**5.8: Associational Conflicts of Interest**

When attorneys are associated with each other in a partnership, firm, or similar organization, a conflict of interest affecting one of the associated attorneys may be imputed to the other attorneys who are members of the association. For example, associated attorneys typically may not represent clients with adverse interests, just like individual attorneys may not represent clients with adverse interests. Associated attorneys may not represent new clients whose interests are adverse to the interests of a client of an associated attorney. And if the clients of an associated attorney develop adverse interests, the attorneys may be required to withdraw from representation.

Of course, conflicts of interest do not necessarily preclude representation. The clients of associated attorneys may provide informed consent to representation despite the conflict, just like the clients of individual attorneys.

Often, the clients of associated attorneys have conflicts of interest relating to the duty of confidentiality. If the conflict in question can be resolved by informed consent, associated attorneys often can avoid violating the duty of confidentiality by adopting screening procedures that prevent attorneys representing one client from accessing confidential information provided by the other client.

[**Rule 1.10: Imputation of Conflicts of Interest: General Rule**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_10_imputation_of_conflicts_of_interest_general_rule/)

1. While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless
   1. the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or
   2. the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer’s association with a prior firm, and
      1. the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
      2. written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and
      3. certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.
2. When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
   1. the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
   2. any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.
3. A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.
4. The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

[**Rule 1.10 Imputation of Conflicts of Interest: General Rule, Comment [1]**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_10_imputation_of_conflicts_of_interest_general_rule/comment_on_rule_1_10/)

For purposes of the Rules of Professional Conduct, the term “firm” denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

[**Rule 1.10 Imputation of Conflicts of Interest: General Rule, Comment [2]**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_10_imputation_of_conflicts_of_interest_general_rule/comment_on_rule_1_10/)

The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm.

**Restatement (Third) of the Law Governing Lawyers § 123 (2000): Imputation of a Conflict of Interest to an Affiliated Lawyer**

Unless all affected clients consent to the representation under the limitations and conditions provided in § 122 or unless imputation hereunder is removed as provided in § 124, the restrictions upon a lawyer imposed by §§ 125- 135 also restrict other affiliated lawyers who:

1. are associated with that lawyer in rendering legal services to others through a law partnership, professional corporation, sole proprietorship, or similar association;
2. are employed with that lawyer by an organization to render legal services either to that organization or to others to advance the interests or objectives of the organization; or
3. share office facilities without reasonably adequate measures to protect confidential client information so that it will not be available to other lawyers in the shared office.

**Restatement (Third) of the Law Governing Lawyers § 124 (2000): Removing Imputation**

1. Imputation specified in § 123 does not restrict an affiliated lawyer when the affiliation between the affiliated lawyer and the personally prohibited lawyer that required the imputation has been terminated, and no material confidential information of the client, relevant to the matter, has been communicated by the personally prohibited lawyer to the affiliated lawyer or that lawyer's firm.
2. Imputation specified in § 123 does not restrict an affiliated lawyer with respect to a former-client conflict under § 132, when there is no substantial risk that confidential information of the former client will be used with material adverse effect on the former client because:
   1. any confidential client information communicated to the personally prohibited lawyer is unlikely to be significant in the subsequent matter;
   2. the personally prohibited lawyer is subject to screening measures adequate to eliminate participation by that lawyer in the representation; and
   3. timely and adequate notice of the screening has been provided to all affected clients.
3. Imputation specified in § 123 does not restrict a lawyer affiliated with a former government lawyer with respect to a conflict under § 133 if:
   1. the personally prohibited lawyer is subject to screening measures adequate to eliminate involvement by that lawyer in the representation; and
   2. timely and adequate notice of the screening has been provided to the appropriate government agency and to affected clients.



[***Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F. 2d 1384 (2d Cir. 1976)**](https://scholar.google.com/scholar_case?case=12185981601498967401)

**Summary:** Attorney Manly Fleischmann was a partner in Jaeckle, Fleischmann and Mugel of Buffalo and in Webster, Sheffield, Fleischmann, Hitchcock and Brookfield of New York City. Cinerama distributed movies and operated movie theaters. Cinerama hired Fleischmann and Jaeckle to defend it in an antitrust action in upstate New York. Then, Cinema 5 hired Webster to represent it in a similar antitrust action in New York City. Cinerama filed a motion to disqualify Webster because Fleischmann was a partner. Fleischmann responded that the actions were not substantially related. The district court granted the motion, and the circuit court affirmed.

Before MOORE, FEINBERG and VAN GRAAFEILAND, Circuit Judges.

VAN GRAAFEILAND, Circuit Judge:

This appeal from an order granting defendants’ motion to disqualify plaintiff's counsel presents a somewhat unusual set of facts. Counsel has been disqualified from further representation of plaintiff because a partner in this New York City law firm is also a partner in a Buffalo firm which is presently representing the defendant Cinerama, Inc. in other litigation of a somewhat similar nature. Although we agree with the district court that there was no actual wrongdoing and intend no criticism of the lawyers involved, we find no abuse of the district court’s discretion, and so affirm.

There is little or no dispute as to the facts, most of them having been stipulated. Attorney Manly Fleischmann is a partner in Jaeckle, Fleischmann and Mugel of Buffalo and in Webster, Sheffield, Fleischmann, Hitchcock and Brookfield of New York City. He divides his time between the two offices. Cinerama is a distributor of motion pictures and the operator of several large theater chains. In January 1972 the Jaeckle firm was retained to represent Cinerama and several other defendants in an action brought in the United States District Court for the Western District of New York. Plaintiffs in that suit are local upstate theater operators who allege antitrust violations resulting from discriminatory and monopolistic licensing and distribution of motion pictures in the Rochester area. A similar action involving allegedly illegal distribution in the Buffalo area was commenced in March 1974, and the Jaeckle office represents the interests of Cinerama in this action also. Both suits are presently pending in the Western District.

The instant action, brought in the Southern District of New York in August 1974, alleges a conspiracy among the defendants to acquire control of plaintiff corporation through stock acquisitions, with the intention of creating a monopoly and restraining competition in New York City's first-run motion picture theater market. Judge Brieant found that there was sufficient relationship between the two law firms and the two controversies to inhibit future confidential communications between Cinerama and its attorneys and that disqualification was required to avoid even the appearance of professional impropriety.

Appellant’s counsel strongly dispute these findings. They say that they should not be disqualified unless the relationship between the controversies is substantial, and they contend there is nothing substantial in the relationship between an upstate New York conspiracy to deprive local theater operators of access to films and an attempted corporate take-over in New York City.

The “substantial relationship” test is indeed the one that we have customarily applied in determining whether a lawyer may accept employment against a former client. However, in this case, suit is not against a former client, but an existing one. One firm in which attorney Fleischmann is a partner is suing an actively represented client of another firm in which attorney Fleischmann is a partner. The propriety of this conduct must be measured not so much against the similarities in litigation, as against the duty of undivided loyalty which an attorney owes to each of his clients.

A lawyer’s duty to his client is that of a fiduciary or trustee. When Cinerama retained Mr. Fleischmann as its attorney in the Western District litigation, it was entitled to feel that at least until that litigation was at an end, it had his undivided loyalty as its advocate and champion, and could rely upon his “undivided allegiance and faithful, devoted service.” Because “no man can serve two masters,” Matthew 6:24, it had the right to expect also that he would “accept no retainer to do anything that might be adverse to his client's interests.” Needless to say, when Mr. Fleischmann and his New York City partners undertook to represent Cinema 5, Ltd., they owed it the same fiduciary duty of undivided loyalty and allegiance.

Ethical Considerations 5-1 and 5-14 of the American Bar Association's Code of Professional Responsibility provide that the professional judgment of a lawyer must be exercised solely for the benefit of his client, free of compromising influences and loyalties, and this precludes his acceptance of employment that will adversely affect his judgment or dilute his loyalty. The Code has been adopted by the New York State Bar Association, and its canons are recognized by both Federal and State Courts as appropriate guidelines for the professional conduct of New York lawyers.

Under the Code, the lawyer who would sue his own client, asserting in justification the lack of “substantial relationship” between the litigation and the work he has undertaken to perform for that client, is leaning on a slender reed indeed. Putting it as mildly as we can, we think it would be questionable conduct for an attorney to participate in any lawsuit against his own client without the knowledge and consent of all concerned. This appears to be the opinion of the foremost writers in the field, and it is the holding of the New York courts. In *Matter of Kelly*, New York's highest court said that “with rare and conditional exceptions, the lawyer may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship.” Nor is New York alone in this view. In *Grievance Committee v. Rottner*, Connecticut’s highest court held that the maintenance of public confidence in the bar requires an attorney to decline employment adverse to his client, even though the nature of such employment is wholly unrelated to that of his existing representation.

Whether such adverse representation, without more, requires disqualification in every case, is a matter we need not now decide. We do hold, however, that the “substantial relationship” test does not set a sufficiently high standard by which the necessity for disqualification should be determined. That test may properly be applied only where the representation of a former client has been terminated and the parameters of such relationship have been fixed. Where the relationship is a continuing one, adverse representation is prima facie improper, and the attorney must be prepared to show, at the very least, that there will be no actual or apparent conflict in loyalties or diminution in the vigor of his representation. We think that appellants have failed to meet this heavy burden and that, so long as Mr. Fleischmann and his Buffalo partners continue to represent Cinerama, he and his New York City partners should not represent Cinema 5, Ltd. in this litigation.

Because he is a partner in the Jaeckle firm, Mr. Fleischmann owes the duty of undivided loyalty to that firm's client, Cinerama. Because he is a partner in the Webster firm, he owes the same duty to Cinema 5, Ltd. It can hardly be disputed that there is at least the appearance of impropriety where half his time is spent with partners who are defending Cinerama in multi-million dollar litigation, while the other half is spent with partners who are suing Cinerama in a lawsuit of equal substance.[[1]](#footnote-0)

Because “an attorney must avoid not only the fact, but even the appearance, of representing conflicting interests,” this requires his disqualification. Moreover, because of the peculiarly close relationship existing among legal partners, if Mr. Fleischmann is disqualified, his partners at the Webster firm are disqualified as well.

Nothing that we have heretofore said is intended as criticism of the character and professional integrity of Mr. Fleischmann and his partners. We are convinced that the dual representation came about inadvertently and unknowingly, and we are in complete accord with Judge Brieant’s finding that there has been no actual wrongdoing. Furthermore, the record shows that after learning of the conflict which had developed, the Jaeckle firm, through Mr. Fleischmann, offered to withdraw its representation of Cinerama in the Western District actions. However, that offer was not accepted, and Mr. Fleischmann continued, albeit reluctantly, to have one foot in each camp.

Under the circumstances, Judge Brieant’s order of disqualification cannot be construed as an abuse of his discretion. We therefore affirm.

**Questions:**

1. Why did the court grant Cinerama’s motion to disqualify Fleischmann? Did it identify a conflict of interest? Was Fleischmann working on the action against Cinerama?
2. Why did Cinerama file a motion to disqualify Webster? Should Cinema 5’s preferences matter under the circumstances?
3. What if Webster screened Fleischmann from the Cinema 5 litigation? What if Fleishmann left Jaeckle?



[***Borden v. Borden*, 277 A. 2d 89 (D.C. App. 1971)**](https://scholar.google.com/scholar_case?case=11851927748596594921)

**Summary:** Helen Borden filed a complaint to divorce her husband, George Borden. Helen was represented by an attorney from the Neighborhood Legal Services Program (NLSP). Helen’s attorney moved for assignment of counsel to represent George. The trial court ordered attorney David S. Raycroft, who works for NLSP, to represent George. Both attorneys from NLSP filed a motion to set aside the trial court’s order since both attorneys were employed by NLSP and the order created a conflict of interest under the Code of Professional Responsibility. The trial court denied the motion because no economic conflict existed. The appellate court reversed, because the NLSP functions as a firm and there is an inherent conflict of interest that public policy concerns do not override.

KERN, Associate Judge:

The issue presented by this appeal is whether it was error for the trial judge sitting in the Domestic Relations Branch of the District of Columbia Court of General Sessions to refuse to vacate his order assigning an attorney employed by the Neighborhood Legal Services Program (NLSP) to represent the defendant in this action, when the plaintiff was already represented by an NLSP lawyer.

On September 22, 1969, appellant Helen Borden filed a complaint seeking a divorce from appellee George Borden on the ground of adultery. On April 2, 1970, appellant, represented by an attorney from NLSP and proceeding in forma pauperis, moved for assignment of counsel to represent appellee. The trial court ordered David S. Raycroft, an attorney employed by the NLSP, to enter an appearance on behalf of and represent appellee. On June 8, 1970, appellant's attorney, joined by appellee's attorney, filed a motion to set aside the trial court's order of appointment of counsel on the ground that since both attorneys in the case were employed by the NLSP the order created a conflict of interest under the Code of Professional Responsibility, and the divorce ultimately obtained could be invalid due to alleged collusion.

On June 9, 1970, the trial judge denied the motion to set aside his appointment of counsel, relying specifically on his order in another case, *McGee v. McGee*, which stated, inter alia:

Since, therefore, no economic conflict exists, no corporate interests is in any way involved and no legal partnership as such has been disclosed it would appear that in fact and objectively speaking there is no conflict of interest.

Mrs. Borden appeals from this order of denial.

While the trial court’s refusal to set aside his order of appointment is not final in the sense of disposing of the case on its merits, it does have “a final and irreparable effect upon the rights of the parties” and is therefore appealable. The effect of the trial court's order is to force the parties to go to trial represented by attorneys who practice law within the same organization, which appears on its face to constitute a conflict of interest, and who have stated upon the record their inability to represent the cause of their clients and remain faithful to the Code of Professional Responsibility. In addition, the parties have ground for concern that the final decree in the case on the merits could be subject to the subsequent charge of collusion and its validity thus put in question. We think that the administration of justice would best be served by recognizing the cloud which the order of appointment of counsel has put upon the present proceedings and by treating the order as final for the purpose of review.

Turning to the merits of the assignment of counsel order, it is axiomatic that members of the same law firm may not represent adverse parties. Corporation Counsel concedes this but takes the position that:

NLSP cannot be analogized to the typical law firm for purposes of application of the conflict-of-interest concept NLSP’s activities more logically fall within the group legal services concept.

It argues that under *N.A.A.C.P. v. Button*, the constitutional right being asserted must be balanced on the scale of public interest against the alleged professional impropriety. When this is done, in the instant case, so the argument goes, the right and need of the poor to have legal representation in domestic relations matters is paramount to the allegedly remote possibility of a conflict of interest growing out of the representation of both parties by NLSP attorneys. It is pointed out that since NLSP attorneys receive no compensation from their clients there can be no economic conflict of interest, as would be the case if they were practicing in the same law firm.

We are not persuaded that the possibility of conflict of interest which appellee’s attorney proffered as his reason for wishing to withdraw from participation in this case is remote. While the NLSP is not a law firm it is a group of attorneys practicing law together in an organizational structure much like a law firm. It has a Board of Directors and an Executive Director who are analogous to a firm’s managing partners. It has one attorney in each of its branch offices whose responsibility is to supervise the junior attorneys, much like a firm's senior partner working with his associates. All NLSP attorneys participate in office meetings and receive intra-office communications on substantive law, litigation techniques and tactics and office policy. Lawyers who practice their profession side-by-side, literally and figuratively, are subject to subtle influences that may well affect their professional judgment and loyalty to their clients, even though they are not faced with the more easily recognized economic conflict of interest. In addition, the appointment of attorneys who work together presents an impression scarcely consistent with the bar’s efforts to maintain public confidence in the law and lawyers.

Also we fail to find in this case the extraordinary circumstances present in *N.A.A.C.P. v. Button*, where legal representation to vindicate constitutional rights of a group of citizens was simply unavailable except in the form of group legal services which the State contended amounted to barratry, maintenance and champerty. With all deference to the trial court’s efforts to date to assure full representation of all who seek access to the Domestic Relations Court we are not persuaded that the supply of attorneys available in the District of Columbia has been exhausted so that NLSP attorneys must now represent both sides of a divorce action.

Finally, we are reluctant to approve any action in the matter of professional ethics which distinguishes between attorneys who are in private practice and attorneys who are not. In the first place, Congress has expressly recognized that “anti-poverty lawyers” are to be governed by the traditional standards of the profession. The ABA has held that legal aid attorneys have a “primary obligation of loyalty” to their clients and are required “to act in accordance with the Code of Professional Responsibility.” Other jurisdictions have specifically barred anti-poverty lawyers from representing adverse parties in domestic relations litigation because such representation falls afoul of the Canons. We are reluctant ever to make an exception from the professional norm for attorneys employed by the government or others who provide legal representation without compensation from the client because then we might encourage a misapprehension that the special nature of such representation justifies departure from the profession's standards. We should avoid always any action that would give the appearance that government attorneys are “legal Hessians” hired “to do a job” rather than attorneys at law. On the other hand, we should expect always from these attorneys uncompromising adherence to the profession's established standards.

We conclude that it was error for the trial court to refuse to vacate its assignment of an NLSP attorney to represent appellee in the trial of appellant's divorce action which was being presented by another NLSP attorney and that this case must be remanded for appointment of new counsel for appellee.

**Questions:**

1. What was the conflict of interest?
2. Why did NLSP’s corporate counsel argue against the motion?
3. What public policy concerns did the court say were not sufficient to override the inherent conflict of interest?
4. Did the court’s ruling harm or benefit NLSP’s mission to provide legal services to the poor?



# [***People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.*, 20 Cal. 4th 1135 (Cal. 1999)**](https://scholar.google.com/scholar_case?case=4067765311132328506)

**Summary:** Attorney Eliot G. Disner was “of counsel” to Shapiro, Rosenfeld & Close. Attorney Geordan Goebel represented SpeeDee Oil Change Systems. Goebel consulted with Shapiro about an antitrust action SpeeDee had filed against Mobil Oil, and then associated Shapiro with the action as counsel. Cohon and Gardner represented Mobil in the SpeeDee action. Cohon consulted with Disner about the SpeeDee action, and planned to retain him as a consultant. But when Cohon and Gardner learned that Shapiro was representing SpeeDee, they filed a motion to disqualify the firm, because of its association with Disner. The trial court denied the motion, and the intermediate appellate court affirmed, because Disner did not provide any confidential information to Shapiro. The California Supreme Court reversed, because Disner represented adversaries in the same litigation.

CHIN, J.

When a conflict of interest requires an attorney’s disqualification from a matter, the disqualification normally extends vicariously to the attorney’s entire law firm. This rule safeguards clients’ legitimate expectations that their attorneys will protect client confidences. Here, we decide whether the same rule should apply when a party unknowingly consults an attorney “of counsel” to the law firm representing the party's adversary in the subject of the consultation.

Mobil Oil Corporation consulted Attorney Eliot G. Disner, who was of counsel to Shapiro, Rosenfeld & Close. Mobil was a defendant in a complaint in intervention by respondents Gary and Annette Burch et al., Southern California franchisees of SpeeDee Oil Change Systems, Inc. While Mobil was consulting Disner, respondents associated the Shapiro firm as counsel of record in their action against Mobil. Mobil moved to disqualify the Shapiro firm upon learning of its association, arguing that Disner had a conflict of interest that required its vicarious disqualification.

The trial court denied Mobil's motion. The court found no basis for a presumption that Disner disclosed confidences to the Shapiro firm, notwithstanding Disner's relationship with the firm. The Court of Appeal affirmed, concluding that substantial evidence existed for implied findings that Disner’s relationship with the Shapiro firm was not “close, personal, continuous, and regular” and that Disner conveyed no confidential information to the firm. We granted Mobil's petition for review.

We adopt the prevailing rule concerning “of counsel” conflicts of interest and reverse the judgment of the Court of Appeal. For attorneys in the same firm to represent adverse parties in the same litigation is so patently improper that the rule of disqualification is a per se or “automatic” one. Conflicting representations that would disqualify all of a law firm’s attorneys are not more acceptable when an attorney of counsel to the firm creates the conflict. Clients, and the public, should expect confidentiality and loyalty from attorneys who effectively declare they practice law in a close, personal, and continuing association. These legitimate expectations would be frustrated if a firm could represent one party in litigation while an attorney of counsel to the firm represented an adversary in the same case.

FACTUAL AND PROCEDURAL BACKGROUND

Attorney Geordan Goebel, a sole practitioner, had represented respondents since 1994. Because of the action’s scope, he decided to associate a law firm as attorneys of record to help him prosecute respondents’ claims. Goebel approached the Shapiro firm because of its expertise in franchise law and met with Mitchell Shapiro on June 22, 1996. Around this time, the Shapiro firm's letterhead listed 14 attorneys’ names, with 4 more attorneys listed as of counsel to the firm, all at the same office address. Among those identified as of counsel to the firm was Eliot G. Disner, an attorney who had substantial experience with antitrust issues.

Over the next few weeks, Goebel developed a “good working relationship” with the Shapiro firm. On July 10, he signed a notice associating the Shapiro firm as counsel of record for respondents. Mitchell Shapiro signed the notice for the Shapiro firm on July 12. The notice of association of counsel was served by mail on July 15, 1996, and filed with the court the following day.

The law firm of Cohon and Gardner represented Mobil in the SpeeDee Oil action. Early in July 1996, Jeffrey Cohon, an associate with Cohon and Gardner, spoke to Attorney Steven Hecht about contacting Disner concerning the case. Hecht knew both Cohon and Disner personally. To facilitate an initial check for conflicts, Cohon told Hecht the name of the case and the principal attorneys involved. Hecht spoke with Disner later that week. Hecht asked Disner if he knew of the case involving SpeeDee Oil and Mobil. When Disner said he did not, Hecht asked him to call Jeffrey Cohon.

Disner and Cohon spoke by telephone on July 11 or 12. When Cohon returned Disner's call, the receptionist answered the telephone, “Shapiro, Rosenfeld and Close.” Cohon's call was put through to Disner, who confirmed he had spoken with Hecht and had not heard of the SpeeDee Oil case or the attorneys involved in it. In a conversation Cohon believed was confidential, he and Disner discussed the case’s substantive allegations, its procedural status, and Mobil's theories. They arranged a meeting for July 16.

On July 16, 1996, Cohon and Gardner Attorneys Bennett Cohon, Jeffrey Cohon, and Steven Gardner met with Disner to discuss his assisting with Mobil's representation. They spoke for one to two hours over lunch. Gardner received a copy of Disner's resume, which—like Disner's business card—prominently featured the Shapiro firm's name and address.

Gardner briefed Disner on the case and Mobil's position. The matters disclosed to Disner included "the background of the case, Mobil's theories in the case, Mobil's discovery strategy and an analysis of the procedural and substantive issues which had arisen to date and [were] likely to arise in the future, the state of the case, experts, and consultants, and specific factual issues." The Cohon and Gardner attorneys considered the information disclosed to Disner to be confidential and attorney work product.

According to Gardner's and Jeffrey Cohon's declarations, when the meeting ended, Gardner and Disner agreed to prepare a document formally retaining Disner as a consultant. Disner did not directly contradict the Cohon and Gardner attorneys' statements. His declaration stated that at the end of the meeting, the Cohon and Gardner attorneys "expressed interest" in using his services, although they did not know "exactly" how they intended to do so.

Gardner further declared that Disner agreed to check some statutes and case law that applied to a few of the issues they discussed. He stated that he and Disner spoke again later in the afternoon of July 16, and Disner conveyed the results of his review of those issues. No declaration contradicted Gardner's account of those discussions.

The next day, July 17, Gardner received the notice of the Shapiro firm's association as counsel for respondents. Consequently, that same day the Cohon and Gardner firm informed Disner that Mobil would not be using his services. Gardner immediately faxed a letter to the Shapiro firm, Disner, and Goebel, stating that Mobil objected to the Shapiro firm’s participation in the case on behalf of respondents. Gardner's letter asserted the Shapiro firm had an ethical conflict because of Cohon and Gardner’s conversations with and disclosures to Disner concerning the case. The Shapiro firm responded with a letter faxed the next day, contending there was no basis for the firm’s disqualification. The response stated that the Shapiro firm had already associated as counsel for respondents when Disner met with the Cohon and Gardner attorneys. The response also stated that Disner was of counsel to the Shapiro firm and not an associate, partner, or shareholder.

Four days later, on July 22, 1996, Mobil filed an ex parte application for an order shortening time for a motion to disqualify the Shapiro firm. Mobil's motion was set for hearing on July 24, 1996. The moving and opposing papers included declarations and exhibits setting out the facts related above. In addition, Disner's declaration stated he had not "discussed the merits of the SpeeDee Oil action with any attorney or other employee" of the Shapiro firm. He also said he customarily reviewed possible conflicts of interest with the firm before associating with them on cases. Disner and the Shapiro firm did not discuss a potential conflict in this instance because neither had asked the other to associate for the SpeeDee Oil case. Similarly, Mitchell Shapiro declared that he had "not discussed this action" with Disner and did not know "what was discussed between" Disner and the Cohon and Gardner attorneys.

The Shapiro firm's declarations submitted in opposition to Mobil's motion provided additional details of the firm's relationship with Disner. Disner's declaration stated: "Although I am designated as `Of Counsel' to SRC [the Shapiro firm], I have a separate law practice from SRC. I have my own clients, whom I bill separately from SRC. I pay rent to SRC for office space. I have my own staff whom I pay for their services. I do not share in any profits of SRC, nor do I incur any liabilities on behalf of SRC. In those few cases (perhaps 3-4 per year) on which I associate with SRC, which is strictly determined on a case-by-case basis, if I use any attorney from SRC to perform services, I pay SRC a percentage of that attorney[s] usual hourly rate for the time spent working on my clients' cases. Similarly, if SRC uses my services on any cases, it pays me a percentage of my usual hourly fee for services rendered.”

The trial court denied Mobil's motion to disqualify the Shapiro firm. The court decided the matter based on the written submissions, stating: “There is no basis on which to presume that Eliot Disner, Esq., who is of counsel to the Shapiro firm, imparted any confidential information to the firm, as concerns this case. Disner and the Shapiro firm were initially unaware of each other's involvement in this case and Disner was not retained by MOBIL nor is he presently involved in this case."

Court of Appeal affirmed the trial court's order, applying an abuse of discretion standard of review. The court viewed the matter as one involving conflicting evidence and inferences on the actual nature of the particular "of counsel" relationship in question: "We agree that if the Shapiro firm simultaneously represented both Mobil and the respondents in this litigation, it would be subject to automatic disqualification. And we assume for purposes of discussion that by performing legal research for Mobil, Mr. Disner represented it. However, the trial court impliedly concluded Mr. Disner practiced law separate and apart from the Shapiro firm except on those few annual occasions when Mr. Disner or the Shapiro firm associated the other on a particular case. There was probative and persuasive evidence of a ‘close, personal, continuous, and regular’ professional affinity which characterizes the ‘of counsel’ relationship. However, there was conflicting evidence which indicated there was in reality no ‘close, personal, continuous, and regular’ relationship. Simply stated, the evidence concerning the relationship was in conflict and the trial judge resolved that dispute in favor of one side. Furthermore, even if a concern for client confidentiality arose on the facts of this case, substantial evidence established Mr. Disner did not impart any confidential information to the Shapiro firm. Therefore, we find no abuse of discretion.”

DISCUSSION

This case requires us to resolve two distinct questions. First, were Disner's contacts and discussions with the Cohon and Gardner attorneys such that he represented Mobil for purposes of a conflict of interest analysis? Second, if so, should any conflict of interest be imputed to the law firm to which he was of counsel so as to require its disqualification? To answer these questions, we first review the principles involved when one party seeks to disqualify its opponent's counsel, beginning with the appropriate standard of appellate review.

DISQUALIFICATION PRINCIPLES

A motion to disqualify a party's counsel may implicate several important interests. Consequently, judges must examine these motions carefully to ensure that literalism does not deny the parties substantial justice. Depending on the circumstances, a disqualification motion may involve such considerations as a client’s right to chosen counsel, an attorney’s interest in representing a client, the financial burden on a client to replace disqualified counsel, and the possibility that tactical abuse underlies the disqualification motion.Nevertheless, determining whether a conflict of interest requires disqualification involves more than just the interests of the parties.

A trial court’s authority to disqualify an attorney derives from the power inherent in every court “[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.” Ultimately, disqualification motions involve a conflict between the clients’ right to counsel of their choice and the need to maintain ethical standards of professional responsibility. The paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one’s choice must yield to ethical considerations that affect the fundamental principles of our judicial process.

Protecting the confidentiality of communications between attorney and client is fundamental to our legal system. The attorney-client privilege is a hallmark of our jurisprudence that furthers the public policy of ensuring “‘the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense.’” To this end, a basic obligation of every attorney is “to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.”

To protect the confidentiality of the attorney-client relationship, the State Bar Rules of Professional Conduct prohibits attorneys from accepting, without the client's informed written consent, “employment adverse to the client or former client where, by reason of the representation of the client or former client, the attorney has obtained confidential information material to the employment.” Where an attorney successively represents clients with adverse interests, and where the subjects of the two representations are substantially related, the need to protect the first client's confidential information requires that the attorney be disqualified from the second representation. For the same reason, a presumption that an attorney has access to privileged and confidential matters relevant to a subsequent representation extends the attorney’s disqualification vicariously to the attorney’s entire firm.

A related but distinct fundamental value of our legal system is the attorney's obligation of loyalty. Attorneys have a duty to maintain undivided loyalty to their clients to avoid undermining public confidence in the legal profession and the judicial process.The effective functioning of the fiduciary relationship between attorney and client depends on the client's trust and confidence in counsel. The courts will protect clients' legitimate expectations of loyalty to preserve this essential basis for trust and security in the attorney-client relationship. Therefore, if an attorney—or more likely a law firm—simultaneously represents clients who have conflicting interests, a more stringent per se rule of disqualification applies. With few exceptions, disqualification follows automatically, regardless of whether the simultaneous representations have anything in common or present any risk that confidences obtained in one matter would be used in the other.

The most egregious conflict of interest is representation of clients whose interests are directly adverse in the same litigation. Such patently improper dual representation suggests to the clients—and to the public at large—that the attorney is completely indifferent to the duty of loyalty and the duty to preserve confidences. However, the attorney’s actual intention and motives are immaterial, and the rule of automatic disqualification applies. “The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct,” but also to keep honest attorneys from having to choose between conflicting duties, or being tempted to reconcile conflicting interests, rather than fully pursuing their clients’ rights. The loyalty the attorney owes one client cannot be allowed to compromise the duty owed another.

Here, any concerns about compromised attorney loyalty must take into account the limited period during which the Shapiro firm represented respondents and Disner was engaged in communications with Mobil's counsel. Mobil effectively ended the risk of divided loyalty by promptly terminating Disner's services. However, the concern for client confidences, like the attorney's duty to preserve those confidences, continues after the attorney's services end. Therefore, we examine the relationship between Disner and Mobil, conducted through Mobil’s counsel, to determine whether Disner should be deemed to have represented Mobil for purposes of a conflict of interest analysis.

CONSULTATION AND REPRESENTATION

In considering whether an attorney-client relationship has reached a point where the attorney can be subject to disqualification for a conflict of interest, we begin with the relationship's early stages, as noted in *Beery v. State Bar*:“The fiduciary relationship existing between lawyer and client extends to preliminary consultations by a prospective client with a view to retention of the lawyer, although actual employment does not result. When a party seeking legal advice consults an attorney at law and secures that advice, the relation of attorney and client is established prima facie. The absence of an agreement with respect to the fee to be charged does not prevent the relationship from arising.”

The primary concern is whether and to what extent the attorney acquired confidential information. That question is not necessarily answered by the amount of time involved. “Even the briefest conversation between a lawyer and a client can result in the disclosure of confidences.” Consequently, a formal retainer agreement is not required before attorneys acquire fiduciary obligations of loyalty and confidentiality, which begin when attorney-client discussions proceed beyond initial or peripheral contacts. An attorney represents a client—for purposes of a conflict of interest analysis—when the attorney knowingly obtains material confidential information from the client and renders legal advice or services as a result.

The initial discussions between Disner and the Cohon and Gardner attorneys involved substantial amounts of material confidential information. Moreover, Disner did not receive the information about Mobil’s case theories, strategy, and analyses from a lay person who might or might not be knowledgeable about which matters were significant. Instead, after receiving the background information on the case, Disner participated in an extended briefing with the attorneys conducting Mobil’s defense against respondents' claims. Obviously, communications of that kind are likely to involve an efficient transfer of material confidential information and attorney work product.

The record here shows without contradiction that Disner received material confidential information concerning respondents’ claims against Mobil. In his first telephone conversation with one of Mobil's attorneys, Disner discussed the substantive allegations, the procedural status, and Mobil's theories of the case. During their luncheon meeting, Mobil's attorneys again briefed Disner on Mobil’s theories and on its attorneys' discovery strategy, analyses of the issues, and assessment of the state of the case. Moreover, he acted on some of that information and provided Mobil's attorneys with the results of his own research. Although Disner stated that he did not discuss “the merits” of the case with attorneys or employees of the Shapiro firm, the firm's declarations fail to establish that Mobil's confidences were unavailable to its adversaries' attorneys, or that effective screening procedures secured those confidences from disclosure.

Therefore, the undisputed facts established that, for purposes of a conflict of interest analysis, Disner represented Mobil. Consequently, Disner and the firm to which he was of counsel, the Shapiro firm, represented opposing parties in the same litigation. The potential for a breach of the duty of confidentiality, whether inadvertent or otherwise, is apparent. The record provides no basis for considering whether an ethical screen, or other means of protecting Mobil's confidences, could serve the same prophylactic purpose as disqualification. We turn, then, to the reasons for applying the rule of disqualification to attorneys of counsel to a firm.

IMPUTED DISQUALIFICATION AND “OF COUNSEL” ATTORNEYS

As amicus curiae, the State Bar of California, observes, “The ‘of counsel’ designation has, over the years, come to mean a variety of things in jurisdictions across the nation.” Attorneys who are of counsel to a firm may be permanent full-time practitioners who for various reasons are not on the traditional career path towards partnership in the firm. Of counsel attorneys also may be part-time affiliates of a firm who have other personal or professional commitments, or they may be potential partners brought into a firm for a probationary period.

The minimum requirements for designating an attorney in California as being of counsel to a firm are found among the standards for communications that presumptively violate the prohibition against false or deceptive communications: “A ‘communication’ which states or implies that a member or law firm is `of counsel' to another lawyer or a law firm unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and Professions Code sections 6160-6172) which is *close, personal, continuous, and regular.*"”

We agree with the State Bar's view that the essence of the relationship between a firm and an attorney of counsel to the firm "is the closeness of the `counsel' they share on client matters. Members of the public are encouraged to consult with those sharing an `of counsel' relationship with the expectation that the counselling resources of both are fully available to clients." The same view was reflected in the Bar Association of San Francisco's Formal Opinion No. 1985-1: “A firm which lists an attorney as ‘of counsel’ on its letterhead, shingle or listing is making an affirmative representation to its clients that the services of that attorney are available to clients of the firm."

As noted earlier, the need to protect client confidences can cause one attorney's conflict of interest disqualification to be imputed to other attorneys in the same firm. When attorneys presumptively share access to privileged and confidential matters because they practice together in a firm, the disqualification of one attorney extends vicariously to the entire firm.

The vicarious disqualification rule recognizes the everyday reality that attorneys, working together and practicing law in a professional association, share each other's, and their clients', confidential information. The expectation that attorneys associated together will share confidences is reflected in the American Bar Association Model Rules of Professional Conduct, rule 1.6, comment [8]: "Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers."

The close, personal, continuous, and regular relationship between a law firm and the attorneys affiliated with it as of counsel contains many of the same elements that justify the rule of vicarious disqualification applied to partners, associates, and members. An of counsel attorney, particularly one frequently in the firm's offices or in contact with the firm's attorneys, may be consulted on a variety of matters without being formally identified as co-counsel. This close, fluid, and continuing relationship, with its attendant exchanges of information, advice, and opinions, properly makes the of counsel attorney subject to the conflict imputation rule, regardless of whether that attorney has any financial stake in a particular matter.

We find persuasive amicus curiae the State Bar of California's conclusion in its 1993 ethics opinion on the subject: "[T]o the extent the relationship between a principal member [of the State Bar] or law firm and another member or law firm is sufficiently `close, personal, regular and continuous,' such that one is held out to the public as `of counsel' for the other, the principal and `of counsel' relationship must be considered a single, de facto firm for purposes of rule 3-310. Accordingly, if the `of counsel' is precluded from a representation by reason of rule 3-310 of the California Rules of Professional Conduct, the principal is presumptively precluded as well, and vice-versa." The American Bar Association Committee on Ethics and Professional Responsibility reached the same conclusion in its Formal Opinion No. 90-357: "There can be no doubt that an of counsel lawyer (or firm) is `associated in' and has an `association with' the firm (or firms) to which the lawyer is of counsel, for purposes of both the general imputation of disqualification ... and the imputation of disqualification resulting from former government service.... Similarly, the of counsel lawyer is `affiliated' with the firm and its individual lawyers for purposes of the general attribution of disqualifications under DR 5-105(d) of the Model Code." Notwithstanding the variations to be expected across the nation on any point of law, the prevailing view is that for purposes of disqualification, the of counsel attorney is considered to be affiliated with a firm so that the disqualification of one from representation must be imputed to the other.

In order to designate themselves as of counsel, attorneys must have close, personal, continuous, and regular relationships with their affiliated firms. Consequently, the attorneys brought together in these relationships frequently will have occasion to share client confidences in the course of exchanging advice and performing legal services for those clients. The fundamental nature of the relationship makes a presumption of shared confidences as appropriate for the of counsel attorney as it is for partners, associates, and members of law firms. From the clients' and the public's perspective, the of counsel attorney can hardly be distinguished from other attorneys who may be more closely tied to a firm financially. As a result, the need to preserve confidentiality and public confidence in the integrity of the legal profession and judicial process require that of counsel attorneys be regarded as the same as partners, associates, and members of law firms for conflict of interest issues.

In this case, the of counsel attorney obtained confidential information and provided legal services to Mobil. For conflict of interest purposes, the attorney's involvement went beyond initial or peripheral contacts and rose to the level for which fiduciary duties of confidentiality and loyalty properly can be imposed. This development meant that Disner and the Shapiro firm represented adversaries in the same litigation, with the concomitant potential for a breach of the duty of confidentiality.

Disner's conflict of interest must be imputed to the Shapiro firm because of the public designation of their relationship. Consequently, Disner's conflict of interest must inevitably lead to the Shapiro firm's vicarious disqualification from representing respondents to assure the preservation of Mobil's confidences and the integrity of the judicial process.

**Questions:**

1. Why did the Supreme Court hold that the Shapiro firm was disqualified from representing SpeeDee?
2. How could the Shapiro firm have avoided disqualification?
3. Could adopting a “firewall” have enabled the Shapiro firm to represent SpeeDee?

[***Kala v. Aluminum Smelting & Refining Company, Inc.*, 81 Ohio St. 3d 1 (1998)**](https://scholar.google.com/scholar_case?case=6669181594411401164)

**Summary:** Attorney Pearson and the Spangenberg law firm represented Kala in an action against his former employer, Aluminum Smelting. During Kala’s appeal, Pearson left Spangenberg and joined the Duvin firm, which represented Aluminum Smelting in the same action. Kala filed a motion to disqualify Duvin, which the Ohio Supreme Court granted despite Duvin’s efforts to firewall Pearson, because of the strong appearance of impropriety.

LUNDBERG STRATTON, J.

The issue before the court is whether a law firm should be automatically disqualified from representing a party when an attorney leaves his or her former employment with a firm representing a party and joins the law firm representing the opposing party, or whether that law firm may overcome any presumption of shared confidences by instituting effective screening mechanisms. Although this issue has been dealt with in many other jurisdictions, this is a case of first impression for Ohio. To fairly decide this issue, we must consider the Disciplinary Rules and Ethical Considerations in the Ohio Code of Professional Responsibility, competing public policy interests, and the guidance provided by federal case law.

ETHICAL PRINCIPLES

A fundamental principle in the attorney-client relationship is that the attorney shall maintain the confidentiality of any information learned during the attorney-client relationship. A client must have the utmost confidence in his or her attorney if the client is to feel free to divulge all matters related to the case to his or her attorney.

The obligation of an attorney to preserve the confidences and secrets of the client continues even after the termination of the attorney’s employment.

In addition, an attorney should avoid even the appearance of impropriety. Because of the importance of these ethical principles, it is the court's duty to safeguard the preservation of the attorney-client relationship. In doing so, a court helps to maintain public confidence in the legal profession and assists in protecting the integrity of the judicial proceeding.

When an attorney leaves his or her former employment and becomes employed by a firm representing an opposing party, a presumption arises that the attorney takes with him or her any confidences gained in the former relationship and shares those confidences with the new firm. This is known as the presumption of shared confidences. Some courts have held that such a change of employment results in an irrebuttable presumption of shared confidences that necessitates the disqualification of the attorney (primary disqualification) and the entire new firm (imputed disqualification).

CLIENT'S RIGHT TO CHOOSE COUNSEL

Balanced against the former client’s interest in preventing a breach of confidence is the public policy interest in permitting the opposing party's continued representation by counsel of his or her choice. Disqualification interferes with a client's right to choose counsel.

“Disqualification, as a prophylactic device for protecting the attorney-client relationship, is a drastic measure which courts should hesitate to impose except when absolutely necessary. A disqualification of counsel, while protecting the attorney-client relationship, also serves to destroy a relationship by depriving a party of representation of their own choosing.”

This issue has become increasingly important as the practice of law has changed. A review of the historical development of disqualification issues reveals the early conflicts created by the clash of the above principles.

HISTORY OF MOTIONS TO DISQUALIFY

Many of the early disqualification cases arose out of charges of conflict of interest where government attorneys left the public service and went into private practice. Early courts struggled with the need to fashion a rule that would preserve the confidences of the government client yet not discourage able attorneys from entering public service through fear of being locked forever into government service, unable to change positions.

“If past employment in government results in the disqualification of future employers from representing some of their long-term clients, it seems clearly possible that government attorneys will be regarded as ‘Typhoid Marys.’ Many talented lawyers, in turn, may be unwilling to spend a period in government service, if that service makes them unattractive or risky for large law firms to hire.”

As more and more private attorneys also began changing firms, motions to disqualify under the irrebuttable presumption of shared confidences increased, and inequities and abuses also began to surface. While some of these motions to disqualify were legitimate and necessary, such motions were also often misused to harass an opponent, disrupt the opponent's case, or to gain a tactical advantage, and therefore were viewed with increasing caution.

As a result, several federal cases began fashioning a way to deal with the competing interests caused by increased mobility of attorneys and the rise of motions to disqualify. The Court of Appeals for the Sixth Circuit in *Manning* summed up the changing practice of law as follows:

Perhaps these motions have become more numerous simply because the changing nature of the manner in which legal services are delivered may present a greater number of potential conflicts. Certainly, the advent of law firms employing hundreds of lawyers engaging in a plethora of specialties contrasts starkly with the former preponderance of single practitioners and small firms engaging in only a few practice specialties. In addition, lawyers seem to be moving more freely from one association to another, and law firm mergers have become commonplace. At the same time that the potential for conflicts of interest has increased as the result of these phenomena, the availability of competent legal specialists has been concentrated under fewer roofs.

Consequently, these new realities must be at the core of the balancing of interests necessarily undertaken when courts consider motions for vicarious disqualification of counsel.

As a result of the changing legal profession, federal courts and the ABA Model Rules of Professional Conduct began allowing the use of various mechanisms to isolate an attorney who had transferred employment. Although originally applied only to government attorneys, these mechanisms have now been extended to situations involving transfers of private counsel as well.

DEVELOPMENT OF STANDARDS FOR DISQUALIFICATION

Several federal courts in addressing both primary and imputed disqualification have devised a three-part test to determine whether disqualification is proper when one attorney leaves a firm and joins another firm representing an opposing party. We believe this test adequately covers many different scenarios and will give the courts of Ohio guidance on disqualification issues.

First, a court must determine whether a substantial relationship exists between prior and present representations. If there is no substantial relationship, then no ethical problem exists. For example, when an attorney had represented a client in a trademark infringement case, the Court of Appeals for the Sixth Circuit denied disqualification in a later unrelated civil RICO case.

Second, if a substantial relationship is found between the current matter and the prior matter, the court must examine whether the attorney shared in the confidences and representation of the prior matter. There is a presumption that such confidences would also be shared among members of the prior firm, but that presumption may be rebutted.

In *Freeman*, the Court of Appeals for the Seventh Circuit, in setting the rules on primary disqualification, instructed the trial court that it could “rely on any of a number of factors, among them being the size of the law firm, the area of specialization of the attorney, the attorney’s position in the firm, and the demeanor and credibility of witnesses at the evidentiary hearing.”

If the presumption of shared confidences within the prior firm is rebutted by such evidence, then there is again no need for primary disqualification, as there are no confidences to be shared. However, if that presumption is not rebutted, and the attorney does or is presumed to possess client confidences, primary disqualification results, and a presumption of shared confidences arises between the attorney and the members of the attorney's new firm. The issue then is whether a presumption of shared confidences will also disqualify the entire new firm (imputed disqualification). Kala implies that this presumption should be irrebuttable and that once an attorney, particularly one as involved in the case as Pearson was, moves to opposing counsel's firm, no steps can be taken to restore confidence so as to overcome the appearance of impropriety; the entire firm must be disqualified.

Some courts have taken this approach. New Jersey has refused to adopt the rebuttable-presumption approach, finding that there is no way to overcome the appearance of impropriety in a "side-switching attorney" case. The New Jersey courts cite the impossibility of proving when a breach has been made, as those lawyers within the new firm are least likely to divulge such information. Judge Orlofsky in Cardona explained:

"At the heart of every `side-switching attorney' case is the suspicion that by changing sides, the attorney has breached a duty of fidelity and loyalty to a former client, a client who had freely shared with the attorney secrets and confidences with the expectation that they would be disclosed to no one else. It is for this reason that the `appearance of impropriety doctrine' was adopted to protect the public, our profession, and those it serves. In short, this much maligned doctrine exists to engender, protect and preserve the trust and confidence of clients."

On the other hand, with the realities of modern-day practice, as discussed in the Manning case, such a hard-and-fast rule works an unfair hardship also. Ultimately, one must have faith in the integrity of members of the legal profession to honor their professional oath to uphold the Code of Professional Responsibility, safeguarded by the precautions required to rebut the presumption of shared confidences. If used properly, the process of screening attorneys who possess client confidences from other members of a firm can preserve those confidences while avoiding the use of the motion to disqualify as a device to gain a tactical advantage. Therefore, we believe that the fairer rule in balancing the interests of the parties and the public is to allow the presumption of shared confidences with members of the new firm to be rebutted.

Thus, the third part of the test on disqualification is whether the presumption of shared confidences with the new firm has been rebutted by evidence that a "Chinese wall" has been erected so as to preserve the confidences of the client.[[2]](#footnote-1) The Chinese wall is the specific institutional screening mechanisms that will prevent the flow of confidential information from the quarantined attorney to other members of the law firm.

Factors to be considered in deciding whether an effective screen has been created are whether the law firm is sufficiently large and whether the structural divisions of the firm are sufficiently separate so as to minimize contact between the quarantined attorney and the others, the likelihood of contact between the quarantined attorney and the specific attorneys responsible for the current representation, the existence of safeguards or procedures which prevent the quarantined attorney from access to relevant files or other information relevant to the present litigation, prohibited access to files and other information on the case, locked case files with keys distributed to a select few, secret codes necessary to access pertinent information on electronic hardware, instructions given to all members of a new firm regarding the ban on exchange of information, and the prohibition of the sharing of fees derived from such litigation.

A very strict standard of proof must be applied to the rebuttal of this presumption of shared confidences, however, and any doubts as to the existence of an asserted conflict of interest must be resolved in favor of disqualification in order to dispel any appearance of impropriety.

Some courts have held that unrebutted affidavits attesting to a Chinese wall are sufficient to prevent disqualification. However, we reject such a bright-line test, as the court should maintain discretion to weigh issues of credibility. The court should be free to assess the reputation of an attorney and law firm for integrity and honesty. The court should also be free to balance the appearance of impropriety against the protections of a Chinese wall. For example, suppose a sole practitioner representing a plaintiff switches sides to a five-person defense firm representing the opposing party, leaving his former client to seek new counsel. The appearance of impropriety in such a fact pattern may be impossible to overcome.

If applied properly, screening mechanisms to insulate a quarantined attorney from the rest of the firm can protect client confidences while allowing for attorney mobility and the right of a client to choose counsel.

ADDITIONAL FACTORS TO CONSIDER IN MOTIONS TO DISQUALIFY

In addition to the screening devices, there are other important factors to be considered by the trial court. First, the screening devices must be employed as soon as the disqualifying event occurs. Very few cases address how early the disqualifying event occurs. In the *Manning* case, a conflict arose with the attorney's former firm only after the attorney, with the former client's knowledge, had moved to an uninvolved law firm. In *Cromley*, the attorney and the new firm agreed that “absolutely nothing of a substantive nature regarding the instant lawsuit would occur until decisions were made and the clients were made aware of them.” Other cases reviewed have been silent as to the issue of when screening procedures were timely employed, although all cases agree that the screens must be in place when the attorney joins the firm. Instituting screens after a motion to disqualify is too late. Accordingly, a court must weigh the timeliness of the screening devices.

A second factor to consider is the hardship that a client would incur in obtaining new counsel if a motion to disqualify is granted. Hardship may be more of an issue if a conflict arose after a transfer. However, hardship may not carry much weight in a “side-switching” case. Ironically, where an attorney switches sides and joins an opposing counsel’s firm, the attorney has de facto deprived his or her first client of the attorney of that client's choice, namely himself or herself. If the attorney has been lead counsel, other counsel in the firm must spend time and effort to take over the lead. If no one remaining in the prior firm is able to handle the matter, or if the attorney was a sole practitioner, the former client must seek out new counsel and incur the burden and expense created by the switch. In this scenario, the departing attorney has created a competing hardship for his or her former client, and the claim by the new firm of hardship created by its own doing in accepting the new attorney into the firm may no longer be persuasive. These are matters that should be left to the trier of fact to weigh.

In addition, a law firm contemplating hiring counsel who had been directly involved on the opposing side also has a duty to disclose to its own client that such a hiring may place the firm in conflict and could result in disqualification. The law firm may have to subordinate its desire to augment its staff against its duties to its client and avoid placing the firm's interests above the client's interests.

Finally, the court should hold an evidentiary hearing on a motion to disqualify and must issue findings of fact if requested based on the evidence presented. Because a request for disqualification implies a charge of unethical conduct, the challenged firm must be given an opportunity to defend not only its relationship with the client, but also its good name, reputation and ethical standards. In *Analytica*, the Court of Appeals for the Seventh Circuit summarized the situation as follows:

An attorney’s and/or a law firm’s most valuable asset is their professional reputation for competence, and above all honesty and integrity, which should not be jeopardized in a summary type of disqualification proceeding of this nature. As court proceedings are matters of public record, a news media report concerning a summary disqualification order, based on a scant record of this type, can do irreparable harm to an attorney's or law firm's professional reputation. We must recognize that the great majority of lawyers, as officers of the court, do conduct themselves well within the bounds of the Code of Professional Responsibility.

THE REBUTTABLE-PRESUMPTION TEST FOR MOTIONS TO DISQUALIFY

In conclusion, we hold that in ruling on a motion for disqualification of either an individual (primary disqualification) or the entire firm (imputed disqualification) when an attorney has left a law firm and joined a firm representing the opposing party, a court must hold an evidentiary hearing and issue findings of fact using a three-part analysis:

(1) Is there a substantial relationship between the matter at issue and the matter of the former firm’s prior representation;

(2) If there is a substantial relationship between these matters, is the presumption of shared confidences within the former firm rebutted by evidence that the attorney had no personal contact with or knowledge of the related matter; and

(3) If the attorney did have personal contact with or knowledge of the related matter, did the new law firm erect adequate and timely screens to rebut a presumption of shared confidences with the new firm so as to avoid imputed disqualification?

APPLICATION OF TEST TO THIS CASE

Under the facts of this case, Pearson clearly met the substantial-relationship test and possessed client confidences, as he was the lead attorney on Kala's lawsuit. Thus, the first two parts of the test require disqualification of Pearson and raise a presumption in favor of disqualification of Duvin. No one disputes that Pearson, himself, cannot work further on the case.

Therefore, we must determine whether the entire firm should be disqualified under the third part of the analysis, imputed disqualification. The appellate court took evidence in the form of affidavits but denied the parties oral argument. The appellate order consisted of the following findings:

"Motion by appellant to disqualify counsel for defendants/appellees is granted. Appellee's new counsel shall file a notice of appearance on or before May 31, 1996."

Therefore, we must examine the record we have before us, which consists of exhibits and affidavits filed while the parties were briefing the disqualification question in the court of appeals.

Kala retained Pearson and the Spangenberg firm in 1993 as his attorneys. From 1993 through 1995, Kala trusted Pearson, relied upon him as his attorney, and disclosed all matters pertaining to his case involving his former employer, Aluminum Smelting. Pearson proceeded to file an appeal after the directed verdict and apparently even participated in a settlement conference with the Eighth District Court of Appeals on November 13, 1995. On January 8, 1996, Pearson obtained a continuance to file Kala's appellate brief. On January 22, 1996, Pearson left the Spangenberg firm and joined the Duvin firm, which was representing Aluminum Smelting and had been throughout the prior proceedings with Kala. The only conclusion that can be reached from the record is that Pearson was negotiating with Duvin while still actively representing Kala without disclosing to Kala his negotiations.

The appearance of impropriety is so strong that nothing that the Duvin firm could have done would have had any effect on Kala's perception that his personal attorney had abandoned him with all of his shared confidences and joined the firm representing his adversary while the case was still pending. No steps of any kind could possibly replace the trust and confidence that Kala had in his attorney or in the legal system if such representation is permitted. This is the classic "side-switching attorney" case.

We find that under this set of egregious facts, the appearance of impropriety was so great that the attempts made by Duvin to erect a Chinese wall were insufficient to overcome the appearance of impropriety. Accordingly, we affirm the disqualification ruling of the court of appeals.

Questions:

Further Reading:

1. Mr. Fleischmann's personal participation in the Buffalo litigation was minimal, and we are confident that he would make every effort to disassociate himself from both lawsuits and would not divulge any information that came to him concerning either. However, we cannot impart this same confidence to the public by court order. [↑](#footnote-ref-0)
2. “Chinese wall" has become the legal term to describe a “procedure which permits an attorney involved in an earlier adverse role to be screened from other attorneys in the firm so as to prevent disqualification of the entire law firm simply because one member of firm previously represented a client who is now an adversary of the client currently represented by the firm.” Black's Law Dictionary (6 Ed.Rev.1990) 240. This term refers historically to the Great Wall of China, which served ancient Chinese emperors as a barrier to invasion. Ironically, however, the Great Wall of China was of limited military value. The concept is also referred to in cases and commentary as "screening devices," "ethical screens," or "institutional mechanisms for screening." [Editor’s note: Screening procedures are now typically called “firewalls.”] [↑](#footnote-ref-1)