, 635 F. Supp. 1, 4-5 (E.D. Pa. 1983). *See also Nemours Found. v. Gilbane, Aetna, Federal Ins. Co.*, 632 F. Supp. 418, 426 (D. Del. 1986) (observing that *Miller* court did not "in principle" reject screens). Although the Ninth Circuit declined to decide the issue in *Paul E. Iacono Structural Eng'r, Inc. v. Humphrey*, 722 F.2d 435, 442 (9th Cir. 1983), both district courts within the Circuit and the Federal Circuit have determined it would allow screens. *See Kennecott*, 899 F.2d at 1228; *United States ex rel. Lord Elec. Co. v. Titan Pac. Constr. Corp.*, 637 F. Supp. 1556, 1565-67 (W.D. Wash. 1986) (concluding the Ninth Circuit had not resolved the screen question, held a screen appropriate). *See also Haagen-Dazs*, 639 F. Supp. at 287 (finding that the Ninth Circuit left question open, but other courts held screening acceptable where effective). *But see* *Elan Transdermal Ltd. v. Cygnus Therapeutic Sys.*, 809 F. Supp. 1383, 1392 (N.D. Cal. 1992) (criticizing *Titan Pacific* and claiming rebuttable presumptions are not California law after *Paul E. Iacono*). The Tenth Circuit has discussed at length the requirements of a screen but left the question open when there are no "specific institutional mechanisms" in place. *See Smith v. Whatcott*, 757 F.2d 1098, 1101 (10th Cir. 1985); *SLC Ltd. V v. Bradford Group West, Inc.*, 147 B.R. 586, 591 (Bankr. D. Utah 1992) (recognizing the exception to irrebuttable presumption when attorney effectively screened, but screen not effective in *SLC* or *Whatcott* because screen was not erected immediately). Neither the Fourth, Fifth nor Eighth Circuits has encountered a question of screening in a private firm context, although the Federal Circuit assumes the Eighth Circuit would allow screens. *See EZ Paints*, 746 F.2d at 1461-62.

For an excellent discussion of the federal circuit conflict regarding screens, see Randall B. Bateman, *Return to the Ethics Rules as a Standard for Attorney Disqualification: Attempting Consistency in Motions for Disqualification by the Use of Chinese Walls*, 33 DUQ. L. REV. 249, 268-74 (1995). *See also* Donald R. McMinn, *ABA Formal Opinion 88-356: New Justification for Increased Use of Screening Devices to Avert Attorney Disqualification*, 65 N.Y.U. L. REV. 1231, 1264-68 (1990). Because the Supreme Court has determined that disqualification motions are not appealable, additional circuit court precedent on screens is unlikely. *See infra* note 92.

32. *See, e.g.*, McMinn, *supra* note 31, at 1277-79; Linda Ann Winslow, *Federal Courts and Attorney Disqualification Motions: A Realistic Approach to Conflicts of Interest*, 62 WASH. L. REV. 863, 870-72 (1987). *But see infra* notes 48-57.

with his legal needs and of forcing additional expenditures to educate new counsel. As one court concluded:

[J]udges must exercise caution not to paint with a broad brush under the misguided belief that coming down on the side of disqualification raises the standard of legal ethics and the public's respect. The opposite effects are just as likely—encouragement of vexacious [sic] tactics and increased cynicism by the public.<sup>33</sup>

Second, those supporting such screens suggest that private attorneys have the same need to maintain mobility that government attorneys do.<sup>34</sup> Courts and commentators refer to “modern realities” and practical factors in support of that conclusion.<sup>35</sup>

Another client-centered concern underlies the final justification for totally private firm screens:

Not only do overly strict ethical rules restrict an attorney's employment opportunities, they restrict the availability of legal services. Lawyers and firms will be inclined to refuse to accept representation of smaller clients with matters that do not generate substantial fees for fear that they would be forced to reject more lucrative representation in the future. Broadly-construed conflict of interest rules constrict the supply of services to those groups in our society that tend to have the greatest difficulty procuring legal representation.<sup>36</sup>

Of course, even where screens in a solely private context are con-

33. *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1576-77 (Fed. Cir. 1984). See generally *Unchanging Rules in Changing Times: The Canons of Ethics and Intra-firm Conflicts of Interest*, 73 YALE L.J. 1058, 1066-69 (1964); Winslow, *supra* note 32, at 871. Professor Peterson described the harm to the present client well:

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.

On the other side, the client of the attacked law firm often asserts a policy of avoiding unnecessary hardship. He has reposed trust and confidence in one law firm to manage what may be emotionally charged litigation, and now must turn to a different group of lawyers. He will sustain increased legal fees and loss of litigation momentum while the new law firm becomes familiar with the case. He must also sacrifice continuity of litigation strategy and style.

Craig A. Peterson, *Rebuttable Presumptions and Intra-Firm Screening: The New Seventh Circuit Approach to Vicarious Disqualification of Litigation Counsel*, 59 NOTRE DAME L. REV. 399, 400-401 (1984). See also McLaren, *supra* note 27, at 154 n.20; McMinn, *supra* note 31, at 1274-75; *The Chinese Wall Defense To Law-Firm Disqualification*, 128 U. PENN. L. REV. 677, 679 n.11, (1980).

34. See McMinn, *supra* note 31, at 1231-35.

35. See *Manning v. Waring, Cox, James, Sklar and Allen*, 849 F.2d 222, 224-25 (6th Cir. 1988). The *Manning* court identified three such realities: there are more large law firms with several specialists rather than solo practices and small firms; lawyers are moving more freely among firms during their career and more firms are merging. See *id.* See generally McMinn, *supra* note 31.

36. *Titan Pac.*, 637 F. Supp. at 1563 n.5.

sidered acceptable, several requirements must be met. First, rather than an informal arrangement or mere personal resolve to maintain confidences, most courts require "specific institutional mechanisms" be in place to rebut the presumption that confidences have been or will be shared.<sup>37</sup> Courts generally find it impossible for small firms to erect screens given the increased likelihood of interaction among attorneys.<sup>38</sup> One court, expressing skepticism concerning whether a screen could be workable in a small firm, stated: "the relatively small group of professional colleagues with whom [the lawyer] interacts on a daily basis are also the group of people who must . . . in turn, be screened from [his] disclosure, however inadvertent."<sup>39</sup> Thus, a large firm with departmental divisions will most likely be viewed as able to maintain a screen.<sup>40</sup>

Second, and more importantly, most courts<sup>41</sup> require that a screen be erected immediately when a lawyer joins the firm or when the firm undertakes a new matter that potentially raises disqualification issues.<sup>42</sup>

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37. *La Salle Nat'l Bank v. County of Lake*, 703 F.2d 252, 259 (7th Cir. 1983). See also *Kennecott Corp.*, 1990 WL 28065, at \*2; *Whatcott*, 757 F.2d at 1101; *Schiessle v. Stephens*, 717 F.2d 417, 421 (7th Cir. 1983); *Nelson v. Green Builders, Inc.*, 823 F. Supp. 1439, 1447 (E.D. Wis. 1993); *Hallmark Cards, Inc. v. Hallmark Dodge, Inc.*, 616 F. Supp. 516 (W.D. Mo. 1985); *SLC Ltd. v. Bradford Group West, Inc.*, 147 B.R. 586, 591 (Bankr. D. Utah 1992); *In re McLaren*, 115 B.R. 922, 928 (Bankr. N.D. Ohio 1990); *In Re Chicago S. Shore and S. Bend R.R.*, 101 B.R. 10, 14 (Bankr. N.D. Ill. 1989); *In re Columbia Realty Assocs., Ltd.*, 71 B.R. 804, 810 (Bankr. N.D. Ill. 1987); *City of Hoquiam v. Public Employment Relations Comm'n*, 628 P.2d 1314, 1322-23 (Wash. Ct. App. 1981). But see *General Elec. Co. v. Industra Prods., Inc.*, 683 F. Supp. 1254, 1259 (N.D. Ind. 1988) (holding that screening is one way to rebut presumption of shared confidences, but there are others); *United States ex rel. Lord Elec. Co. v. Titan Pac. Constr. Corp.*, 637 F. Supp. 1556, 1565 (W.D. Wash. 1986) (holding absence of screening does not preclude rebuttal of presumption); *Kapco Mfg. Co. v. C & O Enters., Inc.*, 637 F. Supp. 1231, 1239-41 (N.D. Ill. 1985) (allowing rebuttal without screen); *Panduit*, 744 F.2d at 1577-78 (allowing rebuttal of presumption by showing no confidential information actually received).

38. See, e.g., *Cheng v. GAF Corp.*, 631 F.2d 1052, 1058 (2d Cir. 1980) (court not satisfied that screen would be effective in small firm); *Dugar v. Board of Educ.*, No. 92 C 1621, 1992 WL 142303, at \*1 (N.D. Ill. June 18, 1992); *Baird v. Hilton Hotel Corp.*, 771 F. Supp. 24, 27 (E.D.N.Y. 1991); *Weglarz v. Bruck*, 470 N.E.2d 21, 25 (Ill. App. Ct. 1984); *Yaretsky v. Blum*, 525 F. Supp. 24, 30 (S.D.N.Y. 1981). But see *Nemours Found. v. Gilbane, Aetna Federal Ins. Co.*, 632 F. Supp. 418, 428-29 (D. Del. 1986) (holding size is important factor, but not dispositive); *Titan Pac.*, 637 F. Supp. at 1566 (allowing screen in small firm).

39. *Yaretsky*, 525 F. Supp. at 30.

40. See, e.g., *English Feedlot, Inc. v. Norden Lab., Inc.*, 833 F. Supp. 1498, 1587 (D. Colo. 1993); ANNOTATED MODEL RULES, Rule 1.10 note (Elements of a Screen).

41. But see *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1581 (Fed. Cir. 1984), (requiring no immediate screen); *Carbo Ceramics, Inc. v. Norton-Alcoa Proppants*, 155 F.R.D. 158, 160, 163 (N.D. Tex. 1994) (accepting screen erected one month after lawyer joined firm); *North Am. Philips Corp. v. American Vending Sales, Inc.*, No. 93 C 3261, 1993 WL 473630, at \*6 (N.D. Ill. Nov. 15, 1993) (holding although lawyer hired two years previously, firm had no reason to know of conflict until suit filed).

42. See, e.g., *Smith v. Whatcott*, 757 F.2d 1098, 1101-02 (10th Cir. 1985); *Schiessle*, 717 F.2d at 421; *EZ Paint Corp. v. Padco, Inc.*, 746 F.2d 1459, 1462 (Fed. Cir. 1984); *LaSalle*, 703 F.2d at 259 (holding six months as untimely); *Marshall v. New York Div. of State Police*, 952 F. Supp. 103, 111 (N.D.N.Y. 1997) (holding "screening device implemented only after a disqualified

One court reasoned:

In short, it is insufficient to remedy a conflict of interest by building a "Chinese Wall" to screen a "tainted" attorney after the potential for improper disclosure has existed. Once Pandora's Box has been opened, the ethical malaise which may have escaped cannot be treated by nailing a plank over the open vessel.<sup>43</sup>

Thus, the screen must be erected as soon as the potentially disqualifying event occurs, not later when a motion is filed or a court finds a disqualifying conflict.

Cases that discuss the general elements of an acceptable screen typically require a firm to segregate both paper and computer files, inform lawyers in the firm about the screen, and preclude fee sharing from the screened case to reduce monetary incentive to share confidences.<sup>44</sup> Some courts have also required or noted with approval the requirement of all lawyers signing affidavits indicating they will abide by a screen.<sup>45</sup> Some courts have suggested that screens are particularly problematic in

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lawyer has been with a firm" not adequate); *Decora, Inc. v. DW Wallcovering, Inc.*, 899 F. Supp. 132, 140-41 (S.D.N.Y. 1995) (rejecting a screen implemented after motion to disqualify was filed); *Nelson*, 823 F. Supp. at 1451 (holding screen was at least one year late); *Isidor Paiewonsky Assocs., Inc. v. Sharp Properties, Inc.*, Civ. a. No. 87-44, 1990 WL 303427, at \*8 (D.V.I. Apr. 6, 1990) (holding two years untimely); *Papanicolaou v. Chase Manhattan Bank, N.A.*, 720 F. Supp. 1080, 1087 (S.D.N.Y. 1989) (rejecting a screen implemented after motion filed); *Haagen-Dazs Co. v. Perche No! Gelato, Inc.*, 639 F. Supp. 282, 287 (N.D. Cal. 1986) (holding screen erected one year after attorney hired and two months after lawsuit filed was untimely); *SLC Ltd.*, 147 B.R. at 591; *In re Davenport Communications Ltd. Partnership*, 109 B.R. 362, 367 (Bankr. S.D. Iowa 1990). *But see Panduit*, 744 F.2d at 1581 (requiring no immediate screen); *Carbo Ceramics*, 155 F.R.D. at 160, 163 (accepting screen erected one month after lawyer joined firm); *North Am. Philips*, 1993 WL 473630 at \*6 (holding although lawyer was hired two years previously, firm had no reason to know of conflict until suit was filed).

43. *SLC Ltd.*, 147 B.R. at 592.

44. *See, e.g., Manning v. Waring, Cox, James, Sklar and Allen*, 849 F.2d 222, 226 (6th Cir. 1988) (explaining court should consider size and structure of firm, likelihood of contact with disqualified attorney, access to files and fee sharing); *Smith v. Whatcott*, 757 F.2d 1098, 1101 (10th Cir. 1985); *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1267-68 (7th Cir. 1983); *Nelson*, 823 F. Supp. at 1447-48; *Hutnick v. Inland Steel Co.*, No. 86 C 2567, 1987 WL 9003, at \*4 (N.D. Ill. Mar. 27, 1987); *Henriksen v. Great Am. Sav. and Loan*, 14 Cal. Rptr. 2d 184, 188 n.6 (Cal. Ct. App. 1992); *In re McLaren*, 115 B.R. 922, 928-29 (Bankr. N.D. Ohio 1990); *In re Chicago S. Shore and S. Bend R.R.*, 101 B.R. 10, 14 (Bankr. N.D. Ill. 1989); *In re Columbia Realty Assocs., Ltd.*, 71 B.R. 804, 809 (Bankr. N.D. Ill. 1987); *In re GHR Energy Corp.*, 60 B.R. 52, 66 (Bankr. S.D. Tex. 1985); *Employers Ins. v. Albert D. Seeno Constr. Co.*, 692 F. Supp. 1150, 1154 n.17 (N.D. Cal. 1988). *See generally* ANNOTATED MODEL RULES, Rule 1.10 note (Elements of a Screen); Susan R. Martyn, *Visions of the Eternal Law Firm: The Future of Law Firm Screens*, 45 S.C. L. REV. 937 (1994).

45. *See, e.g., United States ex rel. Lord Elec. Co. v. Titan Pac. Constr. Corp.*, 637 F. Supp. 1556, 1566-67 (W.D. Wash. 1986) (requiring all lawyers at firm to file assurances with court that they will screen disqualified lawyer); *NFC, Inc. v. General Nutrition, Inc.*, 562 F. Supp. 332, 336 (D. Mass. 1983) (requiring affidavits and declarations). *See also* OR. CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(1)(1), (2) (requires affidavits from screened lawyer and firm member that lawyer and all firm members will abide by screen).

cases that were pending when the lawyer joined the new firm, and have not allowed them.<sup>46</sup> Assuming that such protections are in place, those supporting the use of screens assert that their governing bar should trust that most lawyers are honest and should discipline those who are not, rather than adopting a blanket rule against screens.<sup>47</sup>

Those opposing such use of screens point out differences between government and private firm practices. Concern that lawyers will be discouraged from public service is a stronger policy argument than is mere "attorney mobility."<sup>48</sup> Moreover, information that government lawyers possess is generally less "private" in light of the Freedom of Information Act and other statutes allowing public access to government information.<sup>49</sup> As a result, many courts have concluded that erection of a screen in private firm cases, even assuming attorney integrity, is inappropriate.<sup>50</sup> In their view, client and public suspicions cannot be put to

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46. See, e.g., *Cheng v. GAF Corp.*, 631 F.2d 1052, 1058 (2d Cir. 1980) (explaining one factor supporting disqualification is the new firm is currently pursuing same action lawyer was exposed to at prior firm); *Baird v. Hilton Hotel Corp.*, 771 F. Supp. 24, 26 (E.D.N.Y. 1991) (stating danger of disclosure continues where case ongoing); *In re McLaren*, 115 B.R. 922, 927 (Bankr. N.D. Ohio 1990) (explaining wall inappropriate in ongoing case). See also *The Chinese Wall Defense to Law-Firm Disqualification*, 128 U. PENN. L. REV. 677, 712 (1980) (showing relevancy of time lapse between matters since likelihood for recollection of confidences is greater, files are more likely available and the likelihood of breach higher with recent representation); Howard M. Liebman, *The Changing Law of Disqualification: The Role of Presumption and Policy*, 73 N.W. L. REV. 996, 1016 (1979). See generally ANNOTATED MODEL RULES, Rule 1.10 note (Elements of a Screen). For a discussion of additional requirements, see *infra* text accompanying notes 108-122.

47. See, e.g., *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 754 (2d Cir. 1975). See generally James Lindgren, *Toward a New Standard of Attorney Disqualification*, 1982 AM. B. FOUND. RES. J. 419 (1982).

48. See, e.g., *Henriksen*, 14 Cal. Rptr. 2d at 184 (holding vicarious disqualification rule only unduly harsh regarding government attorneys); *Edward J. DeBartolo Corp. v. Petrin*, 516 So. 2d 6, 7 (Fla. 5th DCA 1987) ("hardship of recruiting attorneys in the private sector is not an overriding problem"); *Lansing-Delaware Water Dist. v. Oak Lane Park, Inc.*, 808 P.2d 1369, 1377 (Kan. 1991) (noting that ABA considered screens in private context and rejected them). In *Cheng v. GAF Corp.*, 631 F.2d 1052 (2d Cir. 1980), the court distinguished *Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980), by stating:

In *Armstrong* we noted the absence of a threat of taint of the underlying trial, and cited several policy reasons for approving the screening employed there. Primary among these reasons was a recognition that to disallow screening in all cases involving government attorneys might hamper the "government's efforts to hire qualified attorneys." 625 F.2d at 443. In the instant case, by contrast, there *does* exist a threat of taint of the underlying trial, but there are no public policy reasons against disqualification as compelling as those involved in *Armstrong*.

631 F.2d at 1058 n.7. See also Thomas D. Morgan, *Screening the Disqualified Lawyer: The Wrong Solution to the Wrong Problem*, 10 U. ARK. LITTLE ROCK L.J. 37, 49-50 (1988); Memorandum to A.L.I. Council Regarding Adoption of § 204, at 14-15 [hereinafter ALI Memorandum] (on file with author).

49. See Morgan, *supra* note 48, at 52.

50. See, e.g., *Amoco Chem. Corp. v. D.C. MacArthur*, 568 F. Supp. 42, 47 (N.D. Ga. 1983); *Roberts v. Hutchins*, 572 So. 2d 1231, 1234 n.3 (Ala. 1990); *Towne Dev. of Chandler, Inc. v.*

rest by using a screen. Given that only the lawyers seeking to avoid disqualification have access to facts proving the screen is maintained, "in the end, the public has no way of knowing whether a breach in the [screen] might ever occur."<sup>51</sup>

Given the reduced weight of the arguments in favor of private screens and the increased likelihood that information retained is sensitive, courts and some commentators find that private screens simply are not worth the risk. Leaving intentional breaches aside, it is viewed as impossible to protect against inadvertent disclosure of information, especially "soft" information such as general knowledge regarding company practices and policies.<sup>52</sup> Moreover, screening becomes increasingly more difficult to control where "multiple lawyers in multiple office megafirms are being screened from multiple matters over a number of years, requiring an elaborate matrix, perhaps even a computer program, to sort out which lawyers are screened from what engagements."<sup>53</sup> In addition, these commentators observe that few courts have carefully articulated minimum requirements for a successful screen.<sup>54</sup> Also, they argue, financial incentive to disclose information remains even where the attorney may not directly share in fees, because a victory for the new client is generally beneficial to the firm.<sup>55</sup>

Opponents to screens also point out that it is difficult to avoid client harm when the screen is breached. Former clients could be harmed yet never know of a breach. Clients suspecting a breach may be forced to disclose confidences to a judge in order to prove a breach has occurred<sup>56</sup>—the very course of action for which courts created irrebuttable presumptions to avoid. Worse, disclosures to the new client rather than merely to another lawyer may occur and would be impossible to

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Superior Court, 842 P.2d 1377, 1381-82 (Ariz. Ct. App. 1992); *DeBartolo*, 516 So. 2d at 6; *Lansing-Delaware*, 808 P.2d at 1377.

51. *Petroleum Wholesale, Inc. v. Marshall*, 751 S.W.2d 295, 301 (Tex. Ct. App. 1988). See also *State ex rel. Freezer Servs., Inc. v. Mullen*, 458 N.W.2d 245 (Neb. 1990) (stating that through rule prohibiting screen the parties and public can be assured that confidences will be protected from intentional or inadvertent disclosure); *WOLFRAM*, *supra* note 9, at 402 ("In the end there is little but the self-serving assurance of the screening-lawyer foxes that they will carefully guard the screened-lawyer chickens."); see *Freedman*, *supra* note 28 (temptations to violate confidences are high; violations are impossible to police or prove).

52. See *Morgan*, *supra* note 48, at 48-49 (relative informality of information exchanged within firm makes breach likely); ALI Memorandum, *supra* note 48, at 9-10 (information inadvertently transmitted because of atmosphere that anything can be said out loud because it will be kept confidential in a law firm). Courts have held that confidential information triggering disqualification includes not only facts regarding a specific case, but general information concerning a client that could be used to his detriment. See *supra* text accompanying notes 12-15.

53. ALI Memorandum, *supra* note 48, at 9.

54. See, e.g., *id.* at 12.

55. See *Morgan*, *supra* note 48, at 48.

56. See ALI Memorandum, *supra* note 48, at 13.

correct.<sup>57</sup>

The intensity of this debate is reflected in the history of discussions regarding screens within the ALI in connection with its proposed Restatement. An earlier draft of section 204 allowed screening only in the case of government attorneys. After extensive debate, the ALI director was asked to appoint a sub-committee to consider alternative approaches to screening.<sup>58</sup> The final draft of section 204 allows screening for lawyers who have moved from a private firm only where:

[T]here is no reasonable prospect that confidential information of the former client will be used with material adverse effect on the former client because:

- a) the confidential client information . . . is not likely to be significant . . .
- b) adequate screening procedures are in effect . . . ; and
- c) timely and adequate notice of the screening has been provided.<sup>59</sup>

Comments following the rule clarify that screening will be allowed only where the lawyer had no contact or minimal contact with client confidences while at the first firm. *Silver Chrysler* arguably already covers such cases<sup>60</sup> and the Restatement would clearly allow screens in only a small number of cases.<sup>61</sup> However, as one advisor to the Restatement observed: "This section amounts to a foot in the door to expand law which so far has been less sympathetic to the practitioner's view point . . . ."<sup>62</sup>

Despite the adopted rule, it is clear the screening issue remains unresolved. As the Reporter explains in remarks to the Council, issued prior to adoption of the rule, "[d]espite the fact that only one version comes back to the Council, there remains a difference of view whether the limited screening provided for in the Reporter's proposal is preferable to the more expansive screening that at least some sub-committee members prefer. That choice seems to be the principal issue for the

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57. See *id.* at 11.

58. See RESTATEMENT (THIRD) OF THE LAW, THE LAW GOVERNING LAWYERS, Reporter's Memorandum (Council Draft No. 6 1991), at xxii-xxiii [hereinafter Reporter's Memorandum].

59. RESTATEMENT (THIRD) OF THE LAW, THE LAW GOVERNING LAWYERS § 204 (Proposed Final Draft No. 1 1996) (emphasis added).

60. See *supra* text accompanying notes 18-24.

61. This approach is advocated by Professor Morgan. See Morgan, *supra* note 48, at 51-53. The limited acceptance of screens is consistent with an earlier draft of the Model Rules, which was rejected in favor of a rule totally prohibiting screens in the private firm setting. Compare MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 (discussion draft) with MODEL RULES, Rule 1.11. See also *Nemours Found. v. Gilbane, Aetna, Fed. Ins. Co.*, 632 F. Supp. 418 (D. Del. 1986) (adopting rule that screen appropriate where representation peripheral).

62. *Symposium Question and Answer Session, Symposium: The Evolving Restatement of the Law Governing Lawyers*, 46 OKLA. L. REV. 91, 92 (1993) (comments of Susan R. Martyn) [hereinafter *Q and A*].

Council.”<sup>63</sup> Of course, there were some members of the Council who disagreed with the notion of any screen, claiming that clients might have to disclose information to prove that disclosure will have a “material adverse effect” because the confidential information provided was “significant.”<sup>64</sup>

#### IV. THE CLIMAX: THE ACADEMIC MEETS THE PRACTITIONER

Two questions arise in the controversy about screens. The first is a sociological one: are lawyers generally princes or knaves? Will they scheme to extract every advantage they can, or are they constrained by morality and professional honor? Allusions to each of these archetypes abound in discussions regarding screens.<sup>65</sup>

The second is the practical question: assuming lawyers want to do the right thing and protect client rights, can they? Or are effective screens an impossibility?

Like everyone else considering the topic, I had an opinion regarding the answers to those questions: some lawyers and some screens would be flawed, but the adversarial system could take care of cases where breaches occurred. Antagonists could conclude from the course of discovery that information had been shared and would take necessary steps, such as filing disqualification motions, to resolve problems.

It occurred to me that my opinions were one part amateur psychology and one part conjecture, and so I solicited information from those

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63. Reporter's Memorandum, *supra* note 58, at 23. For further description of the debate, see Susan R. Martyn, *Conflict About Conflicts: The Controversy Concerning Law Firm Screens*, 46 OKLA. L. REV. 53 (1993).

64. ALI Memorandum, *supra* note 48, at 13. See also *Q and A*, *supra* note 62, at 94-95 (vague standard invites self interested lawyer to assume information not significant). Although section 204 has been cited in a few cases, it has not yet made a great impact. See, e.g., *Cardona v. General Motors Corp.*, 942 F. Supp. 968, 977 (D.N.J. 1996) (citing section 204 but noting that New Jersey does not accept the rule); *Roberts & Schaefer Co. v. San-Con, Inc.*, 898 F. Supp. 356, 362-63 (S.D. W. Va. 1995) (citing section 204 but expressing concern with trend to liberalize disqualification rule); *Elan Transdermal Ltd. v. Cygnus Therapeutic Sys.*, 809 F. Supp. 1383, 1391 n.14 (N.D. Cal. 1992) (refusing to consider tentative draft of section 204 as it does not reflect California law); *Towne Dev. of Chandler, Inc. v. Superior Court*, 842 P.2d 1377, 1382 (Ariz. Ct. App. 1992) (citing section 204 but finding that it conflicts with intent of the drafters of the Arizona rules).

65. Compare, e.g., *In re Chicago S. Shore and S. Bend R.R.*, 101 B.R. 10, 15 (Bankr. N.D. Ill. 1989) (stating there is every right to assume that lawyers will be honorable and adhere to screening procedures); *Rivera v. Chicago Pneumatic Tool Co.*, No. 51 63 64, 1991 WL 151892, at \*6 (Conn. Super. Ct. Aug. 5, 1991) (“court must presume that plaintiffs’ counsel will scrupulously comply with the Rules of Professional Conduct”) and *Nemours*, 632 F. Supp. at 428 (“credit members of the legal profession with a certain level of integrity”) with *Cardona*, 942 F. Supp. at 977-78 (adopting Wolfram’s “fox and chickens” analogy) and *Papanicolaou v. Chase Manhattan Bank*, 720 F. Supp. 1080, 1087 (S.D.N.Y. 1989) (“in the course of litigation both scuttlebutt and official information travel quickly by word of mouth”).

erecting and maintaining screens. A questionnaire was prepared and mailed to management partners at 156 firms comprised of fifty lawyers or more in Michigan, Illinois, Pennsylvania and Oregon. Those states were chosen because their state supreme courts had promulgated rules allowing screens in the private firm context. Firms with over fifty lawyers were selected because, *Nemours*<sup>66</sup> notwithstanding, most courts are hesitant to allow screens in firms smaller than that.<sup>67</sup>

The goal in crafting the questions was to discover several things. Did the firms take professional responsibility generally, and screens specifically, seriously? Did they know the law regarding conflicts and screens? Did they do a good job of getting the information necessary to detect conflicts? Did they have policies to assure compliance with screen requirements and to discourage breaches? Finally, did they believe they could spot violations committed by opposing firms?

Only twenty percent of the firms questioned sent a response,<sup>68</sup> making it difficult to state that the results received hold true for all large firms, let alone for smaller firms. It may be that those firms most aware of and organized to respond to ethics issues participated. The results do, however, provide some insight into how screens are constructed and maintained, raising both hope and concerns.

A review of the survey results revealed that law firms do vigorously attempt to avoid conflicts. However, they are hampered in this effort by insufficient legal and factual information. In addition, it appears that their ability to analyze such issues may be hampered by approaching issues from an adversarial viewpoint, or simply by their personal conflicting interests.

#### A. *General Information and Conflicts Identification Systems*

Most hopeful is that the firms appear to take ethics seriously. Of those firms responding, 83.4% had presented in-house continuing legal education (CLE) regarding professional responsibility issues within the last two years; 83.4% of their attorneys had attended outside CLE on such matters during that period.<sup>69</sup> Virtually all the firms have extensive resources on professional responsibilities in their libraries.<sup>70</sup> Sixty-one

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66. *Nemours*, 632 F. Supp. at 418.

67. See *supra* text accompanying notes 38-39.

68. Two reasons for this spring to mind. First, the questionnaire sought sensitive information. Second, and possibly more importantly, time spent on this questionnaire could not be billed to a client. The questionnaire was twenty-five pages long and could easily have taken over an hour to complete. I was extremely grateful to those law firms concerned enough about this issue to take the time to respond.

69. This may be a result of CLE being mandatory in those jurisdictions.

70. When asked what resources were available at the firm, one respondent provided the

percent have members in their firm who are involved in activities of the organized bar dealing with ethics, discipline, or professionalism. Moreover, the firms seem to recognize the importance of having expertise regarding ethics matters within the firm: 79.6% have a partner in charge of reviewing conflicts, and 70.4% have standing ethics committees. However, only 27% of such committees meet on a regular rather than on an ad hoc basis.

Finally, the firms have a well developed system for detecting conflicts. One hundred percent of those firms questioned consult a client index, while 83.4% also circulate a memorandum before new matters are accepted. Virtually all firms indicated that new files could not be opened without such a review, and that they distributed a written policy outlining the procedures. Only 6% apparently have no requirement that someone other than the lawyer wishing to open the file aid in resolving a conflict.

The problem is that the information discovered during a conflicts check can only be as good as the information that is entered in the system. Virtually all firms include the name of the client, opposing parties and counsel, and co-plaintiffs and defendants. These are, however, potentially disqualifying omissions. For example, while courts have disqualified lawyers for representing parties whose interests conflict with an entity related to a former client,<sup>71</sup> 22.4% of responding firms did not include such information in their conflicts data banks. Courts have disqualified firms for representing parties because of a conflict with

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frightening answer that the firm had "just the Code." It is hard to imagine a tax lawyer saying that one could find "just the Code" in her law firm library. Another respondent pinpoints a significant problem regarding doing research on professional responsibility: "[W]e have about twenty treatises in our main library, all of which are *terribly* indexed." (emphasis in original).

71. See, e.g., *Decora, Inc. v. DW Wallcovering, Inc.*, 899 F. Supp. 132, 137 (S.D.N.Y. 1995) (lawyer disqualified in suit against subsidiary for past related representation of parent company); *Strategem Dev. Corp. v. Heron Int'l N.V.*, 756 F. Supp. 789, 793 (S.D.N.Y. 1991) (law firm disqualified for simultaneously representing a subsidiary and preparing to file suit against the parent company); *Hartford Accident and Indem. Co. v. RJR Nabisco, Inc.*, 721 F. Supp. 534, 539-40 (S.D.N.Y. 1989) (past representation of subsidiary may require disqualification in action against parent); *Teradyne, Inc. v. Hewlett-Packard Co.*, No. C-91-0344 MHP ENE, 1991 WL 239940, at \*1 (N.D. Cal. June 6, 1991) (lawyer disqualified in suit against parent company because of representation of subsidiary and parent's benefit plans). See also *Pennwalt v. Plough*, 85 F.R.D. 264, 271 (D. Del. 1980) (lawyer not disqualified but court recognized potential conflict when sister corporations share board members and personnel). The American Bar Association, in a divided opinion, rejected a per se rule requiring disqualification for same-firm representation of related corporate entities. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-390 (1995). See generally Ronald D. Rotunda, *Conflicts Problems When Representing Members of Corporate Families*, 72 NOTRE DAME L. REV. 655 (1997) (rejecting cases advocating per se rule requiring disqualification because of adverse impact on profits alone); Morgan, *supra* note 3, at 1191-93 (discussing ABA Formal Opinion 95-390).

officers, directors, or partners;<sup>72</sup> yet, 51.2% did not list officers, while 57.6% did not list directors.

Of equal concern is the accuracy of information contained in the index. Of those firms responding, 28.8% do not update information included in the index.

The next set of questions related to how information regarding individual lateral hires or mergers was handled. Ninety-six percent responded that they solicited information regarding matters that lawyers personally handled prior to joining the firm and resolved any conflicts before employment commenced, which is a wise approach. Again, however, there were serious deficiencies in the content of information elicited. All firms asked the lawyers about matters on which they were currently working; 97% asked about matters on which they previously worked and were currently ongoing. However, 51% did not ask lawyers about matters the lawyer previously worked on which were no longer pending. Given the large number of cases involving disqualification due to past client conflicts, this omission seems to ask for trouble.<sup>73</sup>

When firms were asked what they did when the information provided by laterals was not related to any case currently pending in the firm, only 28.6% indicated they would enter the information into their computer bank. Again, given the potential for a later conflict, this seems like a risky approach.

Moreover, firms generally asked for less information from lateral hires than they required to be included in their general conflicts indices.<sup>74</sup> Firms also varied regarding whether they asked questions about the nature of the work performed,<sup>75</sup> despite the focus in many cases on the extent of the lawyer's responsibility and access to confidential information in prior representation.<sup>76</sup> It is possible that those firms that

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72. See, e.g., *Evans v. Artek Sys. Corp.*, 715 F.2d 788 (2d Cir. 1983) (case remanded to determine whether past representation was of corporation or officer).

73. See *supra* notes 7-26 and accompanying text. Of course, it will be difficult for lawyers, especially senior lawyers, to reconstruct all of their past client relationships. However, lawyers will likely remember those cases in which they had major roles, which will at least reduce the likelihood of later disqualification. Perhaps a computer-generated client list from billing records could be compiled.

74. Of those responding, 42% did not ask for names of related corporate or partnership entities; 77% did not ask names of partners/corporate officers; 87.5% did not request the names of directors; 21% did not request co-plaintiff names, while 56% did not ask about co-defendants.

75. I asked which questions, if any, firms asked lawyers regarding their roles in matters. The answers, with percentages indicating firms that did *not* ask, were as follows: did lawyer supervise (29.6%); access to client documents (33.3%); access to client information (33.3%); meetings with client (59.2%); meetings with other lawyers (62.9%); work "on the merits" (44.4%); work limited to procedural matters (66.6%); and work limited to general research (55%).

76. See, e.g., *Cheng v. GAF Corp.*, 631 F.2d 1052, 1056-57 (2d Cir. 1980) (no disqualification where associate had peripheral role); *Silver Chrysler Plymouth, Inc. v. Chrysler*

refrain from asking such questions assume that any work performed in a prior representation would automatically disqualify a lawyer;<sup>77</sup> if not, a firm would be wise to investigate such matters.<sup>78</sup>

Some firms that do not elicit complete information take one additional risk. Despite several cases indicating that disqualification can be triggered by non-lawyer employees,<sup>79</sup> 50% of those responding did not ask for information from new lawyers who may have worked with other firms while in law school; 44.8% did not ask paralegals; 72.6% did not ask secretaries or other support staff; and 56.1% did not ask law students.

Firms clearly have systems in place for identifying conflicts. Many have well designed systems which reduce the likelihood of surprise. Many, however, simply do not solicit all the information they need to protect themselves from discovering a conflict much later than they or their clients should.

### B. Awareness of Law Regarding Conflicts

The next set of questions was designed to provide insight into whether respondents were familiar with the law regarding conflicts generally and screens in particular. I provided them with several hypothetical situations and asked what their firm policy dictates. In each situation, the firm had several options, none of which were exclusive. For example, the first question in this set was as follows:

12. Assume a new hire discloses that he/she worked on a matter for a client whose interests are adverse to those of a client who the firm *currently* represents regarding the *same* matter.

*Is it firm policy to:* (CIRCLE ALL THAT APPLY)

- a. *Withdraw* from representation of current client?

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Motors Corp., 518 F.2d 751, 756-57 (2d Cir. 1975) (holding screen inappropriate where lawyer as senior legal services attorney participated in discussions); *Nemours Found. v. Gilbane, Aetna, Fed. Ins.*, 632 F. Supp. 418, 425 (D. Del. 1986) ("rigid [disqualification] rule exaggerates the difference between a partner and an associate in modern law firms").

77. A small percentage of respondents did indicate that they assumed the lawyer had an active role. Given the number of law firms indicating later in the survey that they resolved conflicts matters on a case-by-case basis (as do many courts), more firms should ask these clearly relevant questions.

78. Some respondents indicated great sensitivity to this issue. I asked whether a firm would ask additional questions about potential conflicts. One response: "Take depositions? Appear in court? Knowledge of a former client's businesses practices if relevant to a perceived conflict?" This is a person who understands conflicts issues. See *supra* text accompanying notes 18-24.

79. See, e.g., *Kapco Mfg. Co. v. C & O Enters., Inc.*, 637 F. Supp. 1231 (N.D. Ill. 1985) (secretary/office manager); *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831 (Tex. 1994) (paralegal). See generally ANNOTATED MODEL RULES, Rule 1.10 note (Imputation Due to Nonlawyer Employees); Stephen E. Kalish, *The Side-Switching Staff Person in a Law Firm: Uncomplimentary Assumptions and an Ethics Curtain*, 15 HAMLINE L. REV. 35 (1991).

YES NO

- b. "Screen" new hire from giving or receiving any information regarding the matter and continue representation of current client?

YES NO

- c. Continue representation of the client without use of a screen?

YES NO

- d. Make a case-by-case determination regarding whether a screen is advisable?

YES NO

IF SO, please briefly explain what factors are considered in making that determination and who makes that determination.

- e. Ask new hire's former client for permission to continue representation of the firm's current client?

YES NO

- f. Proceed only with former client's permission?

YES NO

- g. Follow another course of action not described above?

YES NO

IF SO, please describe.

Respondents were provided with the same set of options for each hypothetical.

Responses to the first question were consistent. Ninety-three percent stated they would erect a screen in cases where an attorney had previously worked on the currently pending case when affiliated with another firm. In fact, 35.2% said that they would require both a screen and former client consent, and 6.4% of those responding said they simply would withdraw under these circumstances.

Equally positive were responses to issues regarding past representations. I initially asked firms to assume that a new hire worked on a case no longer pending but factually related to a matter currently pending in the firm. Only 6.6% of those responding would continue representing the client without a screen; each of these firms would at least evaluate the matter on a case-by-case basis.<sup>80</sup>

More intriguing were responses to the question concerning what a firm would do if it learned a lawyer had represented, while at another firm, a client whose interests conflict with those of the firm's current client and about whom the lawyer has "general knowledge" of person-

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80. Approximately 65% recognized they could not maintain a screen and continue to represent a client without permission; another 26% would at least evaluate the matter on a "case by case" basis. Only 76% of those responding indicated they would simply continue the representation.

nel, policies, and procedures. Although 30% of those responding would not erect a screen, all but one would at least analyze the matter on a case-by-case basis. The comments reflected a real sensitivity regarding this issue. One respondent indicated the hypothetical represented a "'smell test' judgment call, but we would tend to screen if there was any doubt." Others concurred, citing several factors. As one respondent stated, "judgment is made concerning the significance of the 'general knowledge,' confidentiality of general knowledge, and nature of pending matter (e.g., contentious or not)." Another considered the following factors: "Nature of new hire's involvement; level of sophistication of clients; evaluate public nature of new hire's information/knowledge; amount of time since new hire's involvement." These considerations echo concerns voiced by courts when considering the issue of general knowledge.<sup>81</sup> It is encouraging that such careful evaluation appears to be occurring.

Similarly, most lawyers seem to understand the rule that lawyers may not concurrently represent clients whose interests are adverse. Ninety-four percent would either simply withdraw or continue only with both clients' permission. Moreover, some explicitly raised the point that the lawyer must independently evaluate whether she can represent both, even with client consent. As one respondent stated, "some conflicts simply can't be waived. If this is one of those, we would withdraw from both sides."<sup>82</sup>

### C. *Creating Screens*

I am less sanguine about responses concerning when screens should be erected. I asked what the firm would do upon discovering a conflict after the lawyer joins the firm but before a motion to disqualify is filed. Given the spotty information provided in conflicts checks,<sup>83</sup> this is not an unlikely problem for firms to confront. As indicated above, courts generally indicate that a screen should be erected immediately upon a lawyer joining the firm or new matter coming to the firm. Yet, only

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81. See *supra* notes 12-15 and accompanying text.

82. Another indicated that if the "matter were directly adverse, we would most likely withdraw from representing either," and one stated "one must determine if the representation is on the same or a related matter so that one can determine whether the conflict can be waived." Cf., MODEL CODE, DR 5-105(D) (must be "obvious" that firm can represent both and must get consent); MODEL RULES, Rule 1.7(a) (attorney must reasonably conclude that representation will not be affected and must get consent). In an effort to avoid skewing the results, I did not directly ask whether lawyers performed such an analysis; I asked the less direct question of what factors are considered in making a determination about the representation. Thus, I cannot, unfortunately, say what percentage of respondents understood the requirements to be part of the rule. Several did raise the issue, however.

83. See *supra* text accompanying notes 74-79.

7.6% would withdraw; 65% would proceed with a screen without former clients' permission.<sup>84</sup>

Perhaps more alarming, 52% of those responding indicated they would evaluate the appropriateness of a screen on a case-by-case basis. Given that I told them the clients' interests were adverse and that the matters were related, it is unclear what factors are left to evaluate. Two respondents indicated they would consider the extent of the associate's involvement in the prior case, which is fair given the peripheral representation rule.<sup>85</sup> However, 10% indicated the issue was whether communication had *actually* occurred, which clearly is not the standard for disqualification.<sup>86</sup>

Similarly, only 13.8% would withdraw if the firm learns of the conflict when a motion to disqualify is filed. In fact, 9.2% would continue without implementing a screen. Again, several lawyers cite actual sharing of information as the standard. An interesting question is whether the decision to continue is made because changing the approach when a motion is filed is similar to subsequent repairs following an accident: both suggest an admission of lack of due care.<sup>87</sup> Here, 50% say they would proceed only with the former client's consent. Why would a larger number respond only if and when a motion has been filed (when the former client is likely not to be in a conciliatory mood)? Are some firms setting up screens late hoping they do not get caught? Or do they miss the conflict until the opposing side raises the issue?

Some general conclusions can be drawn concerning knowledge and application of conflicts law. The majority of firms responding are generally aware of the rules. The consistent minority who are not, however, is troubling since it is expected that large firms face such issues often and therefore should know the law. Moreover, the fact that these firms took the time to reply indicates a greater than average concern regarding these issues. That such firms do not follow the conflicts rules does not bode well for compliance by others. However, this concern should not be overstated given that many firms are aware of requirements.

What accounts, then, for the broad unwillingness to withdraw when a conflict is discovered after representation begins? Obviously, there is

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84. Requiring consent from both clients is a wise approach given the courts' reluctance in concurrent conflict cases to allow a firm to avoid conflict by choosing which client it wishes to keep and dropping the other like a "hot potato." *See, e.g.,* *Picker Int'l, Inc. v. Varian Assocs.*, 869 F.2d 578, 583 (Fed. Cir. 1989) (firm may not simply choose among clients with conflicting interests). *See generally* ANNOTATED MODEL RULES, Rule 1.9 note (The Hot-Potato Client).

85. *See supra* text accompanying notes 18-25.

86. *See supra* text accompanying notes 37-41.

87. The concern for prejudicial effect of such action lies behind the subsequent repair rule. *See* FED. R. EVID. 407.

loss of revenue for the firm. This provides incentive to advocate strongly on behalf of continuing the representation, especially in light of the fact that disqualification motions are sometimes filed for tactical reasons.<sup>88</sup> I should note, however, that my questions made clear that a conflict did exist, so the concern the motion was filed for tactical reasons should not have been a consideration. It may be that the reason for reluctance to withdraw is the inclination towards advocacy: if possible, an argument should be made to convince the judge to rule favorably.

Given the current state of the law, this is not an irrational response. Many cases stress the need for flexibility in reviewing disqualification motions.<sup>89</sup> Although most cases hold that screens must be erected immediately upon the hire or the event creating the conflict,<sup>90</sup> some courts allow some leeway.<sup>91</sup> Moreover, enough courts have been willing to depart from mainstream thought regarding ethical issues that attorneys can frequently find some case to cite in opposition to a disqualification motion.<sup>92</sup>

Further, it may be that because most conflicts are unintended, law

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88. See, e.g., *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 722 (7th Cir. 1982); *In re Airport Car Rental Antitrust Litig.*, 470 F. Supp. 495, 503 (N.D. Cal. 1979) (holding strategic use of disqualification motions justifies flexibility in rules); *Anchor Packing Co. v. Pro-Seal, Inc.*, 688 F. Supp. 1215, 1223 (E.D. Mich. 1988) ("seems far more possible for tactical considerations to be at issue" when motion filed after litigation has begun); ANNOTATED MODEL RULES, Rule 1.9 note (Use and Abuse of Motions to Disqualify); see also *supra* note 33 and accompanying text.

89. See, e.g., *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1577 (Fed. Cir. 1984) (balancing right to counsel with ethical standards); *Freeman*, 689 F.2d at 721 (disqualification is drastic measure).

90. See *supra* text accompanying note 43.

91. See *supra* note 41.

92. Several cases have either gotten the law wrong or have made very odd comments. In *Salamon v. Messina*, No. 87 C 2097, 1989 WL 6502, at \*1 (N.D. Ill. Jan. 25, 1989), the plaintiff consulted a lawyer regarding recovery of sales commissions. The attorney declined representation of plaintiff, but later his firm represented defendants in the action against plaintiff. The court did not disqualify the firm where the attorney was a partner because it concluded the lawyer's earlier advice to the plaintiff was not a "confidential communication." *Id.* at \*4. In *Donohoe v. Consolidated Operating & Prod. Corp.*, 691 F. Supp. 109 (N.D. Ill. 1988), the court found that the information obtained in the prior representation was not highly probative, yet the court still felt it necessary to comment that "[b]y the time [the motion to disqualify was filed, the attorney] assuredly had ample opportunity to use or disclose to his clients any confidential information he might have had. That calls into question whether any purpose might be served by disqualifying [the firm]." *Id.* at 118. In *INA Underwriters Ins. Co. v. Rubin*, 635 F. Supp. 1 (E.D. Pa. 1983), the court approved a screen although the lawyer never switched firms and the conflict involved representation in the same case. However, the Court may have been influenced by the appearance that the plaintiff might have deliberately attempted to create a conflict. See *id.* at 6. As Professor Rotunda has observed, there has been a dearth of appellate opinions since the Supreme Court held denials of motions to disqualify unappealable in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981). See Rotunda, *supra* note 71, at 665. Rotunda refers to the result as a "death of precedent" in attorney disqualification cases, which provides too much unreviewable discretion to judges and too little guidance to lawyers. *Id.* at 666-68.

firms caught in them tend genuinely to believe they can be resolved in good faith without loss of the firm's valuable services. In so doing, they may tend to underestimate the intensity of the conflict or sensitivity of information.<sup>93</sup>

The problem with adopting an adversarial stance in such a case is that it is adopted not in opposition to a typical adversary, but instead against a former client, to whom the lawyer owes fiduciary duties. Thus, a more objective, less self-serving, and less adversarial approach is required of lawyers analyzing screen issues. Rather than determining whether any argument can be made, the lawyer should recognize the conflict of interest and resolve the matter in a manner consistent with fiduciary responsibilities.<sup>94</sup>

#### D. *Maintaining Screens*

Assuming that continued representation using a screen is appropriate, the question becomes whether firms do an adequate job in erecting and maintaining screens. Many do, but a significant minority do not. One law firm describes a preferred approach: "[We provide a] monthly reminder of our firm policy, which is also contained in our policy manual. [There is an] annual certification by each partner and employee of compliance with the policy, [and we conduct] periodic seminars."

Unfortunately, not enough firms follow this example. Only 35.2% have written policy statements on the topic, though it is assumed most lawyers would probably advise their clients to commit their employment policies to writing to reduce confusion. Twenty-five percent have neither a written or oral policy. None has articulated a firm policy for sanctions if a screen is breached.<sup>95</sup> Moreover, only 47.6% of those responding indicate that they conduct seminars or otherwise provide information about the proper functioning of screens.

In addition, a substantial minority do not seem to be clear on what is required. While 94.5% state they segregate files, 20% of those responding do not have effective policies for limiting access. Representative comments include that "access is available to anyone," "access is not limited except by oral pronouncement," and that access is limited only by the "honor system." Moreover, 43% indicated they do not segregate computer files containing client documents. One firm responds it would lock files in "severe" cases. Query whether past clients would

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93. See *infra* text accompanying note 104.

94. See *infra* text accompanying notes 177-78, 201-05.

95. One respondent did indicate, however, that "there is a general policy that breaches of firm policies will not be tolerated and remedial action will be taken."

feel comfortable with such a system, or whether courts are likely to approve.

Of course, an honor system cannot work unless there is assurance that lawyers and staff are continually aware of the screen. While 92.4% of those responding inform lawyers and staff working on the case of the screen's existence, 25.2% are informed orally or learn of it only if they see a file that has a file label restricting access. There is plenty of opportunity for inadvertent disclosure before notification occurs with such a system. Further, 20% of those responding indicated they do not warn against discussing cases in law firm meetings where disclosure could easily occur. Moreover, 31.5% do not inform lawyers joining a firm after a screen is erected about the screen, and 44% do not send periodic reminders regarding which screens are currently in place.

In addition, despite the requirement to give notice to the opposing party,<sup>96</sup> 36.7% do not do so.<sup>97</sup> Even more troubling, although 83.6% inform the present client of the existence of a screen, 42% do not inform the client of any consequences for breach of a screen. Given the requirement that attorneys provide clients all material information necessary to make informed choices,<sup>98</sup> and the duty to disclose and get client consent where a personal conflict exists between lawyer and client,<sup>99</sup> this failure is unacceptable. Because of the inherent conflict of interest between the lawyer who wants a screen and continued employment, and the client who wants assurances his secrets are protected, the lawyer's subjective analysis is not enough justification.

All told, this variation among firms creates real questions regarding the efficacy of screens. One firm responded that "a screen can be somewhat casual depending on the clients involved, the severity of the case and the severity of the conflict."

While such an approach might work some of the time, it certainly can create problems. Instead, each state's rules should give much more detailed instructions by rule or ethics opinion regarding erection and maintenance of a screen,<sup>100</sup> and should require firms using screens to attend continuing legal education seminars on the matter. Most firms

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96. See MODEL RULES, Rule 1.11(a)(2); MICH. RULES OF PROFESSIONAL CONDUCT Rule 1.10(b)(2) (notice to tribunal required); OR. CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(I)(1) (lawyer must serve affidavit attesting to screen on former law firm); PA. RULES OF PROFESSIONAL CONDUCT Rule 1.10(b)(2) (written notice to appropriate client to ascertain compliance).

97. Fifty six percent stated they shared in fees derived from the case, which violates the MODEL RULES. See MODEL RULES, Rule 1.11(a)(1).

98. See *id.* Rule 1.4; MODEL CODE, EC 7-8. For additional information regarding the requirement of informed consent, see *infra* text accompanying notes 183-205.

99. See MODEL RULES, Rule 1.7(b)(2); MODEL CODE, DR 5-101(A).

100. See *infra* text accompanying notes 108-23.

would appreciate the guidance. One lawyer indicated that the firm had adopted several policies suggested by the questionnaire. As another firm responded, "we need administrative road maps widely available so each firm need not start from scratch to develop processes, procedures, and the like."<sup>101</sup>

### E. Breaching Screens

Absent such guidance, the only remaining safeguard for those otherwise inclined to breach a screen would be the potential that one's adversary would successfully challenge a screen. No responding firm reported that it had ever breached a screen or that an opposing firm had done so. There were, however, fascinating responses concerning what firms thought about other firms' activities and whether their own firm could detect a breach.<sup>102</sup>

The first question asked was whether the firm found that other firms have appropriate safeguards. Half declined to answer; 87% of the other half answered in the affirmative. It is unclear whether those who answered simply did not want to engage in "unlawyer-like" speculation, or whether they believed that admitting awareness would not serve their best interests. When asked whether they thought lawyers in opposing firms inform other lawyers in their firms if a breach occurs, 50% again declined to answer. This time they made comments indicating they had no knowledge. Thus, it is possible the respondents were simply being cautious. Of those responding, 65% stated they believed lawyers did inform their colleagues.<sup>103</sup>

The next question asked whether lawyers in other firms inform their opponent if a breach occurred. Again, 50% did not respond, but 62% of those providing an answer said they believe they do not. There were two very interesting comments provided in answer to this question. One lawyer stated, "In most cases, I believe that breaches are not malicious and if an innocent and undamaging breach occurs here, I probably would not inform the client either." Another wrote: "[Firms would not inform] unless a major breach occurred. Minor breaches, if any, are ignored."

I very much appreciated this candor, and believe that each statement shows that the lawyers have thought carefully about the issue and

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101. Another stated, the "Bar Association should promulgate uniform policies and procedure with swift approval of the state supreme court which would be followed by all attorneys."

102. One polling firm told me they ask questions in two forms: "would you do X?" and "do you think your neighbors do X?" Often those who are unwilling to admit they do X are willing to say that others do.

103. One respondent said "[I have] no opinion, though I do believe many firms ignore or are cavalier about the issue."

believe they would disclose where there is material harm. The true difficulty here is that the person making the decision about materiality is doing so with an enormous conflict of interest. Even a person trying very hard to do the right thing would be inclined to minimize the importance of a disclosure that otherwise could result in disqualification of the firm should they be allowed unilaterally to decide.<sup>104</sup>

In fact, 42.6% of those responding believe opposing firms do not tell their client if a breach occurs. Why would a lawyer not disclose to her own client? One lawyer indicated a client would not be told because "this is primarily a lawyer's issue." Alternatively, the concern might be to minimize the breach of confidence by not further sharing it. However, the clients' rights are at risk, and disclosure of the occurrence of a breach as required under Model Rules 1.4 and 1.7(b) is not the same as disclosure of what confidences were shared. The Model Rules make it "a client's issue."

A failure to report is extremely troublesome. It is especially dangerous because of the perceived difficulty of detecting a breach. One hundred percent of those responding believe an opposing screen could be breached without their firms detecting it.<sup>105</sup> Of the one-third willing to answer the question, 87.5% responded that an opposing party probably has breached a screen without their knowledge.

Of course, lawyers may have responded that a screen might be breached because, as one said, "anything is possible." I believe it is more than caution, however, because 61.6% of those responding indicate that they believe some breaches would be more difficult to detect than others. For example, 58.3% believe their firm could detect that a lawyer had disclosed the existence of a document. Those commenting indicated they could conclude this from depositions or by a request for the document at issue. One of the less certain respondents stated the following regarding how to learn of a leak of any information: "If the only way the opposing party could have obtained the information was from a screened individual, the breach can be detected. Similarly, [we could detect] if there is a pattern of the other side having documents or information which it would not likely have without such a leak. Otherwise [it is] very difficult to detect."

Respondents were more optimistic that they could determine facts concerning the case were communicated; 75.8% said they could. Again,

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104. One easy rationalization would be that the material was probably discoverable anyway. See *Q and A*, *supra* note 62, at 95 (practitioners may rationalize their information is not significant or that they do not remember it); ALI Memorandum, *supra* note 48, at 4-5 (no harm by disclosing former client's aggressive assertions of privilege as she disagreed with former client's view, no confidential facts were disclosed and court would decide privilege questions).

105. Again, 50% offered no response.

some noted that depositions would be a source of learning that facts had been disclosed. Others pointed out they would know facts had been disclosed if they were facts which could only be known by a "tainted lawyer." Another observed it would be easier to detect "if the facts were not widely known and under a protective order from discovery."

Fewer lawyers thought other breaches could be detected. Thirty-three percent of those answering stated they believe they can detect disclosure of business policies and procedures; 46.2% could detect disclosure of discovery shortcuts; 38.5% believe they could discover disclosures about discovery or trial strategy. Most difficult to discover, in their view, would be observations concerning the character or reputation of parties or experts: only 16.6% stated they could spot such a breach.<sup>106</sup>

In summary, I found a large majority of responding firms take conflicts seriously and attempt to resolve them in a measured manner. However, both they and firms with fewer concerns are hampered by flawed conflicts detection, flawed systems for maintaining screens and, to some extent, an adversarial rather than fiduciary analysis of screen issues. This is aggravated by the fact that no firm responding had developed a policy of sanctions regarding breaching screens.<sup>107</sup> Moreover, there are enormous difficulties in proving a screen has been breached. What does this mean for the future of screens?

## V. THE DÉNOUEMENT: RESOLVING THE SCREEN ISSUE

### A. *The Rule*

Despite earnest attempts to use screens only where appropriate and to construct them carefully, limited information and gaps in protective procedures create at least some possibility of unintentional harm. Of course, the potential for intentional breach is also present. Should courts, therefore, prohibit the use of screens?

As indicated above, jurisdictions vary in their view of whether client choice and lawyer mobility trumps the concerns about confidences in the private firm context.<sup>108</sup> It is my hope that the issues raised in this article spark a renewed discussion of those policy questions.

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106. In response to the questions concerning how a firm would go about proving a breach, respondents suggested several discovery techniques: depositions; motions to show cause; and affidavits from their lawyers showing the information could only have come from a breach. Many pointed out that it was difficult to answer such a general question since the facts would vary so much from case to case. One very interesting response was that proof "would be very difficult and likely expensive. As a result, not sure the effort would be made."

107. However, one firm was "about to adopt one," and another said it had a "general policy that breaches of firm policies will not be tolerated."

108. See *supra* text accompanying notes 30-32.

Screens are allowed for government lawyers, and some clients may condition consent to continued representation despite a conflict upon maintenance of a screen. Therefore, two points should be stressed even in jurisdictions where screens are rarely used: the state bar association should clearly define the requirements of an adequate screen, and it should vigorously discipline those lawyers not meeting them.

Michigan Rules of Professional Responsibility Rule 1.10 provides an example of the lack of guidance currently offered. It states:

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or substantially related matter in which that lawyer, or a firm with which the lawyer was associated, is disqualified under Rule 1.9(b), unless:

- (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- (2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.<sup>109</sup>

It and rules like it should be amended. Rule 1.10 should be changed to read:

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or substantially related matter in which that lawyer is disqualified under Rule 1.9(b), unless the disqualified lawyer is screened from any participation in the matter as required by Rule 1.10(e) and is apportioned no part of the fee therefrom.

....

(e) The following conditions must be present where the firm intends to use a screen to avoid disqualification pursuant to Rule 1.10(b):

- (1) The matter was not ongoing at the time the disqualified lawyer joined the firm;
- (2) The firm reasonably believes that continued representation with use of a screen will not adversely affect the interests of the former client and is consistent with applicable law, and the present client has consented after consultation;
- (3) The disqualified lawyer must not have had substantial responsibility in the earlier matter, unless the former client has consented to continued representation with a screen;
- (4) The screen is erected immediately when the firm knows or reasonably should know, it is necessary;
- (5) All documents regarding the matter which is the subject of the screen shall be physically segregated from other firm files and

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109. MICH. RULES OF PROFESSIONAL RESPONSIBILITY Rule 1.10.

shall be kept in a manner which assures that no unauthorized access to them will occur. Computer files shall also be protected in a manner assuring no such access will occur;

(6) The personally disqualified lawyer shall submit to the firm by which the lawyer was formerly employed, and serve on each other party to any pertinent proceeding, a signed document attesting that during the period of disqualification the personally disqualified lawyer will not participate in any manner in the matter or the representation, will not discuss the matter or the representation with any partner, associate, of counsel lawyer, or employee and will not share in any fees for the matter or the representation;

(7) At least one affiliated lawyer shall submit to the same firm and serve on the same parties, a signed document attesting that all partners, associates, or counsel lawyers and employees are aware of the requirement that the personally disqualified lawyer be screened from participating in or discussing the matter or the representation, describing the procedures being taken to screen the personally disqualified lawyer, and assuring that periodic reminders of the existence of the screen will be circulated throughout the firm; and

8) At least one affiliated lawyer shall attest to attending continuing legal education regarding conflicts of interest and screens.

Rule 1.11 should be similarly amended. Should a jurisdiction decide the text of the Rule is too long, it could include some of the text in a commentary, so long as it made clear that only screens meeting the commentary requirements are permissible.

Section (b) removes language regarding the past firm because it is confusing and superfluous. To make a screen necessary, it will already have been shown that the lawyer cannot rebut the presumption of receipt of some confidences under Model Rule 1.9(b). Thus, the lawyer is disqualified without reference to her past firm. The screen rule is designed to rebut the presumption that she passes those confidences to her new firm. Model Rule 1.9 could be amended to reflect that if client consent is conditioned upon a screen, the lawyer must comply with Model Rule 1.10(e).

The exclusion of screens when a case is ongoing in section (1) reduces the likelihood of hiring lawyers to get information. In addition, even assuming good faith, the danger of disclosure of "fresh" information is greater than that of disclosures regarding older cases.<sup>110</sup> As the peripheral representation rule will allow representation where the lawyer's role was minor or disqualification was vicarious,<sup>111</sup> this rule pro-

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110. See *supra* note 47.

111. See *supra* text accompanying notes 19-25.

hibits only lawyers actively working on a case from switching midstream.

The requirement in section (2) that a lawyer reasonably believe that continuing representation with a screen does not harm the former client is consistent with law on the topic and is an attempt to avoid the problem of reasoning like an adversary rather than a fiduciary.<sup>112</sup> The language is drawn from Model Rule 1.7, which requires the lawyer, as fiduciary, to make an independent, objective analysis regarding whether it is appropriate to continue representation where there is a potential conflict of interest, as there clearly is in these circumstances.<sup>113</sup> The reference to applicable law requires the lawyer to withdraw where case law requires, even if she believes that client interests are not implicated. This serves as additional protection against the likelihood the lawyer's judgment will be impaired. This provision is especially important in light of the absence of the requirement of former client consent.

The current client should be informed of the risks of erecting a screen, including the possibility of hiring a new lawyer or suffering other sanctions later. Only then can a client make an informed judgment regarding choice of counsel.<sup>114</sup>

The requirement in section (3) recognizes the cases that reject the use of a screen where a lawyer's material role in earlier litigation exacerbates the likelihood of disclosure of information.<sup>115</sup> While there is still some room for confusion regarding how much of a role is a substantial one, it provides lawyers with notice of a relevant factor.

The requirement in section (4) that a screen be erected immediately is not universal,<sup>116</sup> but is the better rule for many reasons. It minimizes the likelihood of inadvertent disclosure. It encourages more complete conflicts detection procedures. It provides a clearer rule which reduces confusion for lawyers trying to follow the rules and lessens the likelihood of adversarial rather than fiduciary reasoning. Although there may be fewer acceptable screens, this is not an unreasonable limitation given that the subject is an exception to well established rules concerning the

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112. See *supra* text accompanying notes 89-94, 105.

113. Model Rule 1.7 requires that the lawyer "reasonably believe" that the representation will not be affected. MODEL RULES, Rule 1.7(a)(1). Wolfram defines this as the judgment of a "disinterested lawyer." WOLFRAM, *supra* note 9, at 341. For a discussion of Unconsentable Conflicts, see *supra* note 4.

114. The Model Rules would require attorneys to inform the present client about matters as significant as screens that may be necessary to prevent disqualification. See MODEL RULES, Rule 1.4. For additional sanctions affecting client rights, see *infra* text accompanying notes 124-72.

115. See, e.g., *Cheng v. GAF Corp.*, 631 F.2d 1052 (2d Cir. 1980). See also RESTATEMENT (THIRD) OF THE LAW, THE LAW GOVERNING LAWYERS § 204 (requiring attorneys to notify all affected clients of the screen).

116. See *supra* text accompanying notes 88-89.

protection of client confidences.<sup>117</sup>

Documents and computer files are required to be segregated in section (5) because many courts require it and, again, the likelihood of inadvertent disclosure is reduced. Law firms should find the benefit of additional guidance outweighs the additional burdens. Moreover, as suggested earlier, a client may not be comfortable knowing that preservation of its secrets depends on an "honor system" or an adversary's assessment of whether the consequences of breach would be "severe."<sup>118</sup>

Section (6), which requires the screened lawyer to send notice that she is following the requirements for a screen, is based upon the Washington, D.C. Model Rules of Professional Conduct.<sup>119</sup> The section has three purposes. First, it provides notice of special obligations to personally disqualified lawyers. Second, it allows opposing parties to know immediately when a screen has been erected so they may watch for any breach. Third, it notifies former clients who consent to screens that objective requirements must be met.

The requirement in Section (7) that the firm attest to procedures should provide some solace to the adversary and more likely assures the firm actively engages in an ongoing effort to protect the integrity of the screen.<sup>120</sup>

Section (8) requires that someone in the firm, whether managing

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117. See *supra* text accompanying notes 1-17.

118. See *supra* text accompanying notes 95-96.

119. The Washington, D.C. RULES OF PROFESSIONAL CONDUCT Rule 1.11(d) provides:

RULE 1.11 Successive Government and Private Employment . . .

(d) Except as provided in paragraph (e), when any of counsel, lawyer, partner, or associate of a lawyer personally disqualified under paragraph (a) accepts employment in connection with a matter giving rise to the personal disqualification, the following notifications shall be required:

(1) The personally disqualified lawyer shall submit to the public department or agency by which the lawyer was formerly employed and serve on each other party to any pertinent proceeding a signed document attesting that during the period of disqualification the personally disqualified lawyer will not participate in any manner in the matter or the representation, will not discuss the matter or the representation with any partner, associate, or of counsel lawyer, and will not share in any fees for the matter or the representation.

(2) At least one affiliated lawyer shall submit to the same department or agency and serve on the same parties a signed document attesting that all affiliated lawyers are aware of the requirement that the personally disqualified lawyer be screened from participating in or discussing the matter or the representation and describing the procedures being taken to screen the personally disqualified lawyer.

*Id.* This rule should be altered to reflect that all constituent members of the firm, whether lawyers or not, have responsibilities. The requirement of reminders, which reduces the likelihood of inadvertent disclosures, should also be added.

120. Section (7) is also a variation of the Washington, D.C. Rule 1.11. See *supra* note 119. See also OR. CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(I) (affidavits required).

partner, ethics partner, ethics committee members, or lawyer on the file, maintain continuing competence regarding conflicts and screens.<sup>121</sup> States have begun mandating CLE in specific areas rather than merely requiring CLE generally,<sup>122</sup> and the benefit of an exception to conflicts rules could support a concomitant requirement of competence in the area. Some respondents suggested they would appreciate guidance in the area.<sup>123</sup> Their malpractice insurance carriers would probably appreciate it as well. States could mandate the appropriate number of credits in a particular period.

Finally, in a "physician heal thyself" mode, I suggest each firm adopt and circulate its written policies concerning erecting and maintaining screens, including provisions for sanctions, to all members of the firm. Since Section (7) requires the adversary to know what the firm is doing, all members of the affected firm should know as well.

### B. The Sanctions

Adopting rules to reduce the likelihood of inadvertent breaches of confidential information protects client rights. To avoid negligent or intentional breaches, it must be made clear to lawyers that it is not in their interest to engage in a breach.<sup>124</sup> This can only occur if courts severely and publicly punish lawyers who violate the rules.<sup>125</sup> Sanctions

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121. For a discussion of the benefit of in house ethics specialists, see Jonathan M. Epstein, *The In-House Ethics Advisor: Practical Benefits for the Modern Law Firm*, 7 GEO. J. LEGAL ETHICS 1011 (1994). See also Martyn, *Conflict About Conflicts*, *supra* note 63, at 60-61 (advocating establishing firm compliance committee to audit maintenance of screens).

122. For example, the Ohio Bar requires continuing education on matters of professional ethics and substance abuse. See Oh. Supreme Court Rules for Government of the Bar, Rule X, § 3(A). See also PENN. R.L.C.L.E. 6105 (requiring CLE regarding professionalism, substance abuse and ethics).

123. Specific references to what information should be included in a conflicts check was not included in the questioning because the rule was getting long enough. However, the types of information asked for in the questionnaires could be included for guidance either in a comment to the Rule or in CLE sessions. Firms should certainly keep track of parties and affiliated entities, as well as information about all lawyers and staff working on matters. Firms should also ask new hires, whether lawyers or staff members, about past and present matters they have worked on. For a further discussion of the attributes of a screen, see *supra* text accompanying notes 37-38. For additional suggestions, see The Task Force on Conflicts of Interest, *Conflicts of Interest Issues*, 50 BUS. LAW. 1381 (1995), which discusses several screen forms. See also Martyn, *Visions of the Eternal Law Firm*, *supra* note 44, at 948-54.

124. This would include intentional or negligent continuation of representation with a screen under circumstances where the lawyer is not entitled to do so.

125. As Professor Richard Epstein has observed regarding conflicts rules generally:

In dealing with the necessary legal response, it is possible to adopt one of two general models. The first of these models takes the position that it is never quite clear what a conflict of interest is, so that the proper judicial response is to evaluate the facts and circumstances of each case in deciding what should be done. Given the absence of clarity in the rules, the impulse would be to impose relatively minor

may include those imposed by courts as part of their regulatory function, remedies for former clients, and remedies for present clients.

# 1. COURT SANCTIONS

Disqualification is the most widely reported sanction.<sup>126</sup> It has not served as a total deterrent to intentional breaches,<sup>127</sup> perhaps because of the lack of clarity in screen cases<sup>128</sup> or because the lawyer assumes that it is worth taking risks because she will more often come out ahead if she disobeys the rules. More serious and predictable sanctions would change the analysis.<sup>129</sup>

Discipline could be imposed for violating screens;<sup>130</sup> it should reg-

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sanctions on the lawyers who deviate from the accepted conflict of interest standard, such as it is. Firms with conflicts of interest will be allowed to collect their fees for services rendered, and perhaps the work product of discovery and document analysis will be preserved for the benefit of the successor firm.

I believe, however, that the alternative model is the correct one. That model works from the assumption that it is desirable, first, to have bright-line rules, and, second, to impose very heavy sanctions on those law firms that deviate from these rules. The point of the strategy is not heartless cruelty. It is an effort to structure incentives so as to minimize the number of violations that take place in order to avoid the difficulties of running a clean-up operation, at enormous inconvenience and expense to everyone, after the conflicts have occurred.

Richard A. Epstein, *The Legal Regulation of Lawyers' Conflicts of Interest*, 60 *FORDHAM L. REV.* 579, 591 (1992).

126. See, e.g., *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1977); *Hutnick v. Inland Steel Co.*, No. 86 C 2567, 1987 WL 9003, at \*1 (N.D. Ill. Mar. 27, 1987); *Hallmark Cards, Inc. v. Hallmark Dodge, Inc.*, 616 F. Supp. 516 (W.D. Mo. 1985); *Williams v. Trans World Airlines, Inc.*, 588 F. Supp. 1037 (W.D. Mo. 1984); *In re Columbia Realty Assocs.*, 71 B.R. 804 (Bankr. N.D. Ill. 1987); *Smart Indus. Corp., Mfg. v. Superior Court*, 876 P.2d 1176 (Ariz. Ct. App. 1994).

127. See, e.g., *Fund of Funds*, 567 F.2d at 232 (firm's involvement in suit filed by one client against another included sorting documents, preparing legal opinions, and coordinating interviews and discussions); *Hutnick*, 1987 WL 9003, at \*2 (lawyer's response to insurer's motion to disqualify based on substantial work for insurer prior to joining plaintiff's firm was to serve deposition and document requests); *Hallmark Cards*, 616 F. Supp. at 521 (new lawyer immediately began active participation and free discussion in case against client of his old firm); *Williams*, 588 F. Supp. 1037 (former legal assistant for TWA was fired and subsequently called plaintiff's lawyer in pending discrimination suit against TWA to represent her in suit against TWA as well. Plaintiff's lawyer informs TWA that he now has "in-house expert."); *In re Columbia Realty*, 71 B.R. at 807-08, 810 (lawyer whose name was on pleading, was head of bankruptcy department; court concludes he must have had input).

128. See *supra* notes 88-91.

129. See *supra* note 125.

130. Courts have disciplined attorneys for disclosing client secrets. See, e.g., *Kentucky Bar Ass'n v. Meredith*, 752 S.W.2d 786 (Ky. 1988) (public reprimand for disclosing confidences without client's consent); *In re Pool*, 517 N.E.2d 444 (Mass. 1988) (court recognized propriety of earlier disbarment of attorney for breach of confidences but reinstated him as event occurred many years previous to disbarment and attorney was young); *In re Nelson*, 327 N.W.2d 576 (Minn. 1982) (reprimand and suspension for wrongfully disclosing client confidences); *In re Wyse*, 688 P.2d 758 (Mont. 1984), *modified*, 697 P.2d 94 (Mont. 1985) (attorney held in contempt and publicly reprimanded); *Bar Ass'n v. Watkins*, 427 N.E.2d 516 (Ohio 1981) (attorney

ularly happen. Upon disqualifying a firm, judges should report violations of the rules as a matter of course and let the state bar review the behavior.<sup>131</sup> It has been suggested that disciplining a firm may also be appropriate where the firm has poor mechanisms for assuring ethical practice.<sup>132</sup> In firms having no policy or a lax policy regarding screens, such discipline might be warranted.

Moreover, a lawyer who wrongfully represents a client when she is required to decline or discontinue representation arguably multiplies the proceedings by opposing motions to disqualify and by requiring the court to order additional proceedings with new, untainted counsel.<sup>133</sup> If the lawyer's refusal to disqualify herself is intentional or reckless, a federal judge could assess costs and attorney fees pursuant to 28 U.S.C. § 1927.<sup>134</sup>

A broader range of sanctions is available pursuant to the court's inherent power to supervise proceedings generally, as well as supervis-

suspended indefinitely). See also *In re Searer*, 950 F. Supp. 811 (W.D. Mich. 1996) (reprimand for contacting adversary without consent of adversary's counsel).

131. See Crystal, *supra* note 3, at 311 (intentional cases of misconduct should be referred to disciplinary agencies). Any person can report a lawyer to the bar. See ABA STANDARD FOR DISCIPLINE, at 22. Judges have a duty to report violations of the rules reflecting on fitness to practice law. MODEL CODE OF JUDICIAL CONDUCT Canon 3:B(3). See MODEL RULES, Rule 8.4; MODEL CODE, DR 1-103. Some judges do report ethical violations. See, e.g., *In re Direct Satellite Communications, Inc.*, 96 B.R. 507, 522 n.4. (Bankr. E.D. Pa. 1989). See also Stephen R. Ripps & John N. Drowatzky, *Federal Rule 11: Are the Federal District Courts Usurping the Disciplinary Function of the Bar?* 32 VAL. U. L. REV. (forthcoming 1997) (judges provided varying responses regarding whether they reported Rule 11 violations to the bar).

132. See generally Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1 (1991).

133. To avoid such a disruption, one court disqualified a lawyer and ordered his firm to continue representing the client without pay. See *Dewey v. R.J. Reynolds Tobacco Co.*, 536 A.2d 243 (N.J. 1988).

134. 28 U.S.C. § 1927 (1994) provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct.

*Id.* See, e.g., *United States v. Associated Convalescent Enters.*, 766 F.2d 1342 (9th Cir. 1985) (monetary sanctions against defense attorney for appearing as counsel when he knew that the government had listed him as a witness; disqualification occurred just before trial multiplied proceedings); *Kleiner v. First Nat'l Bank*, 751 F.2d 1193 (11th Cir. 1985) (defense attorney disqualified and fined \$50,000 for cooperating in plan to improperly contact plaintiff class members). For a collection of § 1927 cases, see SANCTIONS: RULE 11 & OTHER POWERS (Melissa L. Nelken ed., 3d ed. 1992). For a discussion of the standard of conduct required, see Janet Eve Josselyn, Note, *The Song of the Sirens-Sanctioning Lawyers Under 28 U.S.C. § 1927*, 31 B.C. L. REV. 477 (1990); Debra T. Landis, Annotation, *What Conduct Constitutes Multiplying Proceedings Unreasonably and Vexatiously So as to Warrant Imposition of Liability on Counsel Under 28 USCS § 1927 for Excess Costs, Expenses, and Attorney Fees*, 81 A.L.R. FED. 36 (1987).

ing attorneys practicing before it.<sup>135</sup> Courts have fined lawyers for bad faith behavior<sup>136</sup> and have disciplined them as well.<sup>137</sup>

In addition, courts have the inherent power to enter orders affecting the lawsuit itself, which also has an effect on the present client. A whole range of sanctions, from excluding evidence<sup>138</sup> to dismissing the suit,<sup>139</sup> may be available.

When a lawyer wrongfully accepts or continues representation of a present client despite the fact she or her firm represented a former client in a substantially related matter, the concern is that she potentially had access to information she can now use against the former client.<sup>140</sup> Two groups of cases seem related to this problem: wrongful access to evidence cases<sup>141</sup> and cases involving lawyer communications with represented persons.<sup>142</sup>

In both scenarios, courts have recognized the breadth of their inherent power and have employed a broad range of sanctions. In *Kramer v. Boeing Co.*,<sup>143</sup> a lawyer named Fitzgerald retained documents from an earlier suit despite a protective order requiring their return after the earlier suit was settled.<sup>144</sup> Defendant filed a motion in the first court to find the lawyer in contempt; Fitzgerald responded by asking for a modification of the protective order. The court rejected Fitzgerald's argument that "he would be forced to repeat the time consuming and expensive

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135. See *Chambers v. Nasco, Inc.*, 501 U.S. 32, 50-51 (1991) (affirming sanction of over \$996,000 on the grounds that courts have inherent power to sanction bad faith conduct). In *Chambers*, the Court also stated, "a federal court has the power to control admission to its bar and to discipline attorneys who appear before it." *Id.* at 43; *In re Snyder*, 472 U.S. 634 (1985) (recognizing power to regulate attorney conduct, but reversing suspension for refusal to provide documentation in support of fee request because the standard for imposing discipline was not met).

136. See, e.g., *Kleiner*, 751 F.2d at 1193 (defense attorney fined \$50,000 for participating in scheme to contact plaintiff class members); *Miranda v. Southern Pac. Transp. Co.*, 710 F.2d 516 (9th Cir. 1983) (court has power to fine counsel for violation of local rules but should hold hearing before sanctions imposed).

137. See, e.g., *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 894 F.2d 696 (5th Cir. 1990), *aff'd sub nom. Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) (one lawyer disbarred and two suspended). See also *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 561 (3d Cir. 1985) (noting that courts have "disbarred, suspended from practice, or reprimanded attorneys for abuse of the judicial process").

138. See *Esser v. A.H. Robins Co.*, 537 F. Supp. 197, 203 (D. Minn. 1982) (allowing voluntary withdrawal but requiring all inappropriate materials to be viewed by special master and removed from files prior to transfer to new counsel). See also *infra* text accompanying notes 164-75.

139. See, e.g., *Donaldson v. Clark*, 819 F.2d 1551, 1557 n.6 (11th Cir. 1987) ("court has the power either to dismiss a case with prejudice or to enter a default judgment . . . in extreme situations"). See also *infra* text accompanying notes 156, 175.

140. See *supra* text accompanying notes 5-17.

141. See *infra* text accompanying notes 143-59.

142. See *infra* text accompanying notes 157-76.

143. 134 F.R.D. 256 (D. Minn. 1991).

144. *Id.*

discovery process in the [second] action" if he were required to return the documents.<sup>145</sup> Concluding that Fitzgerald's responsibility to return documents overrode efficiency considerations, the court found him in contempt and ordered him to pay costs and fees for multiplying the proceedings.<sup>146</sup> *Kramer* supports the proposition that a lawyer aware of only discoverable information is not protected from having sanctions imposed.

The lawyer may not be the only one who is penalized. In *Red Star Towing & Transportation Co. v. Ming Giant*,<sup>147</sup> counsel for plaintiff intentionally and surreptitiously submitted exhibits that had not been entered into evidence to the jury.<sup>148</sup> The court concluded that the evidence supported an excessive award and granted remittitur. It further ordered that if plaintiff did not accept the remittitur, the court would consider whether a new trial should be ordered or whether the court should view the misconduct as a waiver of the right to a jury trial and enter its own findings of fact.<sup>149</sup> Thus, the attorney not only risked a personal sanction, he also substantially prejudiced his client's rights.<sup>150</sup> Similarly, the court in *Esser v. A. H. Robins Co.*<sup>151</sup> required all evidence in the withdrawing counsel's file to be reviewed by a special master and removed if tainted by the plaintiff's lawyer's business relationship with an adjuster for the defendant's insurance company.<sup>152</sup>

In *In re Potash Antitrust Litigation*,<sup>153</sup> in-house counsel resigned from his company and provided information to potential plaintiffs in an antitrust action against his former client.<sup>154</sup> The court disqualified the

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145. *Id.* at 259.

146. *See id.* The court was relying on authority granted by 28 U.S.C. § 1927. *See id.* The Ninth Circuit has held that one seeking sanctions for violation of a protective order must return to the original court. *See Kirshner v. Uniden Corp.*, 842 F.2d 1074, 1080 (9th Cir. 1988) (citing 4 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 26.78, at 26-503 to 26-504 (2d ed. 1987)). However, a court's inherent power is broader than that of Rule 26 of the Federal Rules of Civil Procedure, and the inherent power may be used to sanction behavior beyond the discovery context. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 46-50 (1991). *See also infra* text accompanying notes 153-61.

147. 552 F. Supp. 367 (S.D.N.Y. 1982).

148. *See id.* at 378.

149. *See id.* The court also noted that there was a substantial basis for awarding the defendant some or all of the costs and attorneys' fees incurred if there was a retrial. *See id.* at 388 (citing 28 U.S.C. § 1927 and referring to court's inherent power).

150. As a result, the client had a legal malpractice cause of action for damages caused by the lawyer's misconduct. *See infra* text accompanying notes 173-76.

151. 537 F. Supp. 197 (D. Minn. 1982).

152. *See id.* at 203. Sanctions have also been imposed where clients wrongfully obtained evidence. *See, e.g., Lipin v. Bender*, 597 N.Y.S.2d 340 (N.Y. App. Div. 1993) (dismissal was an appropriate sanction for plaintiff's surreptitious removal and use of defendant's confidential documents).

153. Civ. No. 3-93-197, No. MDL 981, 1993 WL 543013, at \*1 (D. Minn. Dec. 8, 1993).

154. *See id.* at \*5-7.

attorney and held that no evidence provided by him could be used to support the plaintiffs' claims.<sup>155</sup> The court further ordered the plaintiffs to file an amended complaint based on information obtained independently of the tainted evidence. Failure to do so would result in dismissal of the plaintiffs' suit.<sup>156</sup> Hence, the ultimate sanction of dismissal is a possibility where counsel wrongfully uses confidences gained in a relationship with a former client to aid another client.

Cases involving wrongful access to people rather than to information make the same point. Both the Model Code<sup>157</sup> and the Model Rules<sup>158</sup> prohibit lawyers from communicating with persons represented by counsel. Although some lawyers have been disqualified for the practice and have been ordered to pay costs and fees,<sup>159</sup> some courts have imposed additional sanctions that implicate client interests.

For example, counsel has been required to disclose all contacts made.<sup>160</sup> Moreover, courts have ordered that evidence gained through such means may not be admitted.<sup>161</sup> In *Papanicolaou v. Chase Manhattan Bank, N.A.*,<sup>162</sup> the plaintiff arrived at defense counsel's office to attend a deposition which had already concluded. The plaintiff asked

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155. *See id.* at \*18-19.

156. *See id.* The district court ultimately granted defendants' motions for summary judgment on the Third Amended Complaint. *See In re Potash Antitrust Litig.*, 954 F. Supp. 1334 (D. Minn. 1997).

157. *See* MODEL CODE, DR 7-104.

158. *See* MODEL RULES, Rule 4.2.

159. *See, e.g.*, *Kleiner v. First Nat'l Bank*, 751 F.2d 1193 (11th Cir. 1985); *Faison v. Thornton*, 863 F. Supp. 1204 (D. Nev. 1993) (attorneys were disqualified and ordered to pay costs for improperly contacting opposing party); *Rentclub, Inc. v. Transamerica Rental Fin. Corp.*, 811 F. Supp. 651 (M.D. Fla. 1992) (disqualification for improper contact); *MMR/Wallace Power & Indus., Inc. v. Thames Assocs.*, 764 F. Supp. 712 (D. Conn. 1991) (disqualification for contacting former member of opposing party's litigation team); *Papanicolaou v. Chase Manhattan Bank, N.A.*, 720 F. Supp. 1080 (S.D.N.Y. 1989) (disqualification).

Courts may also deny disqualification motions where they conclude that other sanctions can avoid harm. *See, e.g.*, *Meat Price Investigators Assoc. v. Spencer Foods, Inc.*, 572 F.2d 163, 165 (8th Cir. 1978) (no prejudice); *Kitchen v. Aristech Chem.*, 769 F. Supp. 254, 258-59 (S.D. Ohio 1991) (exclusion of evidence would suffice); *In re Industrial Gas Antitrust Litig.*, No. 80 C 3479, 1986 WL 1846, at \*4 (N.D. Ill. Jan. 28, 1986) (awarding costs of motion for sanctions). *See generally* *Crystal*, *supra* note 3, at 273 (disqualification motions should not be granted absent taint to trial, damages and discipline are better alternatives); *Green*, *supra* note 3, at 71 (disqualifications should not be based on conflict of interest rules). *See also infra* notes 181, 186.

160. *See, e.g.*, *McCallum v. CSX Transp., Inc.*, 149 F.R.D. 104, 113 (M.D.N.C. 1993); *In re Industrial Gas*, 1986 WL 1846, at \*4.

161. *See McCallum*, 149 F.R.D. at 113 (employer admissions from ex parte interviews inadmissible); *Contini v. Hyundai Motor Co.*, No. 90 CIV. 3547 (VLB), 1991 WL 274465, at \*1 (S.D.N.Y. Dec. 10, 1991); *Cagguila v. Wyeth Lab., Inc.*, 127 F.R.D. 653 (E. D. Pa. 1989) (admissions inadmissible but employees may be deposed). *Cf. Kitchen*, 769 F. Supp. at 258-59 (court denies disqualification motion because defendants had not shown why the remedy of preventing evidence from being admitted would not suffice to prevent prejudice).

162. 720 F. Supp. 1080 (S.D.N.Y. 1989).

defense counsel how the case was going, and the two spoke for an hour and a half.<sup>163</sup> In disqualifying the firm, the court rejected the defendant's argument that "given the exhaustive discovery in the underlying litigation, none of the disclosed information was new to him . . . [and that] plaintiff would soon have to reveal his theories anyway in answering the defendant's forthcoming motion for summary judgment."<sup>164</sup> The court disqualified the firm from continuing its representation of the defendants from the date of the meeting with the plaintiff.<sup>165</sup> In addition, it required that depositions after the meeting date be deleted from the record, and that the firm relinquish only that work product generated before the meeting to the new counsel.<sup>166</sup> All measures, in the court's view, were necessary "to protect the integrity of [the] dispute."<sup>167</sup>

Similarly, recognizing that the flagrancy of the violation may be taken into account in fashioning a remedy, the court in *Faison v. Thornton*<sup>168</sup> exercised its broad discretion under its inherent powers and excluded all evidence gathered in an *ex parte* manner.<sup>169</sup> Although the court in *Faison* declined to dismiss the case, the court cited *Link v. Wabash Railroad Co.*<sup>170</sup> as support for the power to dismiss the case as a result of lawyer misconduct if other remedies were inadequate.<sup>171</sup>

Courts have a wide range of inherent power. In related cases of wrongful access to evidence, courts have been willing to use it both directly against the lawyer and in ways that impact the client. In fact, the possibility exists that, when there is no lesser alternative, dismissal may even be appropriate. Such remedies can and should be employed in the case of a breach of a screen. Information gained in such a manner should not be admissible, and the disqualified lawyer should not be able to transmit it to new counsel. In a rare case of collusion by the client or where a case cannot be supported without using wrongfully obtained

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163. *See id.* at 1081-82.

164. *Id.* at 1085. In rejecting defendant's argument, the court cited *Zeller v. Bogue Electric Manufacturing Corp.*, 346 F. Supp. 651 (S.D.N.Y. 1972), which rejected a similar contention.

165. *See Papanicolaou*, 720 F. Supp. at 1087-88. The court refused to allow the firm to continue despite the firm's attempt to screen the disqualified lawyer because the screen was untimely. *See id.*

166. *See id.* at 1088.

167. *Id.* at 1087.

168. 863 F. Supp. 1204 (D. Nev. 1993).

169. *See id.* at 1214-15, 1218. Courts have recognized that negligent violations of rules against communication are also sanctionable. *See id.* at 1214; *In re Industrial Gas Antitrust Litig.*, No. 80 C 3479, 1986 WL 1846, at \*2-3 (N.D. Ill. Jan. 28, 1986) (negligent instructions to investigator). The attorneys in *Faison* were also required to pay attorneys' fees of approximately \$46,000. *See Faison*, 863 F. Supp. at 1218, 1221.

170. 370 U.S. 626 (1962).

171. *See Faison*, 863 F. Supp. at 1215.

evidence, the case should be dismissed.<sup>172</sup>

## 2. FORMER CLIENT SANCTIONS

In addition to sanctions imposed as part of its regulatory function, a court may also find that harm to the former client should be directly remedied. There are several ways for this to occur.

First, the former client may sue the lawyer for malpractice. In *Damron v. Herzog*,<sup>173</sup> for example, the Ninth Circuit found that representation of a client in a matter substantially related to the subject matter of a previous representation could support a malpractice claim by a former client.<sup>174</sup> In so doing, the court rejected an argument that the lawyer could not be responsible to a client in malpractice after an attorney-client relationship had ended, finding "in the common law a continuing duty owed by attorneys to former clients not to represent an interest adverse to a former client on a matter substantially related to the matter of engagement."<sup>175</sup> Many jurisdictions have held generally that violations of conflict rules in ethical codes are at least some evidence of malpractice.<sup>176</sup>

In addition, a former client may maintain an action for breach of fiduciary duty. The attorney-client relationship has been referred to as a

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172. A lawyer risks being sanctioned for breaching the screen. This risk should be disclosed to the new client. See *infra* text accompanying notes 201-205.

173. 67 F.3d 211 (9th Cir. 1995).

174. See *id.*

175. *Id.* at 213. "With increasing frequency, attorneys are being sued for legal malpractice arising from adverse representation against former clients or from untimely disqualification." RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 16.23, at 483 (4th ed. 1996) [hereinafter MALLIN]. For a lengthy list of such malpractice cases, see *id.* § 16.23, at 483-88.

176. See, e.g., *Schlesinger v. Herzog*, 672 So. 2d 701 (La. Ct. App. 1996) (lawyer represented both sides in merger); *Jenkins v. Wheeler*, 316 S.E.2d 354 (N.C. Ct. App. 1984) (attorney for beneficiaries may not also represent interest of administratrix). The *Jenkins* court observed that "[a]n attorney's representation of two or more clients with adverse or conflicting interests constitutes such misconduct as to subject him to liability for malpractice." *Id.* at 358 (quoting 7 AM. JUR. 2D *Attorneys at Law* § 198, at 248 (1980)). For a general discussion of malpractice actions based on conflicting interests, see MALLIN, *supra* note 175, § 15.18, at 393-98. There is a split of opinion regarding usage of ethics rules as a standard in malpractice cases:

Courts take four different approaches . . . First, some courts hold that professional ethical standards conclusively establish the duty of care and that any violation constitutes negligence per se. Second, a minority of courts finds that a professional ethical violation establishes a rebuttable presumption of legal malpractice. Third, a large majority of courts treats professional ethical standards as evidence of the common law duty of care. Finally, one court has found professional ethical standards inadmissible as evidence of an attorney's duty of care.

Marc R. Greenough, *The Inadmissibility of Professional Ethical Standards in Legal Malpractice Actions After Hizey v. Carpenter*, 68 WASH. L. REV. 395, 398-399 (1993). See generally Note, *The Evidentiary Use of the Ethics Codes in Legal Malpractice: Erasing a Double Standard*, 109 HARV. L. REV. 1102 (1996).

"paradigm[atic]" fiduciary relationship.<sup>177</sup> As the Supreme Court of Pennsylvania observed in *Maritrans GP Inc. v. Pepper, Hamilton & Sheetz*,<sup>178</sup> "at common law, an attorney owes a fiduciary duty to his client; such duty demands undivided loyalty and prohibits the attorney from engaging in conflicts of interest, and breach of such duty is actionable."<sup>179</sup>

Several remedies are available. In *Maritrans*, the court enjoined the firm from representing competitors of the former client because the length and intensity of its involvement with the former client created too great a likelihood that confidences would be revealed.<sup>180</sup> In addition, if the former client establishes a causal relationship between a breach of fiduciary duty and losses, he may be entitled to damages.<sup>181</sup>

A breach of a fiduciary duty theory provides opportunities for damages that a malpractice case does not. First, regardless of whether damages could be shown, a wronged principal is entitled to a disgorgement of fees or a denial of a petition for fees if unpaid.<sup>182</sup> As the Supreme Court has stated, "A fiduciary . . . may not perfect his claim to compensation by insisting that, although he had conflicting interests, he served his several masters equally well or that his primary loyalty was not weakened by the pull of his secondary one."<sup>183</sup>

Thus, as soon as conflict has been shown, a past client should be

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177. Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L. J. 879, 908. See also Pizzimenti, *Duty to Warn*, *supra* note 4, at 463-64 (breach of fiduciary duty is most appropriate cause of action for improperly shared confidences).

178. 602 A.2d 1277 (Pa. 1992).

179. *Id.* at 1283.

180. See *id.* at 1286-87.

181. See *id.* at 1286. See also *Stanley v. Richmond*, 41 Cal. Rptr. 2d 768 (Cal. Ct. App. 1995) (lawyer representing wife in divorce concurrently negotiating to join law firm of husband's lawyer; judgment of nonsuit reversed as wife raised issue of fact regarding whether breach of fiduciary duty was proximate cause of damage); MALLEN, *supra* note 175, § 14.5, at 245. I have suggested elsewhere that a breach of confidence may support actions in contract, malpractice, and breach of fiduciary duty. See Pizzimenti, *Duty to Warn*, *supra* note 4, at 463-64.

182. For an excellent discussion of the use of disgorgement as a remedy for representation of conflicting interests, see Susan R. Martyn, *Developing the Judicial Role in Controlling Litigation Conflicts: Response to Green*, 65 FORDHAM L. REV. 131, 144-46 (1996); Crystal, *supra* note 3, at 311-12. See also MALLEN, *supra* note 175, § 15.19, at 398-400, § 16.22, at 482-83.

183. *Woods v. City Nat'l Bank and Trust Co.*, 312 U.S. 262, 269 (1941). Many fee denials or disgorgements occur in the bankruptcy context. See, e.g., *In re Diamond Mortgage Corp.*, 135 B.R. 78 (Bankr. N.D. Ill. 1990); *In re Direct Satellite Communications, Inc.*, 96 B.R. 507 (Bankr. E.D. Pa. 1989). However, fee disgorgement is a well-established principle in fiduciary law generally. See, e.g., *Blecher & Collins, P.C. v. Northwest Airlines, Inc.*, 858 F. Supp. 1442 (C.D. Cal. 1994); *Financial Gen. Bankshares, Inc. v. Metzger*, 523 F. Supp. 744 (D.D.C. 1981); *In re Estate of Shano*, 869 P.2d 1203 (Ariz. Ct. App. 1993); *Goldstein v. Lees*, 120 Cal. Rptr. 253 (Cal. Ct. App. 1975); *White v. Roundtree Transp., Inc.*, 386 So. 2d 1287 (Fla. 3d DCA 1980); *Perl v. St. Paul Fire and Marine Ins. Co.*, 345 N.W.2d 209 (Minn. 1984); *Zeiden v. Oliphant*, 54 N.Y.S.2d 27 (N.Y. App. Div. 1945); *In re Estate of Ragan*, 775 P.2d 1383 (Or. Ct. App. 1989).

entitled to recoup fees earlier paid. Both the Restatement (Second) of Agency<sup>184</sup> and the Restatement (Third) of Law Governing Lawyers<sup>185</sup> support this view.<sup>186</sup> The penalty of surrendering fees long since earned may provide lawyers and firms incentive to take more care in avoiding conflicts of interest.<sup>187</sup>

Additional motivation may be found in the doctrine that fiduciaries must account for any profit gained by using information obtained from a confidential relationship.<sup>188</sup> For example, in *David Welch Co. v. Erskine & Tully*,<sup>189</sup> a law firm performed legal work for a collection agency

184. The RESTATEMENT (SECOND) OF AGENCY: AGENT VS. PRINCIPAL § 469 (1957) provides:

Disloyalty or Insubordination as Defense - An agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty; if such conduct constitutes a wilful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services for which no compensation is apportioned.

*Id.*

185. The RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (Preliminary Draft No. 11, 1995):

A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter. In determining whether and to what extent forfeiture is appropriate, relevant considerations include the gravity and time of the violation, its wilfulness, its impact on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies.

*Id.*

186. See also Martyn, *Developing the Judicial Role*, *supra* note 182, at 143-45 (discussing the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS).

187. See Crystal, *supra* note 3, at 311-12 (noting a case finding disgorgement served as a sanction for misconduct and deterrence of future misconduct); Green, *supra* note 3, at 73 (personal sanctions should be used). Further, Professor Farnsworth observed, "[T]he law of fiduciary relations . . . is distinctly concerned with deterrence and ethical standards." E. Allan Farnsworth, *Your Loss Or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339, 1358 (1985). Professor Crystal recognized the ability of courts to fashion an appropriate remedy to the facts of a case:

Courts can be extremely flexible in their use of damage awards for unethical conduct, varying the award depending on the degree of misconduct and the harm that results. For example, if a law firm has withdrawn from representation of a client because it inadvertently engaged in a conflict of interest, the court might award the former client legal fees sufficient to compensate it for the expense of familiarizing counsel with the matter. On the other hand, if the firm knowingly engaged in such a conflict, the court might award these expenses and also require the firm to disgorge any legal fees already paid as punishment . . . .

Crystal, *supra* note 3, at 312.

188. See Martyn, *Developing the Judicial Role*, *supra* note 182, at 145 ("Fee forfeiture . . . serves the purpose of deterring attorney misconduct, 'a goal worth furthering regardless of whether a particular client has been harmed.'"); RESTATEMENT (SECOND) OF AGENCY: PRINCIPAL VS. AGENT § 388 (1957) (agent has duty to give profit to principal). See generally Farnsworth, *supra* note 187, at 1354-60; DeMott, *supra* note 177, at 900-01. A partial disgorgement may be appropriate if some work was done before a conflict arose. See Martyn, *Developing the Judicial Role*, *supra* note 182, at 144.

189. 250 Cal. Rptr. 339 (Cal. Ct. App. 1988).

specializing in collecting delinquent employer contributions owed to employee trust funds.<sup>190</sup> After the agency stopped using the firm, the firm began to compete for the collection work and took over some of the collection agency's accounts without the agency's consent. The court accepted evidence that the agency had provided information regarding how to do such work and that the agency operated in a manner designed to assure confidentiality.<sup>191</sup> The court concluded that the competition was a breach of the firm's fiduciary duty<sup>192</sup> and further found that requiring the firm to disgorge all profits made from the later work was appropriate.<sup>193</sup> Because profits are recoverable for breach of fiduciary duty even where no harm to the principal is shown,<sup>194</sup> lawyers could arguably be asked to disgorge to the prior client monies earned in the later representation.

Finally, in cases of a willful breach of fiduciary duty, punitive damages have been awarded.<sup>195</sup> In *Cummings v Sea Lion Corp.*,<sup>196</sup> for example, the Alaska Supreme Court found that a failure to "fully and fairly disclose" a personal conflict of interest could support a finding of

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190. *See id.*

191. *See id.* at 341.

192. *See id.* at 343.

193. *See id.* at 345. The *David Welch* court used the device of a constructive trust. *See id.* For a discussion of the constructive trust doctrine, see Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 827-29 (1983).

194. In *Snepp v. United States*, 444 U.S. 507 (1980), an agent was required to account for profits gained from violating a confidentiality agreement despite no finding of actual damages, because the remedy was viewed as a "natural and customary consequence of a breach of trust. It deals fairly with both parties by confirming relief to the dimensions of the wrong." *Id.* at 515. As Professor DeMott explains:

The general goal of contract damages, in short, is to compensate the plaintiff for loss of an expected advantage. The law of fiduciary obligation calculates damages from a very different perspective. That perspective dictates that the plaintiff is entitled to recover specific restitution of any benefit that the defendant obtained through his breach or, if specific restitution is not feasible, money damages that quantify the defendant's benefit. Even if the fiduciary's actions have not injured the beneficiary, and even if the beneficiary has in some sense gained as a result of the fiduciary's act, the fiduciary must account to the beneficiary for its profits.

DeMott, *supra* note 177, at 888 (footnote numbers omitted). *See also* Farnsworth, *supra* note 187, at 1358-59 n.74 (observing that fiduciary law should not be used in normal arm's length contract disputes because it "unrelentingly applies the disgorgement principle . . . with little regard to questions of cause in fact, joint cause or remote cause" and does not ask if some portion of the profits were attributable to the "skill, industry, or capital" of the agent).

195. *See, e.g.,* *Jerman v. O'Leary*, 701 P.2d 1205, 1210-11 (Ariz. Ct. App. 1985) (punitive damages can be awarded for breach of fiduciary duty in proper case; remanded as jury issue existed); *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 584 (Tex. 1963) (exemplary damages for willful breach of fiduciary duty). *See also* Farnsworth, *supra* note 187, at 1358; Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1069-74 (1991).

196. 924 P.2d 1011 (Alaska 1996).

"fiduciary fraud" and an imposition of punitive damages.<sup>197</sup> Such damages would be appropriate in a case like *In re Potash Antitrust Litigation*,<sup>198</sup> where the attorney contacted several adversaries and provided them with information after he had been fired.<sup>199</sup>

### 3. PRESENT CLIENT SANCTIONS

As previously discussed, the lawyer owes a fiduciary duty to refrain from representing conflicting interests.<sup>200</sup> As a result, the current client may seek the same remedies that the prior client may seek. There are a few specific issues relevant to the current client, however.

First, a fiduciary may represent conflicting interests if she notifies the clients and obtains their informed consent.<sup>201</sup> Thus, the attorney may have a defense both to a malpractice case and to a claim for fee disgorgement if the client is aware of the past representation and nevertheless consents to the representation.

However, a caveat leads to a second point. Even assuming the present client is aware of the past representation, it is unlikely that the lawyer has elicited a truly informed consent. As previously discussed, many lawyers may not even tell a client if a breach of a screen occurs.<sup>202</sup> Moreover, telling a client about a past relationship does not provide an opportunity to give informed consent absent a full recitation of the consequences to the client, such as the potential to suffer loss and delay because his lawyer is disqualified<sup>203</sup> or the client's suit is limited or dismissed.<sup>204</sup> Absent such consent, the present client is entitled to the same remedies as the former client.

In addition, a present client may have an additional malpractice or breach of fiduciary duty claim against the lawyer for her breach of duty to provide informed consent. Courts have been especially willing to find such a duty when the information withheld involves a conflict of interest.<sup>205</sup> Withholding information that might cause a client to take a case

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197. *Id.* at 1022. The court concluded there was sufficient evidence to support the jury's finding that the lawyer's refusal to disclose the conflict amounted to "outrageous . . . [r]eckless indifference to the rights of others." *Id.* (citing *Barber v. National Bank*, 815 P.2d 857, 864 (Alaska 1991)).

198. Civ. No. 3-93-197, No. MDL 981, 1993 WL 543013, at \*1 (D. Minn. Dec. 8, 1993).

199. *See id.*

200. *See supra* notes 177-78.

201. *See* RESTATEMENT (SECOND) OF AGENCY: PRINCIPAL VS. AGENT § 394 (1957); MODEL RULES, Rules 1.7, 1.9; MODEL CODE, DR 5-101, -105; *David Welch Co. v. Erskine & Tully*, 250 Cal. Rptr. 339 (Cal. Ct. App. 1988).

202. *See supra* text following note 103.

203. *See supra* text accompanying notes 127-28.

204. *See supra* text accompanying notes 138-172.

205. *See Pizzimenti, Duty to Warn, supra* note 3, at 471-76.

elsewhere meets that test.

All the firms responding to the questionnaire indicated that existence of such sanctions would make it less likely that lawyers would breach a screen. As sanctions currently exist, lawyers need to be made aware of them. Awareness would be furthered if lawyers were required to have continuing legal education regarding screens.

## VI. EPILOGUE

The truth about screens is that lawyers attempting to do the right thing need guidance, and lawyers attempting to cheat need to know that the consequences are not worth the risk. Clearer screen rules and predictable sanctions could go a long way to resolve these problems.

## QUESTIONNAIRE

*Instructions*

Following is a questionnaire regarding screens. I have attempted to ask questions requiring a "yes" or "no" answer whenever possible to reduce the time it will take you to respond. Please circle "yes," "no," or "not applicable" where appropriate. It would be most helpful if you would elaborate where relevant. Space is provided to respond, but feel free to attach additional comments or materials where appropriate. Thank you again for participating in this survey.

## A. General Information

1. Please circle the answer which best describes your firm.
  - a. 50-100 lawyers
  - b. 100-200 lawyers
  - c. 200+ lawyers
2. Please circle the answer which best describes your firm.
  - a. One office
  - b. More than one office; all located in same state
  - c. More than one office; one or more offices located outside state of main office.
3. Please circle the answer which best describes your office.
  - a. Fewer than 50 lawyers
  - b. 50-100 lawyers
  - c. 100-200 lawyers
  - d. 200+ lawyers

## B. Ethics and Professional Responsibility Resources

- |   |        |
|---|--------|
| 4. Do you present any in-house CLE programs relating to professional responsibility, ethics or professionalism?                     | YES NO |
| IF SO, briefly identify programs presented within the previous two years.   |        |
| 5. Do your lawyers attend outside CLE programs dealing with these subjects? Please briefly explain.                                 | YES NO |
| 6. Are any lawyers in your firm involved in any activities of the organized bar dealing with ethics, discipline or professionalism? | YES NO |
| IF SO, please briefly describe such involvement.  |        |

7. What treatises, services or other library resources do you have available on the premises relating to the subject of professional responsibility and ethics?

C. Identifying Conflicts

8. Upon receiving a new matter in the office:

- a. Does your firm circulate a memo describing the matter? YES NO

IF SO, who circulates memo:

- o IF SO, does the memo include:

- |  |            |
|--|------------|
| 1. description of matter?                              | YES NO N/A |
| 2. name of individual/partnership/corporation?         | YES NO N/A |
| 3. names of related corporate or partnership entities? | YES NO N/A |
| 4. names of partners/corporate officers?               | YES NO N/A |
| 5. names of directors?                                 | YES NO N/A |
| 6. names of controlling shareholders?                  | YES NO N/A |
| 7. names of co-plaintiffs?                             | YES NO N/A |
| 8. names of co-defendants?                             | YES NO N/A |
| 9. names of opposing counsel?                          | YES NO N/A |

- b. Does your firm maintain and consult an index of client matters handled by the firm? YES NO

IF SO:

- |   |            |
|---|------------|
| 1. Is index computerized?   | YES NO N/A |
| 2. Does index include present clients?  | YES NO N/A |
| 3. Does index include past clients?   | YES NO N/A |
| 4. Does index include name of individual/partnership/ corporation?              | YES NO N/A |
| 5. Does index include related corporate or partnership entities?                | YES NO N/A |
| 6. Does index include partners/corporate officers?                              | YES NO N/A |
| 7. Does index include names of directors?                                       | YES NO N/A |
| 8. Does index include names of controlling shareholders?                        | YES NO N/A |
| 9. Does index include co-plaintiffs?  | YES NO N/A |
| 10. Does index include co-defendants?   | YES NO N/A |
| 11. Does index include opposing counsel?  | YES NO N/A |
| 12. Does index include brief description of subject matter of representation?   | YES NO N/A |
| 13. Does index include list of lawyers and paralegals who worked on the matter? | YES NO N/A |
| 14. Is index updated to reflect changes in the above information?               | YES NO N/A |
| 15. Are any such changes communicated to lawyers working on relevant files?     | YES NO N/A |

16. Does index include additional information not mentioned above? YES NO N/A

IF SO, what other information is included?

c. Does your firm have an alternative or additional procedure regarding receipt of new matters that is not outlined above? YES NO N/A

IF SO, please briefly describe it.

- d. How are firm members made aware of your policy regarding new matters?
- e. To whom in the law firm is information indicating a conflict of interest given?
- f. What happens if the new matter procedure uncovers a potential conflict of interest?
- g. What procedure, if any, does your firm follow when an existing client presents the firm with a new matter?
- h. What procedure, if any, does your firm follow regarding identification of conflicts when merging with another firm?

9. Which of the following mechanisms, if any, does your law firm have for identifying or resolving ethical or professional issues?

a. Is there a partner or principal in the firm or office responsible for considering or resolving such issues? YES NO

IF SO, please briefly describe the scope of his/her authority regarding such issues.

b. Is there a committee within the firm to identify, discuss and resolve such issues? YES NO

IF SO, please describe its composition and jurisdiction, and at what intervals it meets.

c. Under what circumstances, if any, are decisions of the relevant partner or committee reviewed by the person or group charged with management of the firm?

d. If your firm consists of more than one office, is identification or resolution of such issues handled at office or firm level? If the former is true, under what circumstances, if any, are such issues resolved at the firm level?

- e. Does your firm have an alternative or additional mechanism to identify or resolve professional or ethical issues not outlined above? YES NO
- IF SO, please briefly explain that mechanism.
- f. Are lawyers in your firm made aware of the mechanisms outlined above? YES NO
- IF SO, how?
10. Does your firm ask lawyers joining the firm to furnish the firm with information regarding matters the lawyer handled prior to joining your firm? YES NO
- IF SO:
- a. When is that question asked?
- b. Is the lawyer asked to list matters on which he/she is currently working? YES NO N/A
- c. Is the lawyer asked to list matters on which he/she previously worked that are still ongoing? YES NO N/A
- d. Is the lawyer asked to list matters on which he/she previously worked that are no longer pending? YES NO N/A
- e. Is the lawyer asked to list:
1. description of matter? YES NO N/A
  2. name of individual/partnership/corporation? YES NO N/A
  3. names of related corporate or partnership entities? YES NO N/A
  4. names of partners/corporate officers? YES NO N/A
  5. names of directors? YES NO N/A
  6. names of controlling shareholders? YES NO N/A
  7. names of co-plaintiffs? YES NO N/A
  8. names of co-defendants? YES NO N/A
  9. names of opposing counsel? YES NO N/A
- f. Which of the following questions, if any, is the lawyer asked regarding his/her role in the matter:
1. Did lawyer supervise? YES NO N/A
  2. Did lawyer have access to client documents? YES NO N/A
  3. Did lawyer have access to client information? YES NO N/A
  4. Was lawyer involved in meetings with client regarding the matter? YES NO N/A
  5. Was lawyer involved in meetings with other lawyers regarding the matter? YES NO N/A
  6. Did lawyer do work "on the merits"? YES NO N/A
  7. Was lawyer's role limited to work on procedural matters? YES NO N/A
  8. Was lawyer's role limited to general research matters? YES NO N/A

- g. Do you ask any other questions not listed above? YES NO N/A

IF SO, please briefly describe.

11. Does your firm ask such questions of:

- |  |            |
|--|------------|
| a. lateral hires?                              | YES NO N/A |
| b. new lawyers?                                | YES NO N/A |
| c. paralegals?                                 | YES NO N/A |
| d. secretaries or other support staff?         | YES NO N/A |
| e. law students?                               | YES NO N/A |
| f. members of firm with whom your firm merges? | YES NO N/A |

FOR QUESTIONS 12-22: Please circle all answers that apply; more than one answer may reflect your firm's policy.

12. Assume a new hire discloses that he/she worked on a matter for a client whose interests are adverse to those of a client who the firm currently represents regarding the same matter.

Is it firm policy to: (CIRCLE ALL THAT APPLY)

- |   |        |
|---|--------|
| a. Withdraw from representation of current client?  | YES NO |
| b. "Screen" new hire from giving or receiving any Information regarding the matter and continue representation of current client? | YES NO |
| c. Continue representation of the client without use of a screen?   | YES NO |
| d. Make a case-by-case determination regarding whether a screen is advisable?   | YES NO |
| IF SO, please briefly explain what factors are considered in making that determination and who makes that determination.          |        |
| e. Ask new hire's former client for permission to continue representation of the firm's current client?                           | YES NO |
| f. Proceed only with former client's permission?  | YES NO |
| g. Follow another course of action not described above?   | YES NO |

IF SO, please describe.

13. Assume a new hire discloses that he/she worked on a matter for a client whose interests are adverse to the firm's client on a matter unrelated to the matter currently pending with your firm.

Is it firm policy to: (CIRCLE ALL THAT APPLY)

- |  |        |
|--|--------|
| a. Withdraw from representation of current client? | YES NO |
|--|--------|

- |   |        |
|---|--------|
| b. "Screen" new lawyer from giving or receiving any information regarding the matter and continue representation of current client? | YES NO |
| c. Continue representation of the client without use of a screen?   | YES NO |
| d. Make a case-by-case determination regarding whether a screen is advisable?   | YES NO |
| IF SO, please briefly explain what factors are considered in making that determination and who makes that determination.            |        |
| e. Ask new hire's former client for permission to continue representation of the firm's current client?                             | YES NO |
| f. Proceed only with former client's permission?  | YES NO |
| g. Follow another course of action?   | YES NO |

IF SO, please describe.

14. Assume a new hire discloses that he/she worked on a matter for a client whose interests are adverse to the firm's current client. Although the matter handled by the new hire has been completed and is not currently pending, the LEGAL issues in that matter are related to those in the matter currently pending with your firm.

Is it firm policy to: (CIRCLE ALL THAT APPLY)

- |   |        |
|---|--------|
| a. Withdraw from representation of current client?  | YES NO |
| b. "Screen" new lawyer from giving or receiving any information regarding the matter and continue representation of the current client? | YES NO |
| c. Continue representation of the client without use of a screen?   | YES NO |
| d. Make a case-by-case determination regarding whether a screen is advisable?   | YES NO |
| IF SO, please briefly explain what factors are considered in making that determination and who makes that determination.                |        |
| e. Ask new hire's former client for permission to continue representation of the firm's current client?                                 | YES NO |
| f. Proceed only with former client's permission?  | YES NO |
| g. Follow another course of action?   | YES NO |

IF SO, please describe.

15. Assume a new hire discloses that he/she worked on a matter for a client whose interests are adverse to the firm's current client. Although the matter handled by the new hire has been completed and is not currently pending, the FACTUAL issues in that matter are related to those in the matter currently pending with your firm.

Is it firm policy to: (CIRCLE ALL THAT APPLY)

- |   |        |
|---|--------|
| a. Withdraw from representation of current client?  | YES NO |
| b. "Screen" new lawyer from giving or receiving any information regarding the matter and continue representation of current client? | YES NO |
| c. Continue representation of the client without use of a screen?   | YES NO |
| d. Make a case-by-case determination regarding whether a screen is advisable?   | YES NO |

IF SO, please briefly explain what factors are considered in making that determination and who makes that determination.

- |   |        |
|---|--------|
| e. Ask new hire's former client for permission to continue representation of the firm's current client? | YES NO |
| f. Proceed only with former client's permission?  | YES NO |
| g. Follow another course of action?   | YES NO |

IF SO, please describe.

16. Assume a new hire discloses that he/she worked on a matter for a client whose interests are adverse to the firm's current client. The matter handled by the new hire has been completed and is not currently pending, and the legal and factual issues in that matter are not related to those in the matter currently pending with your firm.

Is it firm policy to: (CIRCLE ALL THAT APPLY)

- |   |        |
|---|--------|
| a. Withdraw from representation of current client?  | YES NO |
| b. "Screen" new lawyer from giving or receiving any information regarding the matter and continue representation of current client? | YES NO |
| c. Continue representation of the client without use of a screen?   | YES NO |
| d. Make a case-by-case determination regarding whether a screen is advisable?   | YES NO |

IF SO, please briefly explain what factors are considered in making that determination and who makes that determination.

- e. Ask new hire's former client for permission to continue representation of the firm's current client? YES NO
- f. Proceed only with former client's permission? YES NO
- g. Follow another course of action? YES NO
- IF SO, please describe.
17. Assume a new hire discloses that he/she worked on a matter for a client whose interests are adverse to the firm's client. Although the matter handled by the new hire has been completed and is not currently pending, and issues in the former case are unrelated to those in the current case, new hire may have general knowledge regarding the adverse client's personnel, or regarding business policies or procedures, which may be relevant to the matter currently pending.
- Is it firm policy to: (CIRCLE ALL THAT APPLY)
- a. Withdraw from representation of current client? YES NO
- b. "Screen" new lawyer from giving or receiving any information regarding the matter and continue representation of current client? YES NO
- c. Continue representation of the client without use of a screen? YES NO
- d. Make a case-by-case determination regarding whether a screen is advisable? YES NO
- IF SO, please briefly explain what factors are considered in making that determination and who makes that determination.
- e. Ask new hire's former client for permission to continue representation of the firm's current client? YES NO
- f. Proceed only with former client's permission? YES NO
- g. Follow another course of action? YES NO
- IF SO, please describe.
18. Assume that all matters new hire previously handled are not currently pending or have, and no related case is currently pending in your firm. . . Briefly describe what, if anything, is done with the information new hire provides.
19. Assume firm learns after new hire joins firm but before any motion to disqualify is filed that new hire handled a matter for a client whose interests are adverse to the firm's present client in a matter related to the matter currently pending.
- Is it firm policy to: (CIRCLE ALL THAT APPLY)

- a. Withdraw from representation of current client? YES NO
  - b. "Screen" new lawyer from giving or receiving any information regarding the matter and continue representation of the current client? YES NO
  - c. Continue representation of the client without use of a screen? YES NO
  - d. Make a case-by-case determination regarding whether a screen is advisable? YES NO
- IF SO, please briefly explain what factors are considered in making that determination and who makes that determination.
- e. Ask new hire's former client for permission to continue representation of the firm's current client? YES NO
  - f. Proceed only with former client's permission? YES NO
  - g. Follow another course of action? YES NO

IF SO, please describe.

20. Assume firm learns when a motion to disqualify the firm is filed that new hire handled a matter for a client whose interests are adverse to the firm's current client in a matter related to the matter currently pending.

Is it firm policy to: (CIRCLE ALL THAT APPLY)

- a. 'Withdraw from representation of current client? YES NO
  - b. "Screen" new lawyer from giving or receiving any information regarding the matter and continue representation of current client? YES NO
  - c. Continue representation of the client without use of a screen? YES NO
  - d. Make a case-by-case determination regarding whether a screen is advisable? YES NO
- IF SO, please briefly explain what factors are considered in making that determination and who makes that determination.
- e. Ask new hire's former client for permission to continue representation of the firm's current client? YES NO
  - f. Proceed only with former client's permission? YES NO
  - g. Follow another course of action? YES NO

IF SO, please describe.

21. Assume firm learns it concurrently represents two clients whose interests are adverse.

Is it firm policy to: (CIRCLE ALL THAT APPLY)

- a. Withdraw from representation of one client? YES NO
- b. IF SO, did you ask client from whom firm withdrew for permission to represent remaining client? YES NO N/A
- c. Withdraw from representation of both clients? YES NO
- d. "Screen" lawyer working on each file from giving or receiving any information regarding the matter to the other lawyer and continue representation of the current clients? YES NO
- e. Continue representation of the client without use of a screen? YES NO
- f. Ask both clients for permission to continue? YES NO
- g. Proceed only with both clients' permission? YES NO
- h. Make a case-by-case determination regarding whether a screen is advisable? YES NO
- IF SO, please briefly explain what factors are considered in making that determination and who makes that determination.
- i. Follow another course of action? YES NO
- IF SO, please describe.
22. Assume your firm represented a client whose matter is completed. Your firm currently represents a client in a matter related to the past matter.
- Is it firm policy to: (CIRCLE ALL THAT APPLY)
- a. Withdraw from representation of current client? YES NO
- b. "Screen" lawyer working on file for current client from giving or receiving any information regarding the matter and continue representation of current client? YES NO
- c. Continue representation of the client without use of a screen? YES NO
- d. Make a case-by-case determination regarding whether a screen is advisable? YES NO
- IF SO, please briefly explain what factors are considered in making that determination and who makes that determination.
- e. Ask former client for permission to continue representation of the firm's current client? YES NO
- f. Proceed only with former client's permission? YES NO
- g. Follow another course of action? YES NO
- IF SO, please describe.
- D. Screening Procedures
23. Has your firm ever used a screen? YES NO

- |     |  |            |
|-----|--|------------|
| a.  | Is there a written policy regarding screens?<br>IF SO, please attach it to questionnaire.  | YES NO N/A |
| b.  | Is there an oral policy regarding screens?<br>IF SO, please describe it and how it is communi-<br>cated to the firm.                       | YES NO N/A |
| c.  | Does the firm conduct seminars or otherwise<br>provide information about the proper functioning<br>of screens?<br>IF SO, explain.          | YES NO N/A |
| d.  | Does firm conduct seminars or otherwise provide<br>information about confidentiality?<br>IF SO, please explain.                            | YES NO N/A |
| e.  | Who decides whether a screen is appropriate in a<br>particular case?   |            |
| 24. | Assuming your firm employs screens, does the screen<br>include the following:  |            |
| a.  | Are files segregated?<br>IF SO, how?   | YES NO N/A |
| b.  | Who has access to files and how is access<br>limited?  |            |
| c.  | Are computer files indexing client documents<br>segregated?<br>IF SO, how?   | YES NO N/A |
| d.  | Are computer files of documents created by law<br>firm segregated? (e.g., motions, pleadings, and<br>other work product)                   | YES NO N/A |
| e.  | Is the screened lawyer given any information<br>concerning his/her role in maintaining the screen?<br>IF SO, what information is provided? | YES NO N/A |
| f.  | Are parties working on the file informed about the<br>screen?<br>IF SO, how?   | YES NO N/A |
| g.  | Are others working at the firm informed about the<br>screen?<br>IF SO, how?  | YES NO N/A |
| h.  | Are new lawyers and staff joining the firm after<br>creation of the screen informed of the screen?   | YES NO N/A |
| i.  | Are those informed of the existence of a screen<br>reminded of the existence of a screen?<br>IF SO, at what intervals?                     | YES NO N/A |

- j. Does the screened lawyer share in fees derived from the pending case? YES NO N/A
- k. Is the firm cautioned about raising issues in screened cases at section meetings or in other settings where such conversation is likely to arise? Please explain. YES NO N/A
- l. Is opposing side advised of existence of screen? IF SO, when? YES NO N/A
- m. Is opposing side asked permission to continue representation with screen in place? YES NO N/A
- n. Does firm continue representation with screen in place if opposing party does not consent? YES NO N/A
- o. Is your present client advised of the existence of a screen? YES NO N/A
- p. Are the consequences of breach of the screen discussed with present client? IF SO, please briefly explain. YES NO N/A
- q. Has your firm developed other procedures or means to screen not outlined above? IF SO, please explain. YES NO N/A
25. Is there a policy regarding firm procedure if a screen is breached? IF SO, please describe. YES NO N/A
26. Has a screen erected in your firm been breached? IF SO, briefly describe: YES NO N/A
- a. How screen was breached.
- b. How breach was brought to the firm's attention.
- c. What, if any, was the firm's response to the breach?
- d. Was the nature of the information shared relevant to the firm's response? IF SO, how?
- e. How, if at all, were procedures changed following breach?
27. Has your firm worked on matters concerning which the opposing firms have constructed a screen? YES NO
28. Has your firm found that other firms have appropriate safeguards when using screens? IF NOT, what did your firm find to be lacking? YES NO N/A

29. Has your firm ever learned that the screen at an opposing firm was breached? YES NO N/A

IF SO, please explain with respect to each breach:

- a. How did firm learn a breach occurred?
- b. What was your firm's response to that information?

(ANSWER YES TO ALL THAT APPLY)

1. Motion to disqualify filed? YES NO N/A
2. Motion for sanctions filed? YES NO N/A
3. Disciplinary action filed? YES NO N/A
4. Lawsuit filed? YES NO N/A

IF SO, please state cause of action.

5. Settlement reached? YES NO N/A

IF SO, was fact of breach useful to discussions?

Explain.

6. No response? YES NO N/A
7. Other response not outlined above? YES NO N/A

IF SO, please explain.

30. Do you think that lawyers in opposing firms inform other lawyers in their firm if a breach occurs? YES NO

IF NOT why not?

31. Do you think that lawyers in opposing law firms inform their opponent if a breach occurs? YES NO

IF NOT, why not?

32. Do you think that lawyers in opposing law firms inform their clients if a breach occurs? YES NO

IF NOT, why not?

33. Do you think that opposing screens could be breached without your firm detecting breach? YES NO

IF NOT, why not?

34. Do you think that opposing screens have been breached without your firm detecting breach? YES NO N/A

35. Do you think that some breaches are easier to detect than others? YES NO

For example, could your firm detect that opposing lawyer disclosed the following in violation of screen:

- a. documents? YES NO

IF SO, how?

- |   |        |
|---|--------|
| b. facts concerning case?   | YES NO |
| IF SO, how?   |        |
| c. business policies or procedures?   | YES NO |
| IF SO, how?   |        |
| d. shortcuts to discovery?  | YES NO |
| IF SO, how?   |        |
| e. discovery or trial strategy?   | YES NO |
| IF SO, how?   |        |
| f. observations concerning character or reputation of<br>opposing party or experts?   | YES NO |
| IF SO, how?   |        |
| g. other information (explain).   |        |
| 36. How would your firm go about proving that the<br>opposing side breached a screen?   |        |
| 37. Do you think opposing lawyers would be less likely<br>to breach a screen if they were aware of the<br>possibility of the following sanctions being imposed: |        |
| a. discovery sanctions?   | YES NO |
| b. disqualification?  | YES NO |
| c. bar discipline?  | YES NO |
| d. malpractice liability?   | YES NO |
| e. breach of fiduciary duty liability?  | YES NO |
| f. intentional tort liability?  | YES NO |
| g. punitive damages?  | YES NO |
| h. disgorgement of fees paid to firm?   | YES NO |
| i. payment of fees necessary for new lawyer to "get<br>up to speed" on case?  | YES NO |
| j. loss of clients?   | YES NO |
| k. other (please describe)?   | YES NO |
| 38. Do you have any additional thoughts or suggestions<br>regarding how to improve the efficacy of screens?   |        |

THANK YOU VERY MUCH FOR PARTICIPATING IN THIS SURVEY.