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The Former Client's Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly

Steven H. Goldberg*

INTRODUCTION

Disqualification of counsel for conflict of interest was once a rare court action used to enforce the Canons of Ethics and to protect the image of the profession. It was of little interest to commentators, evoking only an occasional concern for the conflict problems of the former government lawyer.¹ The 1953 landmark successive conflict disqualification decision in *T.C. Theatre Corp. v. Warner Bros. Pictures*² initially received only footnote attention in the scholarly journals.³ Two years later the seminal imputed disqualification decision in *Laskey Bros. v. Warner Bros. Pictures*⁴ escaped notice entirely. As recently as 1969, the American Bar Association's (ABA) Code of Professional Responsibility added little about conflict of interest to its 1928 Canons of Ethics.⁵

* Associate Dean, University of Minnesota Law School. I am indebted to my colleagues Victor Kramer, John Matheson, and Carol Rieger for their encouragement and for their insights and comments on an earlier draft of this article. I would also like to thank Cathy Hoffman, class of 1987, University of Minnesota Law School, for her valuable assistance.

1. See Davis, *The Federal Conflict of Interest Laws*, 54 COLUM. L. REV. 893, 908-11 (1954); Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657 (1957); McElwain & Vorenberg, *The Federal Conflict of Interest Statutes*, 65 HARV. L. REV. 955, 970-74 (1952).

2. 113 F. Supp. 265 (S.D.N.Y. 1953).

3. See, e.g., Note, *Disqualification of Attorneys for Representing Interests Adverse to Former Clients*, 64 YALE L.J. 917, 917 n.1, *passim* (1955) (in response to Consolidated Theatres v. Warner Bros. Circuit Management Corp. (*In re Proceedings to Disqualify Nickerson*), 216 F.2d 920 (2d Cir. 1954)).

4. 224 F.2d 824 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956).

5. The 1969 Code deleted the Canons' reference to former clients and mentioned the former government lawyer only in disciplinary rules attached to a Canon entitled "Avoiding Even the Appearance of Professional Impropriety." See CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1969). Disciplinary Rule 9-101(B) provided: "A lawyer shall not accept private employment in a

By 1984, however, the conflict of interest disqualification motion was infamous. The Court of Appeals for the District of Columbia deplored "[t]he tactical use of motions to disqualify counsel in order to delay proceedings, deprive the opposing party of counsel of its choice, and harass and embarrass the opponent."⁶ The tactic was "so prevalent in large civil cases in recent years as to prompt frequent judicial and academic commentary."⁷ The United States Supreme Court did not quarrel with the court of appeals' characterization of lawyer disqualification motions as a "dangerous game."⁸

The fifteen-year journey from ethical equanimity to procedural pandemonium did not travel a path of new law. It ran on a roadway of new reality. The number of lawyers in the United States nearly doubled from 355,000 in 1969 to 649,000 in 1984.⁹ The number and size of large law firms grew exponentially.¹⁰ Mergers, split-offs, and lateral moves by lawyers between firms have become so common that the prominent lawyer newspapers reserve a column for weekly reports of the most noteworthy rearrangements.¹¹

The traditional conflict of interest rule, prohibiting representation of adverse interests in the same matter, caused occasional and inadvertent difficulty for the newly mobile lawyers and the megafirms they joined and left.¹² The real problem,

matter in which he had substantial responsibility while he was a public employee." *Id.* DR 9-101(B).

6. *Koller v. Richardson-Merrell, Inc.*, 737 F.2d 1038, 1051 (D.C. Cir. 1984), *vacated for lack of jurisdiction*, 472 U.S. 424 (1985) (order disqualifying counsel in a civil case not a collateral order subject to immediate appeal as a final judgment).

7. *Koller*, 737 F.2d at 1051.

8. *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 436 (1985) (quoting *Koller*, 737 F.2d at 1051).

9. Curran, *American Lawyers in the 1980s: A Profession in Transition*, 20 LAW & SOC'Y REV. 19, 20 (1986).

10. In his 1978 article, Cantor demonstrates a portion of the growth and marvels at the ability of firms to grow past the 200-lawyer size. See Cantor, *Law Firms are Getting Bigger . . . and More Complex*, 64 A.B.A. J. 215 (1978). The growth in the decade following Cantor's article, as chronicled each fall in the *National Law Journal*, makes 200-lawyer firms common and at best only modestly large. In 1986 the largest firm, Baker & McKenzie, had 808 lawyers in 31 cities throughout the world. See *The NLJ 250*, Nat'l L.J., Sept. 22, 1986, at S-4. Ninety firms had more than 200 lawyers. *Id.*

11. E.g., *Lateral Moves*, Nat'l L.J., Nov. 2, 1987, at 2 (regular feature column).

12. See, e.g., *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1318 (7th Cir.) (disqualification of large multi-city firm in antitrust suit), *cert. denied*, 439 U.S. 955 (1978).

however, was the successive conflict time bomb planted in *T.C. Theatre* and triggered by the imputed disqualification approved in *Laskey*. The *T.C. Theatre* restriction on a lawyer working against a former client in a substantially related matter, coupled with application of that disqualification to all other lawyers in the firm as mandated by *Laskey*, created a formidable weapon for the dangerous game of lawyer disqualification in a world of large firms and mobile lawyers.

The successive conflict and imputed disqualification problems have not gone unnoticed—only unsolved. Courts have reinterpreted the original doctrines, trying to make them work in a new, more complex world. Commentators have manipulated and explained the rules attempting to balance the perceived competing policy and doctrinal interests.¹³ In 1983,

13. Recent commentary has focused as much on successive conflict as almost any ethics topic. Despite the plethora of articles, however, no one has challenged the bases for the two decisions, *T.C. Theatre* and *Laskey*, that support the successive conflict rule. Except for articles concerned with federal conflict of interest, see *supra* note 1, the first consideration of successive conflict was a 1955 student note in the *Yale Law Journal*. See Note, *supra* note 3. With the exception of another Yale student piece a decade later, see Note, *Unchanging Rules in Changing Times: The Canons of Ethics and Intra-Firm Conflicts of Interest*, 73 YALE L.J. 1058 (1964), nothing was written about the subject until the mid-1970s.

For a sample of the successive conflict literature from roughly the last decade, see Greene, *Everybody's Doing It—But Who Should Be? Standing to Make a Disqualification Motion Based on an Attorney's Representation of a Client with Interests Adverse to Those of a Former Client*, 6 U. PUGET SOUND L. REV. 205 (1983); Liebman, *The Changing Law of Disqualification: The Role of Presumption and Policy*, 73 NW. U.L. REV. 996 (1979); Lindgren, *Toward a New Standard of Attorney Disqualification*, 1982 AM. B. FOUND. RES. J. 419; Morgan, *Conflicts of Interests and the Former Client in the Model Rules of Professional Conduct*, 1980 AM. B. FOUND. RES. J. 993; Natale, *The Super Law Firms and Disqualification in the Federal Courts: An Examination of City of Cleveland v. CEI*, 4 HAMLINE L. REV. 287 (1981); Talley, *Toward Chinese Walls: The Seventh Circuit Debates Rebuttable Presumptions in Vicarious Disqualification Cases*, 11 S. ILL. U.L.J. 59 (1986); Note, *Attorney's Conflict of Interests: Representation of Interest Adverse to that of Former Client*, 55 B.U.L. REV. 61 (1975); Note, *Motions to Disqualify Counsel Representing an Interest Adverse to a Former Client*, 57 TEX. L. REV. 726 (1979); Comment, *Disqualification of Counsel: Adverse Interests and Revolving Doors*, 81 COLUM. L. REV. 199 (1981); Comment, *The Ethics of Moving to Disqualify Opposing Counsel for Conflict of Interest*, 1979 DUKE L.J. 1310; Comment, *Attorney Disqualification and Work Product Availability: A Proposed Analysis*, 47 MO. L. REV. 763 (1982); Comment, *A Dilemma in Professional Responsibility: The Subsequent Representation Problem*, 50 U. MO. K.C.L. REV. 165 (1982); Comment, *The Chinese Wall Defense to Law-Firm Disqualification*, 128 U. PA. L. REV. 677 (1980).

Authors have also discussed the subject within larger ethics articles. See, e.g., Aronson, *Conflict of Interest*, 52 WASH. L. REV. 807, 833-48 (1977); Morgan,

only fourteen years after promulgating the second lawyer ethics code in half a century, the ABA passed the Model Rules of Professional Conduct.¹⁴ Unlike the 1969 Code, the 1983 Rules addressed both the successive conflict and imputed disqualification issues. The 1983 Rules recognized much of the previous decade's blitz of commentary and generally codified the disqualification rulings of a majority of courts by providing that a lawyer may not, in a substantially related matter, represent a client against a former client,¹⁵ and further that if one lawyer in a firm is disqualified from representation, all lawyers in that firm are disqualified.¹⁶

This Article contends that the successive conflict and imputed disqualification rules in combination are both bad law and bad ethics and that a different approach would be better for clients, for the adversary system, and for the profession. Part I of the Article analyzes the development of the successive conflict and the imputed disqualification doctrines. It demonstrates that two different, not always consistent, theories caused the successive conflict disqualification principles to develop erratically, resulting in a set of rules incompatible with either supporting rationale. Part II explains why the incorporation of that set of rules into the Model Rules of Professional Conduct leads to unreasonable results, demonstrates that successive conflict disqualification advances no adversary system interests, and offers alternative remedies. It suggests that the former client's disqualification gambit has become obnoxious to the reasonable operation of the civil justice system, clogging it with inappropriate disqualification motions that cause substantial individual and systemic damage. The Article concludes that courts should not hear, let alone grant, disqualification motions based on a lawyer's current opposition to a former client. It further urges the profession to withdraw those Model Rules concerned with successive conflict not only because they do not work well but also because they lack ethical justification.

The Evolving Concept of Professional Responsibility, 90 HARV. L. REV. 702, 728-31 (1977); Developments Note, *Conflicts of Interests in the Legal Profession*, 94 HARV. L. REV. 1244, 1315-34 (1981).

14. Although the Model Rules were amended in 1984, they continue to be known as the 1983 Model Rules. Citations in this Article to the current Model Rules use the date of amendment.

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

16. *Id.* Rule 1.10. For a more detailed discussion of the intricacies of the Model Rules regarding successive conflict, see *infra* text accompanying and following notes 131-34.

I. THE EVOLUTION OF SUCCESSIVE CONFLICT¹⁷ AND IMPUTED DISQUALIFICATION

Our adversary system of dispute resolution, with its substitution of lawyer adversaries for unschooled clients, is founded on the lawyer's absolute fidelity to the client.¹⁸ Indeed, every American ethical code since David Hoffman's fifty resolutions has characterized the lawyer as champion.¹⁹ Consequently, the system always condemned concurrent conflicts, such as simultaneous or successive representation of both sides of the same lawsuit, and simultaneous representation of a client in one lawsuit and opposition to that client in another unrelated lawsuit, as inconsistent with the lawyer's duty of undivided loyalty to

17. This Article uses the phrase *successive conflict* to mean the representation of a new client against a former client. It uses this oxymoron not because the phrase makes analytic sense, but because it has become embedded in the cases and the literature.

18. Lord Brougham's famous 1820 statement of the loyalty proposition may overstate the depth of commitment demanded of lawyers, but it accurately reflects the single-mindedness expected:

[A]n advocate, by the sacred duty which he owes his client, knows . . . [t]o save that client, by all expedient means, to protect that client, at all hazards and cost to all others . . . he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other

1 H. BROUGHAM, SPEECHES OF HENRY LORD BROUGHAM 63 (1841).

19. See 2 D. HOFFMAN, A COURSE OF LEGAL STUDY (2d ed. 1836). Describing the lawyer's ethical obligations of loyalty to the client, Hoffman's resolutions stated: "If I have ever had any connection with a cause, I will never permit myself (when that connection is for any reason severed) to be engaged on the side of my former antagonist." *Id.* at 753 (Resolution VIII). "To my clients I will be faithful; and in their causes, zealous and industrious." *Id.* at 758 (Resolution XVIII).

The profession's 1908 Canons of Professional Ethics, continuing Hoffman's theme of the lawyer as champion, provided: "The lawyer owes 'entire devotion to the interest of the client . . . ' to the end that nothing be taken or be withheld from him, save by the rules of law [T]he client is entitled to the benefit of any and every remedy . . . that is authorized" CANONS OF PROFESSIONAL ETHICS Canon 15 (1908).

The concept of the lawyer as champion also is prominent in the 1969 Code, as amended, as well as the 1983 Model Rules. For example, Ethical Consideration 5-1 provides:

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1 (1980); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (1984) ("Loyalty is an essential element in the lawyer's relationship to a client.").

the client.²⁰ The adversary system's absolute prohibition against simultaneous representation of opponents reflects a concept entrenched firmly in our societal morality.²¹ Loyalty has never merely facilitated some greater good. It has always been a good in its own right, a necessity of character, an ethical imperative.

Preservation of confidences, a concept almost as old in the law as loyalty, also was originally a matter of social morality—an ethical imperative for all good members of society. The attorney-client privilege, which “appear[ed] as unquestioned” early in Elizabeth I's reign,²² was based not on any need or right of the client, but rather on the “obligations of honor among gentlemen”—a class of Englishmen that included attorneys.²³ The lawyer's oath of honor and pledge of secrecy to the client, as necessary attributes of a gentleman, justified the attorney-client privilege.²⁴ The honor of gentlemen, however, was insufficient to sustain the law's deference to secrets at the expense of justice. By the mid-eighteenth century, the concept of gentlemen's honor was gone from the law,²⁵ although missed by many.²⁶

20. See, e.g., *In re Boone*, 83 F. 944 (C.C.N.D. Cal. 1897) (successive, same lawsuit); *Williams v. Reed*, 29 F. Cas. 1386 (C.C.D. Me. 1824) (No. 17,733) (simultaneous, different lawsuits); *Strong v. International Bldg., Loan & Inv. Union*, 183 Ill. 97, 55 N.E. 675 (1899) (simultaneous, same lawsuit). The advocate unencumbered by a concurrent interest that might diminish full vigor in representation constitutes the hallmark of the adversary system.

Indeed, lawyer conflicts of interest were explicitly prohibited by statute as early as the London Ordinance of 1280. 2 MUNIMENTA GILDHALL LONDONIENSIS pt. 2, at 596-97 (H. Riley ed. London 1860). The operation of the adversary system assumes the resolution of truth by a neutral party upon the hearing of opposing sides.

21. See *Exodus* 20:3 (King James) (“Thou shalt have no other gods before me.”); *Matthew* 6:24 (King James) (“No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other.”).

22. 8 WIGMORE, EVIDENCE § 2290, at 542 (McNaughton rev. ed. 1961).

23. *Id.* § 2286, at 530.

24. *Id.* § 2286, at 530, § 2290, at 543.

25. See, e.g., *The Trial of James Hill*, reprinted in 20 A COMPLETE COLLECTION OF STATE TRIALS 1318, 1362 (T. Howell ed. London 1816) (1777) (“[I]f this point of honour was to be so sacred . . . that a man . . . not be at liberty to disclose it, the most atrocious criminals would every day escape punishment; and therefore it is that the wisdom of the law knows nothing of that point of honour.”).

26. For example, one judge lamented that “[i]t is indeed hard in many cases to compel a friend to disclose a confidential conversation; and I should be glad if by law such evidence could be excluded.” *Wilson v. Rastall*, 100 Eng. Rep. 1283, 1287, 4 Term Rep. 753, 759 (1792).

The attorney-client privilege did not, however, expire with the gentleman's privilege. A new, utilitarian theory that "looked to the necessity of *providing subjectively for the client's freedom of apprehension* in consulting his legal advisor" arrived to support the privilege.²⁷ Despite the doctrinal substitution of freedom of apprehension for gentlemen's honor, the language of the latter did not quickly vanish.²⁸ Loyalty language lingered in the case law²⁹ and was incorporated into early

27. 8 WIGMORE, *supra* note 23, § 2290, at 543 (emphasis added). *See generally id.* § 2291, at 545-54 (explaining fully the policy underlying the modern privilege). Wigmore asserts that the explanation given by Mounteney in *Annesley v. Earl of Anglesea* provided one of the foremost statements of the new theory supporting the privilege:

[A]n increase of legal business, and the inabilities of parties to transact that business themselves, made it necessary for them to employ . . . other persons who might transact that business for them; that this necessity introduced with it the necessity of what the law hath very justly established, an inviolable secrecy to be observed by attorneys, in order to render it safe for clients to communicate to their attorneys all proper instructions for the carrying on those causes which they found themselves under a necessity of intrusting to their care.

Id. § 2291, at 546 (quoting *Annesley v. Earl of Anglesea*, reprinted in 17 A COMPLETE COLLECTION OF STATE TRIALS 1139, 1241 (T. Howell ed. London 1816) (1743)).

McCormick states the modern theory of the privilege and confidences succinctly:

This was the theory that claims and disputes which may lead to litigation can most justly and expeditiously be handled by practised experts, namely lawyers, and that these experts can act effectively only if they are fully advised of the facts by the parties whom they represent. Full disclosure will be promoted if the client knows that what he tells his lawyer cannot, over his objection, be extorted in court from the lawyer's lips.

E. CLEARY, MCCORMICK ON EVIDENCE § 87, at 204-05 (3d ed. 1984).

28. Wigmore quotes Gilbert's eighteenth century evidence treatise to demonstrate that the loyalty foundation for the gentleman's honor doctrine was often mingled with, and thus confused the development of, the modern theory that the privilege facilitates consultation by giving the client freedom of apprehension:

After the retainer, they are considered as the same person with their clients and are trusted with their secrets, which without a breach of confidence cannot be revealed, and without such sort of confidence there could be no trust or dependence on any man, nor any transacting of affairs by the ministry or mediation of another; and therefore the law in this case maintains such sort of confidence inviolable.

8 WIGMORE, *supra* note 22, § 2290, at 543 n.3 (quoting G. GILBERT, THE LAW OF EVIDENCE 138 (London ed. 1756)).

29. *See, e.g., United States v. Costen*, 38 F. 24 (C.C.D. Colo. 1889). A famous loyalty-based disbarment action in which a lawyer secretly tried to switch sides, *Costen* helped to perpetuate the loyalty language of confidences by describing Costen's disloyalty in terms of one of its consequences—the sharing of secrets:

[I]t is the glory of our profession that its fidelity to its client can be

ethical statements of the profession's concern for confidences.

For example, the ABA's first formulation of professional ethics refers to confidentiality only as a consequence of the requirement of undivided fidelity. This single concern for confidentiality, found in Canon 6, prepared the way for courts to extend the ethical duty of loyalty beyond the expiration of the attorney-client relationship and to thereby create the successive conflict. Canon 6 proclaimed: "The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."³⁰

A. *T.C. THEATRE AND LASKEY: THE ODD COUPLE'S*
APPROACHES TO CANON 6

In 1953 Judge Weinfeld relied on Canon 6 to resolve the problem of a lawyer representing an interest adverse to a former client. In *T.C. Theatre Corp. v. Warner Bros. Pictures*,³¹ Thomas Cooke, a lawyer who had previously defended Universal Pictures against antitrust conspiracy charges, represented the operator of a chain of theaters seeking antitrust damages from Universal.³² Although concerned with the preservation of confidences, Judge Weinfeld based his decision to disqualify Cooke on a loyalty rationale,³³ adopting the unending fidelity

depended upon; that a man may safely go to a lawyer and converse with him upon his rights or supposed rights in any litigation with the absolute assurance that that lawyer's tongue is tied from ever disclosing it; and any lawyer who proves false to such an obligation, and betrays or seeks to betray any information or any facts that he has attained while employed on the one side, is guilty of the grossest breach of trust.

Id. at 24.

30. CANONS OF PROFESSIONAL ETHICS Canon 6 (1908).

31. 113 F. Supp. 265 (S.D.N.Y. 1953).

32. In addition to Universal, Cooke also sought damages from seven other motion picture producers and distributors on behalf of his client. *Id.* at 267.

33. The court, demonstrating its concern for confidences, stated that "[m]atters disclosed by clients under the protective seal of the attorney-client relationship and intended in their defense should not be used as weapons of offense." *Id.* at 269. The Canons of Professional Ethics contained a specific provision—Canon 37, "Confidences of Client"—designed to preserve client confidences which could have formed the basis for the court's decision to disqualify Cooke. Canon 37 provided: "The duty to preserve his client's confidences outlasts the lawyer's employment A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client." CANONS OF PROFESSIONAL

position of Canon 6: "A lawyer's duty of absolute loyalty to his client's interests does not end with his retainer. He is enjoined for all time . . . from disclosing matters revealed to him by reason of the confidential relationship."³⁴

Judge Weinfeld's opinion reads as if he intended to adopt Canon 6 as written, prohibiting any representation "adversely affecting *any interest* of the client with respect to which confi-

ETHICS Canon 37 (1951). The court, however, consciously avoided the invitation to decide the case under Canon 37 and relied instead on Canon 6, "Conflicting Interests," and its fidelity language. *T.C. Theatre*, 113 F. Supp. at 271. Judge Weinfeld acknowledged that "an important purpose of the rule of secrecy" is "to encourage clients fully and freely to make known to their attorneys all facts pertinent to their cause." *Id.* at 269. He was, therefore, aware of the freedom of apprehension theory of the privilege, but he was unwilling to identify that, rather than loyalty, as the foundation for the Canon 6 concern for confidences.

Judge Weinfeld further demonstrated his reliance on loyalty as the justification for the protection of confidences by his use of precedent. Four of the five cases cited as authority for the rule proscribing a subsequent adverse representation substantially related to a former representation were pure loyalty matters, in which the lawyers were prohibited from turning against a client in the *same* matter—the classic adversary system loyalty problem. *See id.* at 268 (citing *Porter v. Huber*, 68 F. Supp. 132 (W.D. Wash. 1946) (defendant's attorneys disqualified because they had been counsel for government agency bringing action at or shortly before its filing); *In re Maltby*, 68 Ariz. 153, 202 P.2d 904 (1949) (attorney reprimanded for representing husband in attempt to modify child custody following representation of wife in divorce action); *People v. Gerold*, 265 Ill. 448, 107 N.E. 165 (1914) (failure to disqualify prosecution attorney, who had previously represented and advised criminal defendant regarding same general matters for which he was indicted, is reversible error); *Federal Trust Co. v. Damron*, 124 Neb. 655, 247 N.W. 589 (1933) (attorney may not represent parties challenging validity of trust agreement which attorney drew up for former client, even though former client was deceased)).

Ironically, the single authority concerning confidences in a subsequent adverse representation cited by Judge Weinfeld, *Watson v. Watson*, 171 Misc. 175, 11 N.Y.S.2d 537 (N.Y. Sup. Ct. 1939), would not meet the Second Circuit's current interpretation of Judge Weinfeld's substantial relationship test and thus would not require disqualification. *See infra* notes 74-89 and accompanying text. *Watson* involved disqualification of the wife's lawyer in her action of annulment against her husband for fraud in asserting that he was a man of good character. The wife's lawyer had represented the husband in defense of a criminal charge years earlier. The court based its disqualification decision on the proposition that a court would not prohibit representation against a former client unless the lawyer obtained information prejudicial to the former client in the present case. *Watson*, 171 Misc. at 176, 11 N.Y.S.2d at 538 (citing *E. WEEKS, WEEKS ON ATTORNEYS AT LAW* § 271, at 455, § 279, at 466 (1878)). The *Watson* court, therefore, permitted disqualification even though the identity of the issues involved in the former criminal matter and the current annulment action was not patently clear.

34. *T.C. Theatre*, 113 F. Supp. at 268.

dence has been reposed.”³⁵ His phrasing, however, led to a different rule: “[W]here *any substantial relationship* can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited.”³⁶

Two years after *T.C. Theatre*, in *Laskey Bros. v. Warner Bros. Pictures*,³⁷ the Second Circuit faced the same issue of protecting an adverse party's confidences. As presented, the problem had a new twist: the target of the disqualification motions had never represented any of the parties. The plaintiff's lawyer, Arnold Malkan, sued Warner Brothers and others in two separate civil antitrust cases.³⁸ Malkan had started the *Laskey* case while partners with David Isacson, a lawyer who had represented Warner Brothers while at another firm. The *Laskey* court disqualified Malkan, holding that there was an irrebuttable presumption that partners share confidential information. Because Isacson would have been barred from representation, his partner Malkan was disqualified.³⁹ The court had no strong case precedent for either barring a disqualified lawyer's partner⁴⁰ or for an irrebuttable shared confi-

35. CANONS OF PROFESSIONAL ETHICS Canon 6 (1951) (emphasis added). Judge Weinfeld stated:

In cases of this sort, the Court must ask whether it can reasonably be said that in the course of the former representation the attorney might have acquired information related to the subject of his subsequent representation. If so, then the relationship between the two matters is sufficiently close to bring the later representation within the prohibition of Canon 6.

T.C. Theatre, 113 F. Supp. at 269.

36. *T.C. Theatre*, 113 F. Supp. at 268 (emphasis added). Judge Weinfeld stated that “[t]his salutary principle is summed up in Canon 6.” *Id.*

37. 224 F.2d 824 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956).

38. Warner Brothers's motions to disqualify Malkan in both cases were consolidated for hearing. *Id.* at 825.

39. *Id.* at 827.

40. The court cited *Consolidated Theatres v. Warner Bros. Circuit Management Corp.*, 216 F.2d 920 (2d Cir. 1954) and a 1955 Note, *see Note, supra* note 3, for the proposition that all partners are barred from representation when one is disqualified. *Laskey*, 224 F.2d at 826. The *Consolidated Theatres* court disqualified a lawyer and his partner, but the lawyers never raised the separate issue of the partner's disqualification and the court never discussed it. The single sentence in the Note regarding imputed disqualification cited two cases in which the proposition was stated as dictum. *See Note, supra* note 3, at 920. In one case the issue was not raised, but the court assumed that imputed disqualification was appropriate as if the issue had been raised. *Christian v. Waialua Agric. Co.*, 30 Haw. 533, 551 (1928). In the second case, a disbarment proceeding, the facts did not raise the issue at all, but the court nevertheless stated the matter as obiter dictum. *In re Cowdery*, 69 Cal. 32, 63, 10 P. 47, 65 (1886).

dences presumption.⁴¹ It relied, therefore, on what it contended was the underlying rationale for both Canons 6 and 37: preserving a client's freedom of apprehension in disclosing confidences to a lawyer.⁴² That rationale, according to the court, justified extending the Canons' prohibitions beyond the lawyer who had received the confidence to the lawyer's partners as well.⁴³

The court refused, however, to make the presumption of shared confidences irrebuttable in every situation because the chain of disqualification would never end.⁴⁴ Consequently, the court did not disqualify Malkan from the second case, an identical antitrust action against Warner Brothers. Unlike *Laskey*, that litigation had come to Malkan's firm after Isacson had left. The court explained the difference by saying that once the partnership was over, the presumption of confidence sharing "becomes logically less compelling and should therefore become rebuttable."⁴⁵

41. In *T.C. Theatre* Judge Weinfeld rejected a theory of presumed sharing of confidences. In addition to Cooke, the moving party asked Judge Weinfeld to disqualify the law firm that had hired Cooke to work with it on behalf of T.C. Theatre. Not only was Judge Weinfeld unwilling to bar lawyers associated with the disqualified lawyer by finding an irrebuttable presumption of shared confidences, he was unwilling to find any presumption at all. He stated:

Movant . . . presses upon the Court a "presumption" that [Gorfinkle & Adler] must have retained Cooke in order to make use of confidential information he received in the course of his former employment. It is not clear why [the court] should presume the attorneys have acted unethically. On the contrary, [the court] would presume that messrs. Garfinkle & Adler had no such motivation. Cooke was probably retained for the same reason that Universal retained him in the Paramount case—because of his special expertise in antitrust matters.

T.C. Theatre, 113 F. Supp. at 272.

42. See *Laskey Bros. v. Warner Bros. Pictures*, 224 F.2d 824, 827 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956).

43. The court explained: "Such a result, although an extension of the literal wording of Canons 6 and 37 of the Canons of Professional Ethics of the American Bar Association, is necessary to facilitate maximum disclosure of relevant facts on the part of clients." *Id.* at 827.

44. *Id.*

45. *Id.* The applicability of this assertion in *Laskey* is not clear. Malkan represented Laskey Brothers and Austin Theater in two separate antitrust suits against Warner Brothers. Warner's motions to disqualify Malkan in both cases were consolidated for hearing. The court disqualified Malkan from the Laskey litigation, but not from the Austin Theaters suit. See *id.* Yet, the confidences and secrets held by Malkan were equally useful in both cases because the defendant was the same in both cases. If the court meant to suggest that there was greater coincidence of opportunity with possible motive to disclose a confidence when the lawsuit and the partner were at the firm simultaneously, the court did not say so.

Although both *T.C. Theatre* and *Laskey* involved Canon 6 and the use of disqualification to protect the sanctity of prior confidences, they based the disqualifications on different analyses.⁴⁶ The *T.C. Theatre* court identified loyalty as the rationale for Canon 6 and as the appropriate approach to protection of confidences. The *Laskey* court, however, considered the client's freedom of apprehension in consulting with counsel the appropriate approach, extending Canons 6 and 37 beyond their plain meaning to include associates of the lawyer to whom the disclosures were made.

B. THE *STANDARD OIL* CHANGE IN *T.C. THEATRE'S*
SUBSTANTIAL RELATIONSHIP RULE: LESS LOYALTY,
MORE CONFIDENCE

The *T.C. Theatre* court used the phrase *substantial relationship* to explain Canon 6's application of a loyalty obligation to a former client and to establish the condition of proof that required disqualification. Once the substantial relationship between the former and subsequent matters was demonstrated, disqualification followed. The court developed the substantial relationship test, in part, from a concern that the client's attempt to demonstrate his former lawyer's knowledge of confidential information would require disclosure of that information, defeating the purpose of the disqualification motion.⁴⁷ The court therefore assumed that the client had disclosed confidences relevant to the subject matter of the first suit during the former representation.⁴⁸ Judge Weinfeld used the finding of substantial relationship to foreclose a defense to disqualification based on the nonacquisition of confidential information.

Since *T.C. Theatre*, however, many courts have used the substantial relationship test merely to shift the burden of proof in successive conflict disqualification cases. In *United States v. Standard Oil Co.*,⁴⁹ the government alleged that Standard had overcharged in Marshall Plan transactions financed by the Economic Cooperation Administration (ECA). Standard was repre-

46. In contrast to *T.C. Theatre*, the duties of loyalty and fidelity were never mentioned in the *Laskey* court's discussion of the proper presumptions regarding the sharing of confidential information that might lead to disqualification. *Id.*

47. *T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265, 269 (S.D.N.Y. 1953).

48. *Id.* at 268.

49. 136 F. Supp. 345 (S.D.N.Y. 1955).

sented by a Sullivan & Cromwell partner who had been the General Counsel in the ECA's Paris office during the time of the alleged overcharges. To avoid disqualification and to accommodate circumstances different from those faced in *T.C. Theatre*—namely, that a former government lawyer was the target of the disqualification motion—Judge Kaufman had to dilute the effect of *T.C. Theatre*'s almost total prohibition on representation against a former client. In doing so he had to disconnect the substantial relationship test from its loyalty base.⁵⁰ To facilitate the disconnection, Judge Kaufman decided that preservation of confidences, rather than loyalty, was the value to protect.⁵¹ He looked at the nature of the first attorney-client relationship to determine whether there was a risk that the lawyer received confidences that might be used in the second representation.⁵² The court thus reduced the substantial relationship test from a description of the condition that prohibited subsequent representation to a mere burden-shifting device justifying “an *inference* that confidential information was reposed.”⁵³ If the inference failed, the party seeking disqualification was “left with the burden of proving actual knowledge.”⁵⁴

Having disconnected substantial relationship from loyalty and attached it to confidences, Judge Kaufman then had to confront *Laskey*'s irrebuttable presumption that members of a law firm share confidences.⁵⁵ He began by asserting that the pre-

50. If loyalty to a former client was the important value the substantial relationship test for disqualification was intended to vindicate, the former General Counsel of the ECA's Paris office could not possibly stay in the litigation against the ECA.

51. *Standard Oil*, 136 F. Supp. at 356. The court justified the disconnection of the substantial relationship rule from its loyalty base by alluding to the analytic difference between disqualifications based on loyalty and those based on confidences. Observing that almost all of the previous substantial relationship court decisions involved side switching by the lawyer in the same incident or trial or concerned documents drafted by the lawyer, the court stated that those loyalty cases were of “no guidance” for the *Standard Oil* facts. *Id.*

52. The *T.C. Theatre* court, on the other hand, had assumed that loyalty was the value in the attorney-client relationship to protect. Accordingly, the court examined the relationship between assumed confidences in the first representation and the subject matter of the second representation to determine whether the loyalty value was endangered.

53. *Standard Oil*, 136 F. Supp. at 354 (emphasis added).

54. *Id.*

55. The *Laskey* court's presumption was that “knowledge of one member of a law firm will be imputed by inference to all members of that firm.” *Id.* at 360 (citing *Laskey Bros. v. Warner Bros. Pictures*, 224 F.2d 824, 826-27 (2d Cir. 1955)).

sumption for private law firms relied on a premise that information flows freely within a partnership office.⁵⁶ The governmental situation, with large offices in different cities, divisions and subdivisions within those offices, and lawyers practicing in narrow areas, might, he suggested, justify a different assumption about the likelihood that a lawyer would review all of the files to which the lawyer had theoretical access.⁵⁷

In a discussion aimed at deciding whether the imputed knowledge theory applied to government lawyers,⁵⁸ the court pointed to Canon 36's language forbidding a former government attorney from accepting employment concerning a matter the lawyer had "investigated or passed upon" while with the government.⁵⁹ The Canon, without more, seemed to support allowing the former government lawyer to remain in the *Standard Oil* litigation, as long as he had neither investigated nor decided anything concerning the alleged overcharges while with the ECA. The court did not, however, use Canon 36 to avoid disqualification, emphasizing that undoubtedly the Canons intended "to avoid [even] the appearance that an attorney has taken a position contradictory to his former client's interests."⁶⁰ Thus, according to the court, Canon 36 did not insulate former government lawyers entirely from the *Laskey* presumption of shared confidences concerning matters *not* investigated or passed upon.⁶¹

Nevertheless, in language not limited to the government lawyer, the *Standard Oil* court refused to disqualify, thereby laying the foundation for the future debate over the rebuttability of the shared confidences presumption. The court stated that it was unlikely that the Canons of Professional Ethics were "intended to disqualify an attorney who *did not actually come into contact with materials substantially related to the controversy* at hand when he was acting as attorney for a former client now adverse to his position."⁶²

T.C. Theatre, Laskey, and Standard Oil set the stage for the

56. See *id.* Judge Kaufman cited no authority for this rather novel notion.

57. *Id.* at 361.

58. *Id.*

59. *Id.* Canon 36 provided that "[a] lawyer, having once . . . been in the public employ, should not . . . accept employment in connection with any matter which he investigated or passed upon while in such . . . employ." CANONS OF PROFESSIONAL ETHICS Canon 36 (1951).

60. *Standard Oil*, 136 F. Supp. at 361 (emphasis added).

61. *Id.* at 362.

62. *Id.* at 364 (emphasis added).

explosion of successive conflict disqualification motions that would begin years later. Those cases had identified the issues and factors that would be important to the successive conflict disqualification debate. Substantial relationship, although conceived as a phrase to explain the former client loyalty ethic in Canon 6, already had been used or misused as a presumption about confidences. Imputed disqualification, a doctrine devised to preserve the client's freedom of apprehension in sharing confidences with a lawyer, had previewed the compounding problem successive conflict disqualification would present for large law firms. Appearance of impropriety, a theory that would eventually support irrebuttable presumptions under the Model Code of Professional Responsibility, had already been recognized by courts as implicit in the Canons of Professional Ethics. Former government lawyers had been identified as a special group, and the courts' willingness to engage in a functional analysis of their situation carried the potential for changing the successive conflict analysis for private lawyers as well.

C. A NEW ETHICAL FOUNDATION FOR SUCCESSIVE CONFLICT:
CONFIDENCES AND THE APPEARANCE OF IMPROPRIETY

In promulgating its 1969 Code of Professional Responsibility, the ABA withdrew Canon 6 and its loyalty justification for prohibiting subsequent employment against former clients. The new Code, lacking an express prohibition of successive conflict, contained only an oblique reference to the issue in an Ethical Consideration under Canon 4's terse admonition that "[a] lawyer should preserve the confidences and secrets of a client."⁶³ Ethical Consideration 4-5 asked the lawyer to take "[c]are . . . to prevent the disclosure of the confidences and secrets of one client to another" and advised that "no employment should be accepted that might require such disclosure."⁶⁴ Canon 5 of the 1969 Code contained the conflict of interest discussion previously in Canon 6 but did not mention the successive conflict issue,⁶⁵ apparently because the problem of a former client's confidences was not a conflict problem. If former clients were a problem at all, they were a Canon 4 confidences and secrets problem.

Although the 1969 Code abandoned the loyalty justification for prohibiting successive conflict, Judge Kaufman, who had

63. CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1969).

64. *Id.* EC 4-5.

65. *See id.* Canon 5.

authored *Standard Oil* fourteen years earlier, rescued *T.C. Theatre's* substantial relationship-loyalty analysis by interpreting it into the 1969 Code. In *Emle Industries v. Patentex, Inc.*,⁶⁶ the plaintiff's lawyer in a patent suit had previously represented the defendant in a suit involving the same patents. The defendant moved to disqualify, and the plaintiff countered with a claim that the lawyer had received no confidential information from the defendant in the former matter.⁶⁷ To resurrect the *T.C. Theatre* substantial relationship-loyalty analysis, Judge Kaufman maintained that the prohibition against subsequent retainers in former Canon 6 was "implicitly incorporate[d]" into the new Canon 4's one-line admonition to preserve confidences and secrets.⁶⁸ The court contended that the underlying reason for preserving confidences—protecting a client's freedom of apprehension—demanded the result. If courts did not strictly enforce high ethical standards, clients would not discuss their problems freely because they would fear that information revealed one day could be used against them the next.⁶⁹

The plaintiff's contention that the lawyer had not received confidential information during the previous representation⁷⁰ forced Judge Kaufman to deal with his *Standard Oil* statement that the Canons of Professional Ethics probably were not intended to disqualify a lawyer who had not "actually come into contact with materials substantially related."⁷¹ To avoid allowing the *Emle Industries* plaintiffs an opportunity to demonstrate that their lawyer had in fact received no confidential information in the former representation and without Canon 6 to rely on, Judge Kaufman turned to the new Canon 9. He argued that Canon 9's prohibition of the appearance of impropri-

66. 478 F.2d 562 (2d Cir. 1973).

67. *Id.* at 572. The former representation had begun when one of Patentex's licensees asked if it could manufacture a particular stretch support stocking without infringing on a Kayser-Roth patent. *Id.* at 565. Patentex granted several licensees permission to manufacture, but indicated that Patentex would not defend them against any patent infringement suit by Kayser-Roth. *Id.* at 566. The licensees then hired Rabin to seek a declaratory judgment that the Kayser-Roth patent was invalid. Patentex and its parent, Burlington Industries, eventually joined the suit. The plaintiffs in *Emle Industries* contended that Rabin received no confidential information from Patentex, who was only a technical plaintiff in the first action, and that any information that might be helpful in the *Emle Industries* litigation was either contained in a stipulation or was public knowledge in the industry. *Id.* at 572.

68. *Id.* at 570.

69. *Id.*

70. *Id.* at 571.

71. *United States v. Standard Oil*, 136 F. Supp. 345, 364 (S.D.N.Y. 1955).

ety justified disqualification as strongly as the actual impropriety itself.⁷² Ignoring his own *Standard Oil* change, he thus reverted to the *T.C. Theatre* court's position, holding that the substantial relationship test created an irrebuttable presumption that confidences were acquired in the first representation.⁷³

D. *SILVER CHRYSLER: THE STANDARD OIL CHANGE FOR PRIVATE LAWYERS IN THE SECOND CIRCUIT*

The reconstruction of the original substantial relationship doctrine in *Emle Industries* lasted no longer than *T.C. Theatre's* broad prohibition against successive conflict. Under circumstances reminiscent of those that persuaded the *Standard Oil* court to change the nature of substantial relationship, the court in *Silver Chrysler Plymouth v. Chrysler Motors Corp.*⁷⁴ diluted the disqualification effect of *Emle Industries's* reconstructed substantial relationship test.⁷⁵

Silver Chrysler was the first important successive conflict case in which the imputed disqualification motion was based on

72. *Emle Industries*, 478 F.2d at 571. Judge Kaufman cited an ABA informal opinion which stated that "a lawyer should avoid representation of a party in a suit against a former client, where there may be the appearance of a possible violation of confidence, even though this may not be true in fact." *Id.* (quoting ABA Comm. on Professional Ethics, Informal Op. 885 (1965)).

Judge Kaufman would no doubt argue that the proof he allowed in *Standard Oil*—that the Washington and Paris offices of the ECA were separate—differed from the proof he refused in *Emle Industries*—that the lawyer did not actually hold confidential information from the previous employment. Whatever validity this distinction might have for determining whether confidences were reposed in the attorney, it is irrelevant to the Canon 9 issue of how the representation appears to others.

73. *Id.*

74. 518 F.2d 751 (2d Cir. 1975).

75. The harsh tone of the district court decision in *Silver Chrysler* differed significantly from the tone of the circuit court's opinion. The appellate court's closeness to its chief judge, whose *Emle Industries* decision was severely undercut by *Silver Chrysler*, and the district court's closeness with the changing practice of law may explain the tonal difference. Indeed, an entire section of the district court opinion concentrates on the "Dangers of Unnecessary Restrictions on Young Attorneys":

A concern both for the future of young professionals and for the freedom of choice of the litigant in specialized areas of law requires care not to disqualify needlessly. . . .

Changing times have resulted in continual modification of the practitioner's ethical . . . role[] Rules appropriate in guiding lawyers of several decades ago must be applied in light of current realities.

. . . The mode of assignment of work to young associates in modern large law firms make [sic] unreasonable a rule of disqualification

the lawyer's previous private employment. The Silver Chrysler dealership sued to enjoin Chrysler Motors from raising its rent in abrogation of a 1967 Dealer Relocation Agreement. From 1966 to 1969, Silver Chrysler's lawyer had been an associate with Kelley Drye, the law firm listed as counsel in Chrysler Motors's annual reports. During his thirty-two months with Kelley Drye, he had, among other things,⁷⁶ participated in discussions about procedural matters in the Chrysler Motors dealership litigation and had researched specific points of law in the dealership cases.⁷⁷ The plaintiffs argued that imputed disqualification was not appropriate because their lawyer, while at Kelley Drye, had neither worked on matters substantially related nor acquired confidential information from other lawyers working on matters substantially related.

Bypassing analyses under *T.C. Theatre-Emle Industries* or *Laskey*, either of which would have led to disqualification,⁷⁸ the

which would prevent them from ever litigating against clients of their former firm. . . .

The dangers are enhanced by an increasing trend towards concentration in the legal profession. . . .

. . . .
The problem is not limited to associates in large firms. It exists in smaller communities where a few law firms handle most of the commercial practice or in national firms of a modest size specializing in areas of law or commerce. . . .

. . . .
Antitrust implications in unduly restricting the work of the largest law firms' former associates are not insubstantial since these firms have as clients corporations that control a major share of the American economy. . . . The Canons of Ethics furnish no warrant for illegal restraints on trade.

Silver Chrysler Plymouth v. Chrysler Motors Corp., 370 F. Supp. 581, 589-91 (E.D.N.Y. 1973) (citations omitted), *aff'd*, 518 F.2d 751 (2d Cir. 1975).

As *Silver Chrysler* demonstrates, the gap between the substantial relationship theory and the reality of practice has always been more readily apparent to trial courts than to appellate courts. Similarly, the difference between the circumstances of the government lawyer and the assumptions of the substantial relationship finding was more apparent to District Court Judge Kaufman in *Standard Oil* than the difference between the circumstances of the large firm practitioner and the assumptions of the substantial relationship finding was to Circuit Court Judge Kaufman in *Emle Industries*. District Court Judge Weinstein, the trial judge in *Silver Chrysler*, saw the same gap that had impressed District Judge Kaufman. *Id.* at 588.

76. The lawyer had also defended Chrysler Motors in an antitrust suit and handled portions of a hotel eviction for Chrysler Motors's real estate subsidiary.

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

78. Had the *Silver Chrysler* court proceeded as *T.C. Theatre* and *Emle Industries* suggested, it would have analyzed the relationship between the Chrysler Motors matters at Kelley Drye and the present suit against Chrysler

Second Circuit affirmed the trial court's decision not to disqualify the lawyer and, in doing so, changed both the substantial relationship test and the irrebuttability of the presumption of shared confidences within a law firm. The court, relying on its analysis of previous Second Circuit successive conflict cases, began by redefining substantial relationship. In every case ordering disqualification, the similarity of the issues involved in the previous and contested representations was "patently clear."⁷⁹ The court therefore held that a substantial relationship existed only when the identity between the issues involved in the two matters was patently clear.⁸⁰

The court also changed the irrebuttable presumption that members of law firms share confidences among themselves. It purported to rely on *Standard Oil* and *Laskey* for the rule that the "inference . . . that an attorney . . . received confidential information transmitted by a client to the firm . . . is a rebuttable

Motors. The analysis would have assumed that confidential information about all of Kelley Drye's Chrysler Motors matters had come to the former associate. The court would then have determined whether those assumed confidences related to any Chrysler Motors interest involved in the present suit. If they had, the former Kelley Drye associate, now the plaintiff's lawyer, would have been disqualified. Under either the loyalty theory of *T.C. Theatre* or the appearance of impropriety theory of *Emle Industries*, the former associate's actual possession of confidences would have been irrelevant. Because Kelley Drye had handled dealership cases, its former associate would have been disqualified for successive conflict.

The court also might have proceeded solely as if the case presented a *Laskey* imputed disqualification problem. While *Laskey* involved former partners, its analysis is equally applicable to former associates. Had the court applied *Laskey*, it would have decided that "within the framework of [Kelley Drye] the fact of access to confidential information through the person of the [lawyer] with such specialized knowledge is sufficient to bar the [former associate] whether or not [he] actually profit[ed] from such access." *Laskey Bros. v. Warner Bros. Pictures*, 224 F.2d 824, 827 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956). The result would have been the same as under the substantial relationship analysis. That is, the court would have disqualified the former associate because he had access to information from other lawyers at Kelley Drye who had specialized knowledge of Chrysler Motors. The *Silver Chrysler* court could have justified its application of the *Laskey* doctrine to all lawyers currently or formerly at Kelley Drye by relying on the holding in *Consolidated Theaters v. Warner Bros. Circuit Management Corp.*, 216 F.2d 920 (2d Cir. 1954) that all partners are barred from representation when one is disqualified, and by recognizing that the presumption analysis depends on actual involvement, not on position as either associate or partner.

79. *Silver Chrysler*, 518 F.2d at 754.

80. *Id.* *Silver Chrysler's* departure from the *T.C. Theatre* view that there was a substantial relationship if a confidence from the first representation *might* matter in the second, could not have been more stark.

one,"⁸¹ ignoring *Emle Industries's* contrary conclusion. The Court misread *Laskey* in relying on that case for the rule that the presumption of shared confidences can be rebutted.⁸² In *Laskey* the only information disclosed to a firm by a client was the Warner Brothers information disclosed to Isacson while he was at his first firm. The *Laskey* court held the presumption *irrebuttable* that Isacson had shared that information with Malkan in their subsequent firm's representation of Laskey Brothers.⁸³ By both resurrecting *Standard Oil* and misreading *Laskey*, the court undermined the foundation for *Laskey's* automatic disqualification theory.

Equally important was the court's handling of *Emle Industries's* appearance of impropriety theory. The court rejected appearance as the determining factor in successive conflict cases. The court asserted that the refusal to disqualify would not create an appearance of impropriety.⁸⁴ Chrysler could not reasonably expect to foreclose all lawyers previously and currently with the firm who had represented Chrysler on unrelated matters from representing an opposing party.⁸⁵ Canon 9 was not "intended completely to override the delicate balance created by Canon 4."⁸⁶ After *Silver Chrysler* the appearance of improp-

81. *Id.*

82. The *Silver Chrysler* court never explained or justified its erroneous interpretation of *Laskey*. The court might have distinguished *Laskey* theoretically in a way that *Emle Industries* might have distinguished *Standard Oil*. Both the *Silver Chrysler* and *Emle Industries* courts could have argued that as to the rebuttability of the presumption of acquisition of confidences, there is a difference between disclosure by the client and repetition of a confidence by another lawyer in the firm. The operation of the adversary system depends on disclosure by the client, and courts should presume that such disclosure occurred. On the other hand, discussion of client confidences between members of a firm who are not working on the same matter, although not discouraged, is unlikely. At a minimum courts should allow a lawyer to prove that what is unlikely did not in fact happen. The *Silver Chrysler* court made no attempt to distinguish *Laskey* in this fashion.

83. *Laskey Bros. v. Warner Bros. Pictures*, 224 F.2d 824, 827 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956); see also *supra* text accompanying notes 37-45.

84. *Silver Chrysler*, 518 F.2d at 757.

85. *Id.*

86. *Id.* The trial court's rejection of Canon 9 as a basis for disqualification was more direct:

[C]omplexities of the factual determination to be made . . . should [not] be avoided by a decision couched in notions of possible appearance of impropriety. . . . The danger of damage to public confidence in the legal profession would be great if we were to allow unfounded charges of impropriety to form the sole basis for an unjust disqualification.

priety theory never again supported a successive conflict disqualification in the Second Circuit.

Silver Chrysler's patently clear test for defining substantial relationship and its rebuttable presumption of shared confidences dramatically changed future analysis of successive conflict-imputed disqualification cases.⁸⁷ Despite the increase in successive conflict motions, disqualifications declined in the Second Circuit after *Silver Chrysler*. Uncertainty about the ethical base for successive conflict disqualification was responsible, at least in part, for the Second Circuit's decision to stay out of the ethics business.⁸⁸ Instead, future Second Circuit disqualification analyses would focus on preserving the integrity of the trial process, leaving ethical conflicts to be "addressed by the 'comprehensive disciplinary machinery' of the state and federal bar."⁸⁹

E. OUTSIDE THE SECOND CIRCUIT: SUCCESSIVE CONFLICT WEST OF THE HUDSON

As the Second Circuit began to reduce the number of attorney disqualifications by tightening the criteria and rethinking the propriety of judicial enforcement of ethical norms, courts west of the Hudson⁹⁰ began to face the problem⁹¹ and to rediscover a flawed theory leading to successive conflict disqualification. Although the Sixth Circuit adopted the Second Circuit's

Silver Chrysler Plymouth v. Chrysler Motors Corp., 370 F. Supp. 581, 589 (E.D.N.Y. 1973), *aff'd*, 518 F.2d 751 (2d Cir. 1975).

The circuit court's less direct rejection of appearance of impropriety as a reason for disqualification was undoubtedly due to Chief Judge Kaufman's presence. Although the case cannot be reconciled with *Emle Industries*, Kaufman did not dissent.

87. See *infra* notes 107-09 and accompanying text.

88. See *Armstrong v. McAlpin*, 625 F.2d 433, 444 (2d Cir. 1980) (en banc) ("[T]he current uncertainty over what is 'ethical' underscores . . . the wisdom . . . of adopting a restrained approach that focuses primarily on preserving the integrity of the trial process."), *vacated on other grounds*, 449 U.S. 1106 (1981).

89. *Id.* at 446 (citation omitted).

90. Although the First Circuit and parts of the Third Circuit are also east of the Hudson river, the phrase *west of the Hudson* is used to contrast the relatively small corner of the nation in which the aforementioned major doctrinal development took place with the direction pursued by courts outside the Second Circuit.

91. The spate of successive conflict and imputed disqualification motions in the mid-1970s was undoubtedly related to the increased growth and entanglement of the legal profession. The number of motions continues to increase with the growth of large firm practice. The phenomenon of very mobile lawyers practicing in huge law firms on behalf of powerful clients is not limited to New York City, although it started there.

patently clear definition of substantial relationship,⁹² most circuits adopted the *T.C. Theatre* rule as interpreted into the 1969 Code by *Emle Industries*.⁹³ The Ninth Circuit's approach, typical of those adopting *T.C. Theatre*, focuses on the "probability that confidences were disclosed which could be used against the client in later, adverse representation."⁹⁴ It rejects the Second Circuit's requirement that issue identity be patently clear and instead holds that a substantial relationship exists if there is a strong relationship between the issues.⁹⁵

*Brennan's, Inc. v. Brennan's Restaurants*⁹⁶ exemplifies the substantial relationship theory used by courts west of the Hudson. *Brennan's* involved a lawyer who had previously represented all of the parties when they had worked together in a family restaurant business. The business was subsequently divided into two corporations. In a suit over the right to use vari-

92. *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 440 F. Supp. 193, 208 (N.D. Ohio 1976), *aff'd.*, 573 F.2d 1310 (6th Cir. 1977), *cert. denied*, 435 U.S. 996 (1978).

93. See, e.g., *EZ Paints Corp. v. Padco, Inc.*, 746 F.2d 1459, 1461 (Fed. Cir. 1984) (applying law of Eighth Circuit) (substantial relationship test satisfied when prior and present representation were same continuous case); *Analytica, Inc. v. NPD Research*, 708 F.2d 1263, 1266 (7th Cir. 1983) (substantial relationship test satisfied when attorney could have obtained confidential information in first representation that would be relevant in second); *Trone v. Smith*, 621 F.2d 994, 1000 (9th Cir. 1980) (substantial relationship test satisfied when a strong relationship exists between issues); *Brennan's, Inc. v. Brennan's Restaurants*, 590 F.2d 168 (5th Cir. 1979) (substantial relationship test satisfied when possibility confidential information was obtained suggests appearance of impropriety); *Akerly v. Red Barn Sys.*, 551 F.2d 539, 544 (3rd Cir. 1977) (substantial relationship test requires possibility that attorney acquired confidences in first representation that would be relevant in second representation).

The volume of successive conflict cases in the Second and Sixth Circuits, as compared to the rest of the country, suggests that courts decide about one-half of the cases under one approach to substantial relationship and one-half under another approach. The difference can be significant. Consider a lawyer who has in the past represented a client in a divorce action and is now suing that former client for defamation on behalf of a new client, claiming punitive damages. Does knowledge gained through divorce representation that the former client often flies off the handle and says irresponsible things (a secret), or knowledge of net worth (a confidence), disqualify the lawyer in the defamation suit? The Second and Sixth Circuits would probably not disqualify, because the identity between the issues involved in the divorce and defamation actions is not patently clear. On the other hand, courts elsewhere probably would disqualify because the information gained in the representation of the divorce action would likely be useful in the representation of the defamation suit.

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

95. *Id.* at 1000.

96. 590 F.2d 168 (5th Cir. 1979).

ous slogans associated with the original restaurant, the lawyer represented the defendants. When the plaintiffs moved to disqualify the lawyer, the defendants, relying on authority that the substantial relationship rule exists to protect confidences,⁹⁷ argued that he could not possess confidential information from the prior representation because joint clients cannot have confidences between them.⁹⁸

The court characterized the defendants' argument as interpreting "too narrowly an attorney's duty to 'preserve the confidences and secrets of a client.'"⁹⁹ The 1969 Code stated that the ethical confidential information rule did not depend on the nature or the source of the information.¹⁰⁰ Relying on that assertion, the court claimed that Ethical Consideration 4-5's admonition not to use information acquired during the representation to the client's disadvantage demonstrated that the drafters of Canon 4 intended to protect all knowledge acquired from a client, not just confidences or secrets.¹⁰¹ Having expanded the attorney's duty beyond a concern for confidences and secrets, the court disqualified the lawyer, despite his alleged lack of traditionally confidential information, on what would have been loyalty grounds had original Canon 6 remained.¹⁰² Instead, the court relied on Canon 9, arguing that "a client would feel wronged if an opponent prevailed against him with the aid of an attorney who [had] formerly represented the client in the same matter."¹⁰³ This concern, according to the court, implicated Canon 9's principle that attorneys "should avoid even the appearance of professional impropriety."¹⁰⁴

Similarly, most courts west of the Hudson speak as if the *actual* acquisition of confidential information is irrelevant to this loyalty or appearance of impropriety theory of successive conflicts.¹⁰⁵ They abandon that position without meaningful

97. *Id.* at 171 (citing *Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 252 (5th Cir. 1977)).

98. *Id.*

99. *Id.* at 171, 172 (quoting CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1969)).

100. CODE OF PROFESSIONAL RESPONSIBILITY EC 4-4 (1969).

101. *Brennan's*, 590 F.2d at 172.

102. *Id.*; see *supra* text accompanying note 30.

103. *Brennan's*, 590 F.2d at 172.

104. *Id.*

105. There have been more discussions than square holdings. See, e.g., *EZ Paintr Corp. v. Padco, Inc.*, 746 F.2d 1459, 1462 (Fed. Cir. 1984) (applying law of Eighth Circuit) (attorneys disqualified although they denied knowledge of confidences); *Analytica, Inc. v. NPD Research*, 708 F.2d 1263, 1266 (7th Cir. 1983) (irrelevant whether attorney actually obtained confidential information); *In re*

analysis, however, when the successive conflict involves imputed disqualification issues.¹⁰⁶ In a *Silver Chrysler* situation—a lawyer moving from a firm and representing a new client against the former firm's client—most circuits allow the lawyer to rebut the presumption that she actually acquired confidential information about the first firm's client.¹⁰⁷ Although these courts generally adopt a loyalty-based approach in successive conflict cases, they switch to a confidence-based approach in imputed disqualification cases. They attempt to justify this departure from the traditional substantial relationship-irrebuttable presumption approach by describing it as an "exception"¹⁰⁸ created by the Second Circuit when it developed its "peripheral representation" standard in *Silver Chrysler*.¹⁰⁹

The circuits that consider *Silver Chrysler* a peripheral rep-

Corrugated Container Antitrust Litig., 659 F.2d 1341, 1347 (5th Cir. 1981) (presumption that client confidences were shared among partners was irrebuttable); *Trone v. Smith*, 621 F.2d 994, 1001 (9th Cir. 1980) (ethical obligations require disqualification regardless of actual confidential information obtained); *Akerly v. Red Barn Sys.*, 551 F.2d 539, 542 (3rd Cir. 1977) (attorney disqualified when small chance existed that confidential information was obtained); *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 440 F. Supp. 193, 209 (N.D. Ohio 1976) (attorney not disqualified when affirmative evidence showed no confidential disclosure), *aff'd*, 573 F.2d 1310 (6th Cir. 1977), *cert. denied*, 435 U.S. 996 (1978).

106. See, e.g., *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 723 (7th Cir. 1982) (presumption that attorneys in law firm share confidences insufficient to support imputed disqualification); *Gas-A-Tron v. Union Oil Co.*, 534 F.2d 1322, 1324 (9th Cir. 1976) (refusal to disqualify because associate had not actually obtained any confidential information in first representation that would be relevant to second representation), *cert. denied*, 429 U.S. 861 (1976).

107. See, e.g., *Freeman*, 689 F.2d at 723 (presumption may be rebutted by clear and effective showing attorney had no knowledge of confidences and secrets of former firm's client); *Gas-A-Tron*, 534 F.2d at 1325 (presumption may be rebutted by showing attorney had not actually obtained any confidential information during first representation that would be useful in second representation).

The single exception may be the Eighth Circuit. In *Arkansas v. Dean Foods Products Co.*, 605 F.2d 380 (8th Cir. 1979), the court stated that the "attorney client relationship raises an irrefutable presumption that confidences were disclosed." *Id.* at 384 (citing *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 608 (8th Cir. 1977), *cert. denied*, 436 U.S. 905 (1978)). The statement, however, is dictum, and the court relied upon previous cases in which the same point was also made as dictum. See *Fred Weber*, 566 F.2d at 608; *In re Yarn Processing Patent Validity Litig.*, 530 F.2d 83, 89 (5th Cir. 1976). In *EZ Paintr*, the court determined that the Eighth Circuit would follow the great weight of authority holding the presumption rebuttable but acknowledged that *Dean Foods* creates doubt. *EZ Paintr*, 746 F.2d at 1461 & n.3.

108. *Analytica*, 708 F.2d at 1267.

109. See *Trone*, 621 F.2d at 998 n.3; *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 223 & n.1 (7th Cir. 1978).

representation exception use it to arrive at the same nondisqualification result.¹¹⁰ Those circuits that adopt the exception, however, have not examined closely whether *Silver Chrysler's* analytic foundation supports an exception or an entirely different rule. The *Silver Chrysler* court, unfettered by any ethical pronouncement of Canon 6 and unimpressed with Canon 9's appearance of impropriety as a controlling rationale, saw successive conflict as a confidential information problem rather than a loyalty problem.¹¹¹ The added circumstance of many lawyers in one law firm, making it unlikely that any lawyer gained confidences from each of the firm's clients, did not present an exception for the *Silver Chrysler* court. Instead, it illuminated the analytic error of basing the successive conflict disqualification on loyalty. The courts that diminish *Silver Chrysler* to exception status want to maintain the loyalty rationale for the successive conflict rule. They ignore the *Silver Chrysler* rationale that without confidences to protect, the successive conflict rule does not exist.¹¹²

110. See, e.g., *Freeman*, 689 F.2d at 723; *Gas-A-Tron*, 534 F.2d at 1325.

111. The *Silver Chrysler* court explained:

[*T.C. Theatre and Emle Industries*] and the Canons on which they are based are intended to protect the confidences of former clients when an attorney has been in a position to learn them. To apply the remedy when there is no realistic chance that confidences were disclosed would go far beyond the purpose of those decisions.

Silver Chrysler Plymouth v. Chrysler Motors Corp., 518 F.2d 751, 757 (2d Cir. 1975).

As the Second and Sixth Circuits have recognized, *Silver Chrysler* reduced the successive conflict rule to a rule protecting only against use or disclosure of confidences. See, e.g., *Armstrong v. McAlpin*, 625 F.2d 433, 445 (2d Cir. 1980) (en banc) (when firm not in position to use confidential information obtained by partner in former representation, possible appearance of impropriety insufficient to disqualify), *vacated on other grounds*, 449 U.S. 1106 (1981); *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 440 F. Supp. 193, 209-10 (N.D. Ohio 1976) (no disqualification of firm employing former city attorney in absence of evidence attorney disclosed confidences obtained in former representation of city), *aff'd*, 573 F.2d 1310 (6th Cir. 1977); *U.S. Indus. v. Goldman*, 421 F. Supp. 7, 11-12 (S.D.N.Y. 1976) (no disqualification in subsequent adverse representation because no factual allegation attorney acquired or would use confidential information obtained in first representation) (citing *Silver Chrysler*, 518 F.2d at 756-57).

112. *Analytica, Inc. v. NPD Research*, 708 F.2d 1263 (7th Cir. 1983), exemplifies the use of *Silver Chrysler* as an exception and demonstrates that the analytic difference between the loyalty approach and the confidences approach can be critical. In *Analytica*, a law firm, rather than a single lawyer, switched sides in successive matters. The law firm that brought an antitrust suit against NPD had previously represented NPD in a small stock transfer. *Id.* at 1265. The law firm offered to show that the lawyer handling the current antitrust matter had not received any confidential information about NPD from an-

F. TIME TO CHANGE IMPUTED DISQUALIFICATION? THE
RETURN OF THE FORMER GOVERNMENT LAWYER

Standard Oil and *Silver Chrysler* dealt with the sharing of confidences in the first of successive representations and found a way to allow rebuttal of the presumption of shared confidences. Whether the presumption of shared confidences ought to be rebuttable between lawyers at a firm involved in the second of successive representations is currently the most controversial issue in successive conflict cases.

The Second Circuit addressed that issue in *Armstrong v. McAlpin*,¹¹³ a case involving a former government lawyer. In *Armstrong* the defendants were former managers of investment companies the SEC had investigated and placed in receivership. The receiver, using the SEC investigation reports as a

other lawyer within the firm who had completed the prior stock transaction. *Id.* at 1267. Rejecting this attempt, the Seventh Circuit relied on a loyalty analysis to hold that the presumption of shared confidences was not rebuttable. *See id.* The confidences approach of three earlier Seventh Circuit successive conflict cases would have required a different result in *Analytica*. *LaSalle Nat'l Bank v. County of Lake*, 703 F.2d 252 (7th Cir. 1983) (allowing law firm suing county to establish that former county lawyer who had joined firm was sufficiently separated from ongoing litigation to ensure against confidence sharing with lawyers conducting the litigation); *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715 (7th Cir. 1982) (allowing rebuttal by lawyer who moved to another firm and then sued client of former firm); *Nova Therapeutisk v. Baxter Travenol Lab.*, 607 F.2d 186 (7th Cir. 1979) (allowing rebuttal by firm suing former client who, along with partner who had done the client's work, was now with different law firm). Without analysis, the *Analytica* court described those precedents as exceptions to the rule of automatic disqualification in substantially related successive representations. *Analytica*, 708 F.2d at 1267.

The court relied instead on *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978), for the proposition that the successive conflict rule was based on loyalty. It cited *Westinghouse* as support for the principle that if the substantial relationship test applies, "it is not appropriate for the court to inquire into whether actual confidences were disclosed." *Analytica*, 708 F.2d at 1267 (quoting *Westinghouse*, 588 F.2d at 224). Although *Westinghouse* used substantial relationship language, it did not involve a successive conflict—the only kind of conflict case for which substantial relationship analysis is relevant. *Westinghouse* was a true loyalty case in which one law firm simultaneously represented both parties in different actions. It should have had no applicability in *Analytica*.

113. 461 F. Supp. 622 (S.D.N.Y.), *rev'd*, 606 F.2d 28 (2d Cir. 1978), *vacated*, 625 F.2d 433 (2d Cir. 1980) (en banc), *vacated on other grounds*, 449 U.S. 1106 (1981). Chief Judge Kaufman, part of the *Armstrong* en banc majority, authored the *Standard Oil* opinion in 1955, the seminal decision in the government attorney line of cases. His article, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657 (1957), was the first scholarly commentary on the unique position of the former government lawyer.

foundation, sued the defendants to recover misappropriated funds. The defendants moved to disqualify the plaintiff's law firm because one of its partners had been the Assistant Director of Enforcement at the SEC during the investigation of the defendants.¹¹⁴ They relied on the Model Code's automatic disqualification rule which provided that if a lawyer was required under the Disciplinary Rules to decline or withdraw from employment, all lawyers associated with him or his firm were disqualified from representation as well.¹¹⁵ The law firm defended by demonstrating that from the moment the partner joined the firm, the firm had screened him from any contact with the case and the lawyers prosecuting it.¹¹⁶

The court conceded that the Model Code barred the former government lawyer from representing the plaintiff,¹¹⁷ but refused to disqualify the law firm despite the Code's automatic disqualification rule.¹¹⁸ The court allowed the firm to rebut the presumption that information was shared within the partnership by demonstrating that it had screened the lawyer with the confidential information from the law suit.¹¹⁹ The court based its decision on the adverse consequences for the litigation that would result from disqualification, as well as its desire to avoid serious delay and to reinforce "public confidence in the fairness of the judicial process."¹²⁰

114. *Armstrong*, 625 F.2d at 435.

115. *Id.* at 442 (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D) (1969)).

116. *Id.* at 442-43.

117. *Id.* at 442; see CODE OF PROFESSIONAL RESPONSIBILITY DR 9-101(B) (1969) (lawyer may not accept private employment regarding a matter for which the lawyer had substantial responsibility as a public employee).

118. *Armstrong*, 625 F.2d at 445.

119. The court allowed rebuttal of the shared confidences presumption without reliance on the plaintiff's argument that the court should give special consideration to the government's need for good lawyers who would not later be denied private law careers in their field of specialty because of their government service. *Id.* at 443.

120. *Armstrong*, 625 F.2d at 446. The court elaborated:

[T]his is not a case where a law firm, by use of a "Chinese wall," is attempting to justify representation of conflicting interests at the same time.

....
[D]isqualification . . . will have serious consequences for this litigation; separating the receiver from his counsel at this late date will seriously delay and impede . . . his attempt to obtain redress for defendants' alleged frauds. Under the circumstances, the possible "appearance of impropriety is simply too slender a reed on which to rest a disqualification order"

. . . Nor do we believe . . . that a failure to disqualify . . . based on

The *Armstrong* decision has the potential to undermine *Laskey*'s irrebuttable presumption of shared information in the second of successive representations, casting doubt on the presumption's future.¹²¹ An analysis of *Laskey* suggests that courts will apply *Armstrong* rather than *Laskey* in future successive conflict cases that involve second firm confidence sharing now that *Laskey* does not apply in first firm situations. When the *Laskey* court introduced the concept of imputed disqualification, it was explicit that the single justification for creating an irrebuttable presumption of shared confidences between partners was "[t]o facilitate maximum disclosure of relevant facts on the part of clients."¹²² If facilitation of consultation constitutes the sole rationale for imputed disqualification in successive conflict cases, courts should not treat the likelihood of information sharing in the second firm more restrictively than in the first firm.

Three variables mitigate against the possibility that *Armstrong* will undermine *Laskey*'s automatic imputed disqualification rule in the second of successive representations. First, because the Supreme Court has barred interlocutory appeals of disqualification decisions, appellate disqualification opinions will be rare¹²³ and doctrinal evolution of *Armstrong* is, there-

the possible appearance of impropriety will contribute to the "public skepticism about lawyers". . . . [R]ather than heightening public skepticism, we believe that the restrained approach this court [has] adopted towards attempts to disqualify opposing counsel on ethical grounds avoids unnecessary and unseemly delay and reinforces public confidence in the fairness of the judicial process.

Id. at 445-46 (citations omitted).

121. Although the lawyers' infections prompting the motions to disqualify their law firms differed in *Laskey* and *Armstrong*—in *Laskey* the lawyer held client confidences and in *Armstrong* the lawyer held information about a third party gained through government power and process—the difference does not diminish the damage done to the *Laskey* theory. If anything, the case against allowing rebuttal of the presumption is stronger when the lawyer has gained the information through the exercise of government power. See *infra* text accompanying note 194.

Schiessle v. Stephens, 717 F.2d 417 (7th Cir. 1983), is similar to *Armstrong* and in addition involved a private lawyer. Its discussion of whether the presumption of confidence sharing should be rebuttable, however, occurred in dictum, thus limiting its precedential value. The decision discussed Chinese Walls with approval and purported to hold that the "district court erred in relying on an irrebuttable presumption to find that confidences and secrets had been shared." *Id.* at 421. The problem with the case as precedent is that it affirmed the district court decision, finding that the firm had not created any walls and had not therefore rebutted the presumption. *Id.*

122. *Laskey Bros. v. Warner Bros. Pictures*, 224 F.2d 824, 827 (2d Cir. 1955).

123. See *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985) (barring in-

fore, unlikely. Second, the 1983 Model Rules adopted *Armstrong's* holding for former government lawyers¹²⁴ and rejected it when the infected lawyer was formerly in private practice.¹²⁵ In the absence of appellate decisions, lower courts may instead give substantial weight to the Rules. Third, fascination with a prospective solution—the Chinese Wall¹²⁶—has claimed the attention of courts,¹²⁷ commentators,¹²⁸ and the profession, but

terlocutory appeals in civil disqualification matters); *Flanagan v. United States*, 465 U.S. 259 (1984) (barring interlocutory appeals in criminal disqualification matters). For a disqualification appeal to make any economic or tactical sense, it would have to tag along with some appealable issue for which the litigant had some hope. It seems unlikely that a party could show a litigation effect of disqualification or a failure to disqualify that would by itself prompt an appeal, let alone justify a favorable decision.

124. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11 (1983).

125. See MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.9, 1.10 (1983).

126. *Nemours Found. v. Gilbane*, 632 F. Supp. 418 (D. Del. 1986), a district court screening decision, is the most important former client case since *Koller's* prohibition on interlocutory appeals in disqualification cases. See *supra* note 123. The case involved a motion to disqualify an entire law firm from representing the defendants because an associate had previously represented the plaintiffs in a "minitrial" designed to avoid the current litigation. *Nemours*, 632 F. Supp. at 428. The court examined the restriction to former government lawyers of a screening exception to imputed disqualification. The court held that despite Delaware's adoption of Rules 1.9 and 1.10, screening of a lawyer infected from a prior private representation may rebut the presumption of shared confidences. *Id.* Citing a then-unpublished opinion, subsequently published as *INA Underwriters Ins. Co. v. Rubin*, 635 F. Supp. 1, 5 (E.D. Pa. 1983), the court disavowed any rational distinction between former government and former private lawyers:

Once it is admitted that a Chinese Wall can rebut the presumption of imputed knowledge in former government attorney cases, it becomes difficult to insist that the presumption is irrebuttable when the . . . previous employment was private [S]uch a proposition would logically require a belief that privately employed attorneys are inherently incapable of being effectively screened, as though they were less trustworthy . . . than their ex-Government counterparts.

Id. at 428 (quoting Note, *The Chinese Wall Defense to Law-Firm Disqualification*, 128 U. PA. L. REV. 677, 701 (1980)).

In concentrating on the unfairness of denying former private lawyers a remedy available to former government lawyers, the court overlooked the possibility that successive conflict may not be a problem to begin with.

127. See, e.g., *EZ Paints Corp. v. Padco, Inc.*, 746 F.2d 1459, 1462 (Fed. Cir. 1984) (applying law of Eighth Circuit) (Chinese Wall must be constructed immediately upon the new firm's becoming aware of a potentially disqualifying conflict); *Schiessle v. Stephens*, 717 F.2d 417, 421 (7th Cir. 1983) (noting factors enabling a court to conduct a case-by-case examination of the effectiveness of the Chinese Wall's insulation against the flow of confidential information).

128. See, e.g., *Miller & Warren, Conflicts of Interest and Ethical Issues for the Inside and Outside Counsel*, 40 BUS. L.J. 631, 644 (1985) (discussing effectiveness and judicial treatment of Chinese Walls when used by in-house counsel); Riger, *The Model Rules and Corporate Practice—New Ethics for a*

diverted attention from the specific successive conflict problem the walls were borrowed to cure.¹²⁹ Sole concentration on how to construct Chinese Walls and what they protect against to the exclusion of the underlying successive conflict problem¹³⁰ has reduced the likelihood that courts will examine the preservation of confidences issue in a way that would eliminate the problem and the need for a solution.

G. ANOTHER NEW ETHICAL FOUNDATION: CODIFICATION IN THE MODEL RULES OF PROFESSIONAL CONDUCT

The 1983 Model Rules of Professional Conduct represent the ABA's most recent attempt to codify the law of successive conflict and imputed disqualification. The Rules do no better than the judicial decisions, in part because they continue to re-

Competitive Era, 17 CONN. L. REV. 729, 767 (1985) (concluding that Chinese Walls primarily serve the practical needs and interests of the legal profession and thereby dilute the ethical mandates expected of attorneys); Wine-Banks, *Ethics of Switching Sides-II*, 16 LOY. U. CHI. L.J. 516, 517-21 (1985) (allowance of Chinese Wall screening procedure is required by nature of modern law practice); Note, *The Chinese Wall Defense to Law-Firm Disqualification*, 128 U. PA. L. REV. 677 (1980) (examining factors and policies used by courts to appraise effectiveness of Chinese Wall screening).

129. The Chinese Wall—a term borrowed from Wall Street, where they were built to avoid insider trading problems in brokerage houses—was the *Armstrong* solution that allowed rebuttal of the presumption of shared confidences in the second firm. *Armstrong v. McAlpin*, 625 F.2d 433, 445 (2d Cir. 1980) (en banc), *vacated on other grounds*, 449 U.S. 1106 (1981); see also Varn, *The Multi-Service Securities Firm and the Chinese Wall: A New Look in Light of the Federal Securities Code*, 63 NEB. L. REV. 197, 211 (1984) (discussing reasons for building a Chinese Wall in a securities firm). The coincidence in timing between the legal profession's interest in Chinese Walls as a device to avoid ethical dilemmas and the 1986 insider trading scandal on Wall Street should hurry the day when *screening* replaces *Chinese Wall* as the term of art, demonstrating that some good comes of almost everything.

130. Concentration on the solution, rather than the problem, has sparked substantial interest in the wall as a device to avoid conflict problems of many varieties. Courts contemplating general conflict of interest problems have reflected that hope and have discussed Chinese Walls in considering the classic loyalty problems in simultaneous representation of opposing interests. See, e.g., *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1321 (7th Cir. 1978) (Chinese Wall does not modify presumption that actual knowledge of one or more attorneys will be imputed to each member of firm); *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225, 229 & n.10 (2d Cir. 1977) (attempted Chinese Wall within single law firm representing adverse clients in same lawsuit insufficient to prevent disqualification). The Chinese Wall, of course, can do nothing about a law firm's vigor in simultaneously pursuing adverse interests. Attention to the solution, without remembering the nature of the problem for which it was designed, will likely result in even more precedent rejecting the solution.

flect uncertainty and confusion about their theoretical foundations.

Rule 1.9(a) adopts the *T.C. Theatre* rule against successive conflicts, prohibiting a lawyer who has formerly represented a client from representing a new client in the same or a substantially related matter if the new client's interests are materially adverse to the former client's interests, unless the former client consents.¹³¹ The commentary to Rule 1.9(a) suggests that the Second Circuit's *patently clear* test applies in determining whether matters are substantially related.¹³²

Rule 1.9(b) recognizes that the substantial relationship test will not prohibit all representation in which information from a former client may be useful to a present client.¹³³ It prohibits a lawyer who has formerly represented a client from *using* information relating to that representation to the disadvantage of the former client.¹³⁴ The rule is a necessary corollary to Rule 1.6, which controls the disclosure of, but not the use of, confidential information.¹³⁵

Rule 1.10 is the imputed disqualification rule.¹³⁶ The rule

131. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(a) (1984). See *supra* note 14.

132. The commentary states: "The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 comment (1984).

133. *Id.* Rule 1.9(b).

134. *Id.* Professor Wolfram argues that there is no need for Rule 1.9(b) in the Model Rules and that it only invites "curiously gratuitous, interpretative problems." See C. WOLFRAM, MODERN LEGAL ETHICS 364 (1986). His failure to appreciate any significance in Rule 1.9(b) is due to his misunderstanding of the substantial relationship test. He contends that "no doubt . . . a lawyer is disqualified from . . . any case in which the adverse use of a former client's confidential information is a likely temptation." *Id.* at 365. The observation is certainly untrue in the Second and Sixth Circuits. See *Silver Chrysler Plymouth v. Chrysler Motor Corp.*, 518 F.2d 751, 754 (2d Cir. 1975) (enforcing the lawyer's duty of absolute fidelity and guarding against the danger of use of confidential information does not require a blanket disqualification approach); *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 440 F. Supp. 193, 209 (N.D. Ohio 1977) (asserting that equity demands the presumption of disclosure of confidences be rebuttable), *aff'd*, 573 F.2d 1310 (6th Cir. 1977), *cert. denied*, 435 U.S. 996 (1978). Wolfram's observation is also inconsistent with the view expressed in the comment to Rule 1.9. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 comment (1984) (information acquired by a lawyer during representation may not subsequently be *used* by the lawyer to the disadvantage of the client). Rule 1.9(b) protects the use of confidences in a representation against a former client that is not substantially related to the prior matter.

135. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1984).

136. *Id.* Rule 1.10. This Rule states:

applies to all lawyers and law firms, save former government lawyers. Rule 1.10(a) adopts the loyalty-based rule of automatic imputed disqualification, prohibiting members of a firm from representation when any of its lawyers are barred.¹³⁷ It applies to all imputed disqualifications, not just successive conflict cases. Rule 1.10(b) codifies the *Silver Chrysler* approach to the actual acquisition of confidential information about a client at the lawyer's former firm.¹³⁸ A lawyer's subsequent association with another firm will not jeopardize the second firm's representation of a client with interests adverse to the joining lawyer's former client unless the joining lawyer actually possesses confidential information about the former client.¹³⁹ Further, the confidential information must be "material."¹⁴⁰ The rule also adopts the view that in successive conflict situations the presumption of shared confidences in the second representation is irrebuttable.¹⁴¹

Rule 1.10(c) adopts a variation of the rebuttable presumption of shared confidences. It allows a law firm that has lost

(a) 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, 1.8(c), 1.9 or 2.2.

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

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

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

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

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

Id.

137. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10(a) (1984); *supra* note 136; *supra* note 55 and accompanying text.

138. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10(b) (1984); *supra* note 136; *supra* note 111 and accompanying text.

139. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 comment (1984).

140. See *id.* Rule 1.10(b); *supra* note 136.

141. Rule 1.10(a) imputes to the entire firm the successive conflict provisions of Rule 1.9(a). Rule 1.10(b) creates an exception if the attorney moving between firms did not acquire material, confidential information at her prior firm.

both a client and the client's lawyer to represent an adverse interest as long as the lawyers remaining at the firm can show they possess none of the former client's confidential information.¹⁴²

The commentary to Rule 1.10 is remarkable for its inconsistency regarding the problem of the lawyer who moves into a firm with confidential information from past associations. Rule 1.10(b) clearly prohibits the law firm's representation, regardless of whether the joining lawyer actually shares the information. The commentary, however, discusses the need for a functional analysis and defines the relevant considerations as "preserving confidentiality" and "avoiding positions adverse to a client."¹⁴³ Although Rule 1.10(a) treats imputed disqualification of a law firm as a loyalty issue,¹⁴⁴ everything in the commentary suggests that a confidentiality analysis is the only approach appropriate to the successive conflict problem in which a lawyer brings to a new firm confidential information that was gained indirectly at the former firm.¹⁴⁵

Rule 1.11 limits screening to rebuttal of the presumption of confidence sharing in the private firm of a former government lawyer.¹⁴⁶ Screening allows the new firm to represent a party against the government, as well as against any private party about whom the former government lawyer acquired "confidential government information" while with the government.¹⁴⁷

II. A BAD MOVE IN PURSUIT OF AN ETHICAL ANOMALY

The successive conflict disqualification motion is a bad move in pursuit of anomalous ethics that courts and the profes-

142. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10(c)(2) (1984); *supra* note 136.

143. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 comment (1984).

144. See *id.*

145. That is, the comment suggests that the confidentiality approach applies when the confidential information was gained not through direct representation at the former firm, but rather from discussion with lawyers at the former firm who were doing the representing. See *id.*

146. That is, the rule expressly allows a private firm to rebut the presumption of confidence sharing only when the lawyer possessing confidential information is a former government attorney. *Id.* Rule 1.11. There is no similar rule expressly allowing rebuttal of the presumption of confidence sharing by screening when the attorney in question was formerly associated with another private firm.

147. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(b) (1984).

sion should reevaluate. Courts have identified loyalty and a concern for confidences, alternatively or in combination, as the foundation for the successive conflict doctrine. Neither rationale supports the doctrine. Even if those concerns provide a theoretical base for the successive conflict doctrine, however, the operation of the successive conflict rules leads to results inconsistent with either rationale.

A. SUCCESSIVE CONFLICT DISQUALIFICATION MOTIONS: A
BAD MOVE AND WORSE RESULTS

The law of successive conflict, as expressed in most cases and as detailed in the Model Rules, does not lead to results consistent with either a concern for loyalty or for the preservation of confidential information. The following example, though it combines more problems in one case than are likely to occur, does not exaggerate the description of individual problems or the nonsensical results. Suppose law firm 1 represents A Company in a civil antitrust action against B Company, represented by law firm 2, and C Company, represented by law firm 3. Earlier, executives from all three companies were called to testify before a grand jury hearing the criminal antitrust allegations that now form the basis for A Company's civil suit. There was no grand jury indictment.

Three years after service of the complaint in A Company's civil suit, Sharpe, the government lawyer who conducted the grand jury investigation, joins law firm 1, which is representing A Company. Javelin and Lance leave law firm 4, a firm that had been primary outside counsel for A Company before and during the grand jury proceedings, to join law firm 2. Javelin, a leveraged buyout expert, previously represented A Company in defending against a hostile takeover from a company in a different industry. Lance, an international tax expert, had accompanied a senior trial lawyer and two of A Company's executives to the grand jury session, at which they took the fifth amendment. Lance heard the executives tell the senior lawyer about a couple of the questions they anticipated, as well as the senior lawyer's advice to take the fifth amendment.

Law firm 3 had been A Company's primary outside counsel for the year between the time that A Company left law firm 4 and before it went to law firm 1 to bring the antitrust action. Foil was the partner from law firm 3 who worked directly with A Company and who supervised all of A Company's matters. During the year that law firm 3 represented A Company, the

parties did not raise, discuss, or investigate any antitrust matters.

Each of the three law firms has over two hundred lawyers in New York, Chicago, and Paris. All three have elaborate screening procedures. Sharpe is screened by law firm 1. Lance goes to law firm 2's Paris office to practice international tax. Javelin becomes involved in law firm 2's representation of B Company. Foil represents C Company in the litigation. Everyone moves to disqualify everyone else.

The ABA Model Rules and most courts would permit law firm 1 to screen the former government lawyer, Sharpe—the individual with the most knowledge about everyone—so that law firm 1 may continue in the case.¹⁴⁸ Foil and Javelin, the two lawyers who previously represented A Company, may represent C and B Companies, respectively, against A Company because the former and current matters are not substantially related—at least not under the commentary on Rule 1.9 or the Second Circuit's rules.¹⁴⁹ Lance, technically privy to an inconsequential confidence in a substantially related matter—the criminal antitrust investigation—will disqualify all of law firm 2's lawyers. That Lance, a tax lawyer in Paris, knows almost nothing about A Company will not change the result.

If loyalty provides the reason for the successive conflict rule, it seems strange that Javelin, the lawyer previously involved in a takeover defense for A Company, would now be representing B Company against A Company. If loyalty is the

148. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(b) (1984) ("A firm with which the [ex-government] lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom."); *Armstrong v. McAlpin*, 625 F.2d 433, 445 (2d Cir. 1980) (en banc) (screening of former government attorney from participation in case effectively precludes use of confidential information obtained while with the government), *vacated on other grounds*, 449 U.S. 1106 (1981).

149. The Second Circuit has held that a substantial relationship between the subject matter of a former representation and a current adverse representation exists only when the relationship of the issues involved is "patently clear." *Silver Chrysler Plymouth v. Chrysler Motors Corp.*, 518 F.2d 751, 755 (2d Cir. 1975); *see also* *Government of India v. Cook Indus.*, 569 F.2d 737, 739-40 (2d Cir. 1978) (disqualification granted only when issues are identical or essentially the same). The Model Rules appear to have adopted this standard. *See supra* note 132 and accompanying text. Foil and Javelin, the two lawyers who previously represented A Company, may represent clients adverse to A Company because it is not patently clear that the issues in the current antitrust action are identical to the issues in either a leveraged buyout (Javelin) or in any of the nonantitrust matters handled by Foil.

issue, there is no way to explain how Foil, the former primary outside counsel and personal contact person for A Company, can remain in the lawsuit on behalf of C Company. If, on the other hand, the successive conflict rule is a prophylactic against the disclosure of confidences and secrets by a lawyer inclined to breach the prohibition against disclosure, the former government lawyer is the first lawyer who should disqualify a firm. The disqualification of law firm 2, because of the inconsequential knowledge of a tax lawyer in Paris, is odd under any theory given the results for Javelin, Foil, and Sharpe. The possibility that the result of the motions will depend on the federal circuit in which the matter is venued compounds the problem, making reasonable predictions about choice of counsel by clients, acceptance of cases by law firms, and choice of colleagues by lawyers unreasonably difficult.

The costs to the adversary system and the profession of obtaining these results—results inconsistent with any conceivable rationale for the successive conflict rule—are significant. The judiciary has made regular adverse comment, both in and out of court, on the costs to the judicial system in energy and image.¹⁵⁰ The motions consume an inordinate amount of time, harass litigants and lawyers, and promote intense professional and personal bitterness. The disputes are often between lawyers and law firms more than between clients and lawyers. Our adversary system, concerned about its image within the society it serves, gains little from what appears as petty professional squabbling. Worse, when a court disqualifies a firm for a technical conflict, the image of the profession is depreciated gratuitously. If the media views the matter as newsworthy, the public only hears conflict of interest. That the disqualification was because of information that an incoming lawyer had, but of which others were unaware, is lost.

A single example captures the cost to the individual litigant of bringing or defending disqualification motions. In

150. See, e.g., *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 434-36 (1985) (discussing increase in time and expense inherent in motion for disqualification of counsel); *Armstrong*, 625 F.2d at 446 (restrained approach to disqualification avoids unnecessary delay and reinforces public confidence in fairness of judicial process); *Board of Educ. v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979) (courts should hesitate to disqualify attorney and must carefully weigh needs of efficient judicial administration against effect of attorney's conduct); Van Graafeiland, *Lawyers Conflict of Interest—A Judge's View*, 50 N.Y. St. B.J. 101, 140-41, 144 (1978) (noting strategic use of disqualification motions and concluding higher quality of representation attainable with less expenditure of judicial time than that currently consumed by motions to disqualify).

Analytica, Inc. v. NPD Research,¹⁵¹ the disqualified law firm was ordered to pay \$25,000 in fees to NPD's lawyers to cover the cost of the disqualification motion's prosecution in the trial court.¹⁵² The prevailing law firm's trial court claim for fees was \$65,000.¹⁵³ The likelihood that the plaintiff's fees in the entire *T.C. Theatre* matter, in which the successive conflict disqualification doctrine was invented thirty years earlier, did not exceed \$65,000 highlights the enormity of the problem. In a case that might not involve a court's moderating influence in the fee process, \$130,000 spent by two parties to determine whether one party has the right lawyer seems excessive—but not uncommon.

The cost to clients in time, money, emotional energy, and confidence in the system is even more staggering when a disqualification motion is successful. The client with a disqualified lawyer must start again, no matter how technical the disqualification, and often without the benefit of the work done by the disqualified firm.¹⁵⁴ The client loses not only the law firm of

151. 708 F.2d 1263 (7th Cir. 1983).

152. *Id.* at 1265.

153. *Id.* at 1279 (Coffey, J., dissenting).

154. *First Wis. Mortgage Trust v. First Wis. Corp.*, 584 F.2d 201 (7th Cir. 1978) (en banc), is one of the leading cases on the issue of work product sharing between disqualified counsel and successor counsel. On rehearing en banc, the Court of Appeals for the Seventh Circuit rejected a per se rule denying successor counsel the work product of the disqualified attorney. *Id.* at 204-05 (finding "no reason for an irrebuttable presumption . . . that whenever cause of disqualification exists any lawyer work thereafter is lost work irrespective of its nature"). The court noted that the penalty of unavailability of work product to successor counsel "is against the client . . . irrespective of any fault" on the client's part. *Id.* at 205. The court held that when an attorney has been disqualified, the availability of work product to successor counsel must be determined on the basis of the facts of the particular case. *Id.* at 202. While declining to set forth a specific rule, the apparent standard is the likely existence of confidential information in the attorney work product, and *in camera* inspection of the material is recommended. *Id.* at 211 n.6 (suggesting judge "should be satisfied that there is no taint of confidentiality or other improper advantage gained" and that this determination "might well involve" an *in camera* inspection).

Despite *First Wisconsin's* ultimate determination that on its particular facts all work product should be turned over, *id.* at 211, other jurisdictions have relied on the *First Wisconsin* standard to disqualify attorney work product. See, e.g., *EZ Paints Corp. v. Padco, Inc.*, 746 F.2d 1459, 1463 (Fed. Cir. 1984) (applying law of Eighth Circuit) (prohibiting turnover of work product prepared after disqualified attorneys had moved from firm representing plaintiff to firm representing defendant because there was significant danger work product contained confidences obtained from plaintiff); *Realco Servs. v. Holt*, 479 F. Supp. 867, 880 (E.D. Pa. 1979) (pending motion for access, substitute counsel not permitted access to work product of attorney disqualified under

choice, but probably an individual lawyer in whom the client has confidence. Moreover, most clients find selecting counsel and preparing for litigation sufficiently harrowing experiences that they will do almost anything to avoid them once. The system exacts a high price when clients have to suffer twice.

B. ETHICS FOR THE PROFESSION, RULES FOR THE COURTS

Relying on Canon 6, the *T.C. Theatre* court framed the original discussion of successive conflicts as an ethical issue. Characterization of the problem as ethical has continued through many cases interpreting the 1969 Model Code and the 1983 Model Rules.¹⁵⁵ No court has cited compelling precedent for the ethical jurisdiction, but courts have offered various conflicting rationales, including the need to protect the rights of the individual client,¹⁵⁶ and the "need to maintain the highest ethical standards of professional responsibility . . . [to preserve] the public's trust in the integrity of the Bar."¹⁵⁷ The 1983 Model Rules, in ironic contrast to the courts' ethical approach, handle the successive conflict issues from a legislative, rule-making perspective. Rules 1.9, 1.10, and 1.11 consider every possible version of lawyer movement and employment opportunity and present a precise rule-oriented response for each.

The courts' assumption of an ethical jurisdiction and the

substantial relationship test, because disqualified attorney may have acquired and used confidential information in work product) (citing *First Wis. Mortgage Trust v. First Wis. Corp.*, 571 F.2d 340 (7th Cir. 1978)). *But see Behanin v. Dow Chem.*, 642 F. Supp. 870, 874 (D. Colo. 1986) (approving release of disqualified attorney's work product to successor counsel when opponent failed to persuade court alleged confidences were related to instant suit or could be present in any work product); *Black v. State of Mo.*, 492 F. Supp. 848, 871 (W.D. Mo. 1980) (allowing turnover of disqualified attorney's work product to soften impact of client's loss of experienced counsel's time and efforts when defendants failed to show specific injury). *See generally* Comment, *The Availability of Work Product of a Disqualified Attorney: What Standard?*, 127 U. PA. L. REV. 1607, 1611 (1979) (proposing balancing test: court should deny successor attorney work product request only if attorney being replaced was disqualified due to possible use of client confidences and possibility of their use against disqualifying party outweighs harm to client of unavailable work product).

155. The assertion of jurisdiction in *Richardson v. Hamilton International Corp.*, 469 F.2d 1382 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973), is typical: "Whenever an allegation is made that an attorney has violated his moral and ethical responsibility . . . [i]t is the duty of the district court to examine the charge, since it is that court which is authorized to supervise the conduct of the members of its bar." *Id.* at 1385.

156. *See Consolidated Theatres v. Warner Bros. Circuit Management Corp.*, 216 F.2d 920, 926 (2d Cir. 1954).

157. *Emle Indus. v. Patentex, Inc.*, 478 F.2d 562, 565 (2d Cir. 1973).

profession's rule approach to successive conflict share an error: each has intruded into the other's domain and used the other's perspective. The courts' perspective and the profession's perspective could lead to the same result, but the rationales and analyses should differ. The successive conflict doctrine, as it turns out, is both bad law and bad ethics. In the development of successive conflict law, the confusion of both role and perspective has led to a court-designed disqualification doctrine that has no reasonable rule analysis to support it. In the profession's development of the ethics of conflict of interest, that same confusion has led to a series of conflict prohibitions that have no ethical foundation. The courts and the bar might have avoided both results had they used their appropriate perspectives.

The confusion in role and perspective arose in part because the profession, courts, and law schools have rarely discussed what they mean by legal ethics. Specifically, they have not articulated whether legal ethics are a subset of ethics in the general sense or a set of rules. Ethics are permanent and foundational; rules, transitory and relational. Ethics are about values and being. Rules are developed to work out relationships within a society. Ethics are introspective. Rules define how individuals or groups may conduct themselves in light of the rights and needs of other individuals and groups. The status of an assertion as ethic or rule thus depends on the reason for its existence and the consequence of its adoption, rather than on its substance. For example, "Thou shalt not steal," found in the Ten Commandments, is ethical. As a moral imperative, it was promulgated for the purpose of, and is expected to have the consequence of, increasing the holiness, the worth, or the value of the believer. "Intentional taking without claim of right," found in a statute, is a rule. As a description of legal relationship and behavior, it was formulated for the purpose of, and is expected to have the consequence of, maintaining the value or worth to the possessor of what it is that should not be taken. Deciding whether legal ethics are ethics or rules is important because each is entitled to different consideration by those promulgating and interpreting them.

The ABA's successive attempts to describe, through the promulgation of legal ethics, how lawyers are (ethics) or how they should act (rules) exemplify the profession's intellectual ambivalence about the nature of legal ethics. The ABA's 1908 Canons of Ethics were as close to classical ethics—a system of

moral principles or values¹⁵⁸—as the bar ever ventured. The profession adopted the Canons for the same reason that most ethical constructs are developed: to define and separate a group of adherents from the rest of society. The Canons provided a professional separation that allowed for an important, privileged role in a larger society and at the same time forestalled societal regulation.

The ethics label for the 1908 Canons was not a matter of accident. It reflected accurately the perspective of the promulgators.¹⁵⁹ The three quotations placed before the preamble for the specific purpose of establishing the moral base for the endeavor demonstrate the profession's 1908 view that the Canons of Ethics were the lawyers' equivalent of the Ten Commandments:

There is . . . no profession in which so many temptations beset the path to swerve from the line of strict integrity

High moral principle is the only safe guide, the only torch to light [the lawyer's] way amidst darkness and obstruction.—George Sharswood

Craft is the vice, not the spirit, of the profession. . . . Truth and integrity can do more in the profession than the . . . wiliest devices.—Edward G. Ryan

A moral tone ought to be enforced in the profession which would drive such men [those who stir up litigation] out of it.—Abraham Lincoln¹⁶⁰

In contrast, the ABA's 1969 Code of Professional Responsibility had a different tone. The title itself, using "Code" rather than "Canons" and "Professional Responsibility" rather than "Ethics," suggested a greater rule orientation. The 1969 Code retained the ecclesiastical "canon" designation for only one of three divisions within its overall concern for professional responsibility and trifurcated its focus to encompass axiomatic norms, ethical objectives, and mandatory rules.¹⁶¹

158. See THE AMERICAN HERITAGE DICTIONARY 242 (2d ed. 1983).

159. David Hoffman, the father of legal ethics in the United States, was the source for the Canons through the writings of his successors and the state codes based on his resolutions. See Armstrong, *A Century of Legal Ethics*, 64 A.B.A. J. 1063, 1064 (1978). According to Professor Shaffer, Hoffman wrote "of justice as classical [ethicists] often [do], as a matter of personal morals and as a habit or virtue." T. SHAFFER, *AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS* 68 (1985).

160. CANONS OF PROFESSIONAL ETHICS at 4 (1908).

161. The Code is designed . . . as an inspirational guide . . . and as a basis for disciplinary action

. . . .
The Canons are statements of axiomatic norms
The Ethical Considerations are aspirational in character and rep-

States enforce their adopted versions of the ABA's formulations of legal ethics through disciplinary systems developed for that specific purpose. In most jurisdictions the state's highest court acts as the final tribunal within that disciplinary system. As a result, in legal ethics, courts have a dual role involving both the inward-looking ethic that defines the profession and the outward-looking rule that affects others and the adversary system within which lawyers work.

The court's jurisdiction and therefore its proper perspective when asked to consider disciplinary matters parallels the profession's perspective; it is ethic-oriented, concerned with the nature and image of the profession as a self-defined and self-regulated part of society. Its decisions in that role properly perpetuate the profession as a separate societal group defined by its special obligations and privileges.

On the other hand, the court's jurisdiction and therefore its proper perspective when asked to resolve a substantive dispute about lawyer conduct is rule-oriented. The nature and image of the profession are irrelevant to this jurisdiction.¹⁶² The court as substantive arbiter between the litigants has no interest in either the profession's ethics or in whether a particular lawyer adheres to those ethics, unless the questioned conduct affects the rule value of a particular legal-ethics formulation, thereby

resent the objectives toward which every member of the profession should strive. . . .

The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character.

CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (Final Draft 1969).

162. The *Armstrong* court rejected the familiar assertion that the bar and the adversary system are inextricably intertwined in image and effectiveness. See *Armstrong v. McAlpin*, 625 F.2d 443, 445-46 (2d Cir. 1980) (en banc), *vacated on other grounds*, 449 U.S. 1106 (1981). In denying that public disregard for the bar was the equivalent of lost credibility for the adversary system, it distinguished ethics from adversary propriety and adopted a disqualification standard requiring that the conflict taint the underlying trial:

We recognize that a rule that concentrates on the threat of taint fails to correct all possible ethical conflicts. . . . [W]e do not denigrate the importance of ethical conduct by attorneys practicing in this courthouse [H]owever, absent a threat of taint to the trial . . . ethical conflicts . . . are . . . better addressed by the "comprehensive disciplinary machinery" of the state and federal bar or possibly by legislation.

Id. (citation omitted).

In a less lawyerly but equally compelling sense, the adversary system has worked relatively well for years, although lawyers as a group have been regarded as somewhere between used car dealers and felons in society's estimation.

affecting the functioning of the adversary system. The court must, however, base its analysis and enforcement on the rule interest, not on the broader, profession-based ethics interest.

The Second Circuit has adopted this result, if not the entire ethics-versus-rules analysis. Both *W.T. Grant Co. v. Haines*¹⁶³ and *Board of Education v. Nyquist*¹⁶⁴ disavowed any jurisdiction to vindicate the profession's ethical concerns. In rejecting the paternal view, the *Grant* court was concerned only about the effect of the ethical violation on the specific trial: "The business of the court is to dispose of litigation and *not to act as a general overseer of the ethics* of those who practice here unless the questioned behavior taints the trial of the cause before it."¹⁶⁵ Similarly, the *Nyquist* court, admitting that its power to disqualify lawyers in pending litigation had long been assumed, but never discussed,¹⁶⁶ limited its authority to disqualify to the interest for which it had traditional jurisdiction—the general functioning of the adversary system. The court explained that its review of Second Circuit cases suggested that the power to disqualify counsel was used "where necessary to preserve the integrity of the adversary process."¹⁶⁷

This analysis, distinguishing between rules and ethics when delineating courts' jurisdiction and thus proper perspective, not only narrows courts' jurisdiction to consider ethical issues, but also restricts courts' analytic method. Arguments based on rules of relation require functional analysis, whereas arguments based on ethics do not because the value to be preserved does not depend on its relationship to something else. Without an ethical jurisdiction, courts cannot support decisions by relying on the per se rectitude of an ethical tenet in the place of analysis. Specifically, they may no longer rely on the inherent strength of loyalty, moral responsibility, and the appearance of impropriety to avoid rigorous cause and effect analysis. The advocate's fidelity will not matter unless the failure to disqualify will result in the corruption of the adversary process. The appearance of impropriety will matter only upon demonstration that appearance will systematically affect the quality of decision making in the system. A concern for confidences will support disqualification only upon a showing that a contrary rule

163. 531 F.2d 671 (2d Cir. 1976).

164. 590 F.2d 1241 (2d Cir. 1979).

165. *Grant*, 531 F.2d at 677 (emphasis added).

166. *Nyquist*, 590 F.2d at 1245-46.

167. *Id.* at 1246 (emphasis added).

will diminish regularly the quality of justice. This rule-oriented approach to the courts' appropriate rhetoric thus forces them to use a functional analysis in deciding whether to disqualify in successive conflict cases.

Just as the rules perspective is important for the courts, the ethical perspective is important for the profession. The profession should hesitate to incorporate rule analysis for fear that it will replace valid ethical considerations, just as courts should hesitate to consider the ethical perspective for fear that it will override their rule perspective. In adopting the 1983 Model Rules of Professional Conduct, the ABA did just the opposite. The Model Rules are as far from the Canons of Ethics as their nomenclature implies. Although the Model Rules purport to have a relationship to the ethical practice of law, they are designed more to tell lawyers what to do (rules) rather than how to be (ethics):

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has professional discretion.¹⁶⁸

As a result of this perspective, the Model Rules handle the successive conflict issue as if the profession were the keeper of the adversary system, designing rules for mechanical application. The profession, therefore, did no better with ethics than the courts did with rules.

C. SUCCESSIVE CONFLICT DISQUALIFICATION ADVANCES NO ADVERSARY SYSTEM INTEREST

Courts that view successive conflict from the perspective of an effective adversary system of dispute resolution will prohibit the motion because it provides nothing positive for the adversary system and causes significant harm.¹⁶⁹ The three theories offered by various courts to support disqualification—appearance of impropriety,¹⁷⁰ loyalty,¹⁷¹ and preservation of confidences¹⁷²—do not support an adversary system interest in a litigant's status as former client.

168. MODEL RULES OF PROFESSIONAL CONDUCT Scope (1984).

169. See *supra* notes 150-54 and accompanying text.

170. See *supra* note 72 and accompanying text.

171. See *supra* notes 30-34 and accompanying text.

172. See *supra* notes 42-43 and accompanying text.

The appearance of impropriety theory, which first appeared in the cases as a matter of ethics, was rejected as an ethical tenet in the Model Rules. Canon 9 was dropped entirely. The commentary to Rule 1.10 explains that the concept of impropriety is hopelessly dependent on the subjective views of anxious clients, as well as "question begging" because *impropriety* is not defined in the subsequent representation context.¹⁷³ Courts and commentators also have rejected the appearance of impropriety theory as even less useful in making adversary system judgments.¹⁷⁴

Despite the round rejection of an appearances theory, the adversary system does have a legitimate interest in how it appears to the public. The system's continuation depends on public acceptance. That image, however, is not coextensive with the image of the legal profession. The Second Circuit distinguished ethics from adversary propriety in rejecting the familiar assertion that disregard for the bar was the equivalent of lost credibility for the adversary system.¹⁷⁵ Society's continuing low esteem for lawyers and its increasing reliance on the adversary system to correct all ills provide some support for the Second Circuit's view. If the adversary system's image is relevant, courts arguably should never hear successive conflict disqualification motions. These often visible motions, charging unethical conduct, bring matters to public attention that would otherwise escape notice. Further, the motions ask courts to help clients keep secrets, something that in most contexts the public considers distasteful. Whatever force the appearance of impropriety theory might have had for the 1969 Model Code, it offers no support for an adversary system rule against successive conflict.

The contention that successive conflict damages the adversary system is more troublesome when based on the ethical imperative of loyalty. The surrogate's single-mindedness in pursuit of the client's interest is a proposition so essential to the adversary system that it seems superfluous to ask courts to test it. The popular use of the term *successive conflict* suggests that the lawyer representing an adverse interest against a for-

173. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 comment (1984).

174. See, e.g., Kramer, *The Appearance of Impropriety Under Canon 9: A Study of the Federal Judicial Process Applied to Lawyers*, 65 MINN. L. REV. 243, 264-65 (1980).

175. See *Armstrong v. McAlpin*, 625 F.2d 433, 445-46 (2d Cir. 1980) (en banc) (suggesting that those conflicts that do not threaten adversary system are better left to bar's disciplinary machinery or legislation), *vacated on other grounds*, 449 U.S. 1106 (1981).

mer client has a problem of divided loyalty. This is not true. Successive conflict doctrine confuses the surrogate's loyalty obligation with the obligation to vigorously represent a current client. The dispute resolution system's interest in loyalty is limited to assurance that lawyers will vigorously represent the positions of opposing parties, thereby fulfilling the system's adversary assumption.

A successive conflict, unlike the various forms of concurrent conflict, does not present a situation in which the complaining former client has any concern for the vigor of the lawyer's representation of the current client. If a loyalty problem exists in successive client cases, it is ironically the current client who may have cause for concern about the lawyer's vigor. One can imagine situations in which the lawyer might prosecute the current matter less vigorously so that the former client will return. Even more likely, the lawyer has confidences from the former client that the lawyer may not, as a result of the privilege and the confidential information rules, use in the current matter on behalf of the current client. The lawyer's appropriate concern for the duty not to use or disclose those confidences, or for avoiding later accusations of having done so, might restrict the lawyer's pursuit of discovery or vigorous prosecution of the matter for the current client. Courts have never recognized the current client's possible concerns, however, probably because the moving party in successive conflict cases—the former client—has no standing to complain about the vigor of the opponent's counsel.¹⁷⁶ As long as the current client has knowledge of the lawyer's potential handicap, the ad-

176. The consultation and consent requirement of Model Rule 1.7 prohibits a lawyer from accepting a subsequent representation against a former client without disclosing to the current client that the representation might be affected by the lawyer's obligation not to use or disclose the former client's confidential information. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1984). Concern for ensuring the lawyer's single-mindedness assumed by the adversary system may justify a court rule similar to Rule 1.7(b)(2). *See infra* notes 204-05, 208 and accompanying text (proposing such a rule). Should courts decide that the risk of noncompliance with 1.7(b)(2) is substantial, or, in Code jurisdictions, that the matter is not covered under Canon 5, a rule that would allow a former client to make a disqualification motion would be justified, as long as proof of consultation and consent would dispose of the matter in favor of the subsequent representation. If such a rule existed, one would expect lawyers to adopt a rather complete disclosure document that would both inform the prospective client without divulging confidences and provide a one-document response that would make the disqualification procedure short and cheap.

versary system has no loyalty interest to pursue in successive conflict situations.

The only true adversary system concern in subsequent representation situations is confidentiality. Courts mischaracterize that concern, however, when they discuss preservation of confidences as either an ethical issue¹⁷⁷ or as a problem of protecting the client's right to privacy.¹⁷⁸ Rather, the modern theory of confidences relates directly to the operation of the adversary system. The modern theory holds that unless a client believes that lawyers will keep confidences, the client will not be free of apprehension and consequently will not consult adequately with the lawyer, thereby preventing the lawyer from acting effectively.¹⁷⁹

Despite regular reference to this freedom of apprehension theory of confidential information, courts act as if the former client's secrets had an intrinsic value that they must protect, as demonstrated by their continuing distinction between use and disclosure of confidences. When the possibility of unconscious use of confidences is high, courts find a way to disqualify.¹⁸⁰ When the use of confidences would require *disclosure* from one lawyer to another, courts are more likely to avoid disqualification.¹⁸¹ This suggests that courts continue to believe mistakenly that the danger of actual use of confidences at trial, rather than the facilitation of client disclosure, constitutes the real adversary system concern.¹⁸²

Courts' concern for the *actual use* of confidential informa-

177. See, e.g., *Emle Indus. v. Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973) (when attorney *might* have acquired confidential information, attorney is disqualified; "[n]owhere is Shakespeare's observation that 'there is nothing either good or bad but thinking makes it so' more apt than in the realm of ethical considerations").

178. See, e.g., *Consolidated Theatres v. Warner Bros. Circuit Management Corp.*, 216 F.2d 920, 926 (2d Cir. 1954) (requiring assurance of the confidence inherent in the client-attorney relationship for the public good).

179. See *supra* notes 27-28 and accompanying text.

180. See, e.g., *Brennan's, Inc. v. Brennan's Restaurants*, 590 F.2d 168, 172 (5th Cir. 1979); *Emle Industries*, 478 F.2d at 571; *T.C. Theatre v. Warner Bros. Pictures*, 113 F. Supp. 265, 269 (S.D.N.Y. 1953).

181. See, e.g., *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 723 (7th Cir. 1982); *Silver Chrysler Plymouth v. Chrysler Motors Corp.*, 370 F. Supp. 581, 588-91 (E.D.N.Y. 1973), *aff'd*, 518 F.2d 751 (2d Cir. 1975).

182. Indeed, the *Silver Chrysler* court's observation that the use of confidences later in the case and after the motion might justify disqualification supports the suggestion that some courts worry, at least unconsciously, about the actual use of confidential information, rather than about clients' apprehension concerning that use. See *Silver Chrysler*, 518 F.2d at 758.

tion is not appropriate, however, in vindicating the adversary system's interest in confidentiality. The system has recognized no value in secret keeping since the 1700s.¹⁸³ Even then, the client's confidence or secret had no intrinsic or proprietary value; only the honor of the secret-keeper mattered. Confidences differ from trade secrets, for example, which do have intrinsic value because individuals work to create them and a protectable proprietary interest is therefore recognized. Despite occasional discussion to the contrary,¹⁸⁴ the adversary system has no case-specific interest in a client's right to keep confidential information from influencing the outcome of a matter.¹⁸⁵ If the client's confidential information from the first representation affects the result when used in the second, either directly or as the key to discovery of other information, the adversary system has reached a decision closer to the truth. The client whose confidential information has been used or divulged, although unhappy, has not been deprived of either an accurate or a fair result. Because confidentiality lacks intrinsic value, courts misidentify the system's interest in confidences when they assign, implicitly or explicitly, a value to the actual use of confidences in successive conflict disqualification situations.

At most, the adversary system tolerates secret keeping only in the interest of the client's freedom of apprehension, an objective the system pursues on the assumption that it makes the system work better. The adversary system is built on the assumptions that the surrogate can do better than the client in the adversary system and that for the surrogate to do better,

183. See *supra* notes 24-26 and accompanying text.

184. The assertion that one of the reasons for protecting the confidentiality of communications "is to ensure fundamental fairness by prohibiting the use of confidences . . . against that client's interests" is typical. Note, *Attorney's Conflict of Interests: Representation of Interest Adverse to That of Former Client*, 55 B.U.L. REV. 61, 64 (1975). No theoretical or case authority supports the proposition that fairness and confidences have any relation to each other.

185. Confidences contrast directly to loyalty regarding whether the adversary system has an interest in the client's right to keep information from influencing the case's outcome. Courts do have a case-specific interest in the vigor of representation. While truth in a specific case increases as the amount of information unavailable because of confidentiality decreases, less vigorous representation can contribute to a wrong result. The *Nyquist* court identified loyalty as the case-specific interest that might cause disqualification. See *Board of Educ. v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979). Although the court rejected a claim that the particular union lawyer should be disqualified because some of the opponents were other union members whose dues paid the lawyer, it recognized that certain conflicts could raise questions about the vigor of representation and thereby "taint the trial." *Id.*

the surrogate must be fully informed—even about things harmful and embarrassing to the client. The system facilitates the transfer of knowledge to the surrogate by freeing the client from all fear that the surrogate will use or allow others to use the information against the client. Even the cases that search for a loyalty or appearance of impropriety base for successive conflict disqualification accept the client's freedom of apprehension as the underlying rationale.¹⁸⁶

Although many have thought that the world could resolve disputes without lawyers,¹⁸⁷ and that the adversary system could do without confidences,¹⁸⁸ we need not throw either lawyers or confidential information out of the adversary system to

186. See, e.g., *Emle Indus. v. Patentex, Inc.*, 478 F.2d 562, 570 (2d Cir. 1973).

187. The best of history's lawyer bashing is collected in Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CALIF. L. REV. 379 (1987). Shakespeare's infamous advice, "The first thing we do, let's kill all the lawyers," W. SHAKESPEARE, *HENRY VI*, Part II, act 4, scene 2, line 86, is only the best known, if the least understood, of history's disparagement of lawyers. Indeed, many others have shared Shakespeare's sentiment. For example, Thomas More needed no lawyers in Utopia. He stated:

They have no lawyers among them, for they consider them a sort of people, whose profession it is to disguise matters, as well as to wrest laws; and therefore they think it is much better that every man should plead his own cause, and trust it to the judge, as well as in other places the client does it to a counsellor. By this means they both cut off many delays, and find out truth more certainly: for after the parties have laid open the merits of their cause, without those artifices which lawyers are apt to suggest, the judge examines the whole matter, and supports the simplicity of such well-meaning persons, whom otherwise crafty men would be sure to run down

T. MORE, *UTOPIA* 150 (London 1845) (1516). St. Luke was certain that lawyers added, rather than lessened man's burdens. "Woe to you lawyers also! For you load man with burdens hard to bear, and you yourselves do not touch the burdens with one of your fingers." *Luke* 11:46 (Revised Standard Version). Ben Franklin's Poor Richard was no kinder: "Necessity has no Law. I know some Attorneys of the name." B. FRANKLIN, *POOR RICHARD'S ALMANAC* 36 (New York 1849) (1734). Neither was H.L. Mencken inclined to view lawyers favorably: "A peasant between two lawyers is like a fish between two cats." H. MENCKEN, *A NEW DICTIONARY OF QUOTATIONS ON HISTORICAL PRINCIPLES FROM ANCIENT AND MODERN SOURCES* 669 (1942) (quoting a Spanish proverb).

188. Jeremy Bentham thought the idea of confidences substantially more harmful than helpful to the adversary system. See 5 J. BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 300-12 (1827).

Arguably, the rule of confidentiality adds nothing to the quality or acceptability of the adversary system's result. First, in a world of extensive discovery, clients are no longer the major source of lawyers' information. Second, confidential information not used in court (if used, such information is no longer confidential) rarely adds to the advocate's affirmative preparation or to the information the advocate can bring to the fact finder. Third, the client does not need the shield of confidences as an incentive to tell the lawyer something that is truly important to the matter at hand. Finally, if, as a result of

demonstrate that use or disclosure of confidential information provides no reason for a successive conflict rule. Bearing in mind the basic assumptions of the adversary system, two questions should be answered to determine whether the successive conflict rule is needed. Does a rule against successive conflicts meaningfully affect the frequency or completeness of client disclosure to lawyers? If the answer is yes, is the effect enough to justify the harm that the disqualification of lawyers brings to the system? If the answer to either question is no, there is no adversary system reason to maintain a successive conflict disqualification rule.

Courts have regularly disqualified lawyers on the assumption that the answer to both questions is yes. They conclude without demonstration that if clients believe that lawyers later use their confidences against them in substantially related matters, clients will not disclose confidences to lawyers.¹⁸⁹ The conclusion requires an assumption that clients are aware of the possibility of subsequent adverse representation and actually consider it in deciding whether to disclose confidences to their lawyers. Further, the conclusion requires the assumption that clients do not know about the rules against use and disclosure of confidences or do not believe that lawyers will follow those rules. There are no systematic studies, but anecdotal evidence from lawyers undermines both assumptions and suggests that the conclusion is wrong.

Common sense and logic also undermine the courts' conclusion about client apprehension in the successive conflict context. Situated far from the practice of law and the memory of how clients think, most courts are not well positioned to speculate about what clients know or do. Clients do not arrive in lawyers' offices thinking about future matters, let alone future

less information from clients, all lawyers prepare less, courts' decisions will be neither better nor different.

189. See, e.g., *Wilson P. Abraham Constr. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 252 (5th Cir. 1977) (asserting that in order to aid frank exchange between attorney and client, "it is necessary to preclude . . . [the] possibility that information given in confidence . . . will ever be used without [the] client's consent"); *In re Yarn Processing Patent Validity Litig.*, 530 F.2d 83, 90 (5th Cir. 1976) (asserting that attorney conflict of interest rules are "designed to allay any apprehension client may have in frank discussion of confidential information with his attorney"); *Emle Industries*, 478 F.2d at 570 (asserting that without strict enforcement of a lawyer's obligation not to divulge client confidences, "a client would hardly be inclined to discuss his problems freely and in depth with his lawyer, for he would justifiably fear that information he reveals . . . on one day may be used against him on the next").

matters in which their about-to-be-hired lawyer might oppose them. Most clients visit a lawyer's office because they are concerned, if not obsessed, with a present matter. Even if a client arrived with a concern about a future matter in which the lawyer would be on the other side, the client probably does not have the legal knowledge to ask the next important question: whether the future matter and the present problem will be substantially related.¹⁹⁰ The attorney-client privilege law and the ethics rules that require the keeping of confidences, on the other hand, are something that clients know about.¹⁹¹ Most lawyers rehearse those matters with every client early in the relationship.

Furthermore, in describing the presumed client apprehension, courts often speak as if without disqualification, lawyers will in fact use or disclose confidences,¹⁹² a questionable assumption on which to base disqualification decisions. The assumption of illegal and unethical conduct is a significant admission upon which to build a prophylactic rule, an admission that courts should avoid without substantial evidence. No data or anecdotal commentary currently exists to suggest that lawyers do use or disclose confidences in violation of existing rules against doing so. If lawyers do in fact regularly use and disclose confidences in violation of the attorney-client privilege and confidential information rules, courts and the profession have a problem much larger than successive conflict. Moreover, the freedom of apprehension theory supporting the successive

190. A client who can take the analysis far enough to be concerned about whether a lawyer not yet hired for a present case might later oppose her in a yet unknown, substantially related matter knows enough law to make reasonable judgments about confidences.

191. There is some question as to whether the privilege and the ethical prohibitions actually encourage disclosure of confidential information by clients to lawyers. The following body of literature emphasizes that the actual affect of the rules on disclosure is speculative and cannot be scientifically proven. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 112 (1956); Saltzburg, *Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases: Garner Revisited*, 12 HOFSTRA L. REV. 817, 822 (1984); Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1236 (1962).

192. See, e.g., *Industrial Parts Distrib. v. Fram Corp.*, 504 F. Supp. 1194, 1197 (D. Kan. 1981) ("The mere possibility that privileged information could be used against the former client's interest is enough to require disqualification."); *Emle Indus. v. Patentex, Inc.*, 478 F.2d 562, 570-71 (2d Cir. 1973) (requiring a "strict prophylactic rule to prevent any possibility . . . that confidential information . . . may subsequently be used to the [former] client's disadvantage").

conflict disqualification rule does not focus on the actual danger of use or disclosure by a lawyer, but rather on the client's fear of those dangers. Thus, the courts' assumption regarding client apprehension and consequent nondisclosure to lawyers, based as it is on faulty notions about client knowledge and lawyer behavior, lacks sufficient substance to support disqualification.

Even if the courts' questionable assumption of the all-knowing, apprehensive client is true, it is nevertheless unlikely that clients would disclose less in the absence of a rule against subsequent adverse representation. If, because of mistrust of a particular lawyer, the client thought future use of confidential information would be a problem, the client would probably hire someone else. If the client thought the risk of future use was the same with all lawyers, the client might be apprehensive about disclosing confidences. If, however, the client is as rational as courts assume, the apprehension would probably not diminish the client's disclosure. To disclose less than whatever amount the client's general level of confidence would otherwise allow, the client would have to conclude that the information was less helpful to success in the current matter than it would be harmful in some future, hypothetical matter in which the client was unable to hire the same lawyer. It is hard to imagine a situation in which a rational client would not choose the bird in the hand—particularly when the bush, let alone the extra bird, is in doubt.

For those clients who would, however, choose to protect the future, hypothetical lawsuit, the adversary system does not have sufficient interest in client disclosure of confidences to maintain a successive conflict rule that entices the super-rational client to disclose more in the current matter. After all, the client, not the system, must live with the decision between use now and potential harm later. The system has no stake in the secret itself¹⁹³ and thus has no reason to interfere with how much information the client wants the lawyer to use. It is the client who must decide how much disclosure will maximize the potential for victory in the current matter. The system should not have more interest in this choice than does the client!

One argument made in support of the confidential information rules is that the client does not know enough about the relevance or importance of embarrassing information to make a reasonable judgment about whether to disclose it. Three reasons suggest that this argument does not support a successive

193. See *supra* notes 180-85 and accompanying text.

conflict rule that only marginally encourages disclosure. First, clients rarely know so little. Many of the critical issues are factual, and most clients, like most juries, have at least as good a sense about facts as lawyers do. The rational client who knows enough to worry about a potential successive conflict while discussing a current problem probably knows enough to make an informed judgment about confidences. Second, clients do not usually disgorge information in an unstructured fashion. A client responds to a lawyer's questions—questions based on the lawyer's understanding of legal relevance and importance. As a result, the client usually knows what areas of inquiry are important and what information the lawyer wants. Certainly, a client who decides not to disclose, after the lawyer explains the ramifications, can make a valid judgment about present and future interests. Finally, the conclusion that a client will withhold information in the current suit to protect against potential harm in a hypothetical future suit assumes that the client knows enough about the two situations to make a comparison that will result in a judgment not to disclose. The client's ability to make that comparison is doubtful, however, because the client does not even anticipate a future suit, let alone know its nature.

Ironically, in the one context that might justify a successive conflict rule—the former government lawyer situation—the Code liberalized the restrictions on subsequent representations against a former client.¹⁹⁴ The revolving door of government service might, consistent with an adversary system perspective, support a rule against successive conflict because a government lawyer anticipating private practice is uniquely situated to suggest, review, criticize, and enforce legislation and rules in a way that would affect future employment. Worse, a government lawyer has the opportunity to use government power to obtain information about investigation targets for future use in private practice. A loyalty concern for the vigor of the first representation, combined with a cynical view of the transitory government lawyer, might lead to a successive conflict rule as the only way to avoid the risks to the government and to innocent third parties inherent in the revolving door situation.

There is, however, too little evidence of revolving door misconduct for courts to consider seriously a different successive

194. See, e.g., *United States v. Standard Oil*, 136 F. Supp. 345, 365-66 (S.D.N.Y. 1955); *Armstrong v. McAlpin*, 625 F.2d 433, 444-45 (2d Cir. 1980) (en banc), *vacated on other grounds*, 449 U.S. 1106 (1981).

conflict rule for government lawyers based on a concern for loyalty. Further, the issues raised by the revolving door more appropriately belong to a legislature worried about the quality of government lawyers than to a court concerned about the vigor of current representation. The analytic point, however, is important. The adversary system's interest in loyalty, in contrast to its concern for preservation of confidences, might justify a special rule that prohibits subsequent representation by former government lawyers or their firms against the government or against third parties about whom the former government lawyer gained knowledge while with the government.

Finally, screening an identifiable infected lawyer, government or private, is a poor solution to both the loyalty conflict and the confidences problem. Screening has nothing to do with loyalty. The loyalty problem concerns the lawyer's lack of vigor while with the government. Screening has no effect on what the lawyer does while with the government because it occurs during subsequent employment. Screening also is not a prophylactic. Unlike disqualification, it does not create a barrier that makes the prohibited conduct impossible. If courts assume the precondition for screening—that a lawyer aware of a confidence and the rule against disclosure will nevertheless disclose it—they should not conclude that screens will be effective. Office procedures designed to inhibit unintentional disclosure of confidential information will have no deterrent effect on willful disclosure.

The successive conflict disqualification doctrine lacks analytic support and real world justification. Confidences, to the extent they facilitate operation of the adversary system, are an appropriate concern for courts. Courts should not, however, disqualify lawyers without demonstrating that systematic disqualification will affect the ability of other lawyers to prepare adequately in the future.¹⁹⁵ Even if courts assume that the successive conflict rule has some marginal salutary effect in facilitating a client's consultation with a lawyer, the costs to the system and to individuals are disproportionately large. The time and energy consumed, the delay in the courts, the monetary costs to clients, the rule's documented potential for abuse

195. Courts have said that systematic disqualification affects how future clients will act, but there is no evidence supporting this assertion. Common sense suggests that the successive conflict disqualification doctrine has no effect on disclosure and, therefore, no effect on the lawyer's ability to represent a client. See *supra* text accompanying notes 189-91.

by lawyers, the added fuel that the motion brings to an already overheated adversary system, and the possible devastating effect on the client's ability to continue with the litigation outweigh any positive effect of the successive conflict rule. A disqualification motion based on successive conflict is a bad move that courts should not tolerate. It helps neither the client nor the image of the adversary system. If courts will stay away from lawyers' ethics and concentrate instead on the adversary system, they will help the system, clients, and probably lawyers.

D. SHOULD A CLIENT BE FOREVER? A RULE AGAINST
SUCCESSIVE REPRESENTATION AS A QUESTION
OF ETHICS

In assessing the desirability of a successive conflict rule, the profession should stick to its appropriate perspective, an ethics perspective. If the legal ethics process is not a matter of self-definition for the profession's own sake, if it merely establishes relational rules for lawyers in view of the interests of clients, lawyers have no right to control the process.¹⁹⁶ They add little expertise, and in addition, as one of the parties to whom the rules apply, they carry the burden of self-interest.

The profession's adoption in the Model Rules of the Second Circuit's view of subsequent representations was rule oriented and ethics blind. Because the product is indistinguishable from what a legislature might create, it is subject to criticism as rules and as ethics.

Three aspects of the Model Rules treatment of the successive conflict problem demonstrate why the profession's rule perspective has led to ridiculous rules and to absolutely terrible ethics. First, the Model Rules allow screening of former government lawyers but not other lawyers. The stated rationales for that *rule*—lawyer mobility and the availability of good lawyers for government service—apply equally to private practice and thus are not persuasive. As an *ethical* matter, however, a rule that distinguishes government from private lawyers is not only unjustified but repugnant. Indeed, the only possible ethical explanation for the difference is that former government

196. The organized bar has unwisely rejected this perspective for the general legal ethics process. The profession will achieve the best result on the successive conflict issue, however, if it focuses on how lawyers should be, rather than on what they should do.

lawyers are less likely to divulge confidences than private lawyers. Neither logic nor history supports such an explanation.

Second, the difference in the rebuttability of the presumption of shared confidences, depending on whether the situation involves the first or the second firm, is merely an absurd court *rule*. It is, however, an *ethical* insult. To adequately represent a client, the first firm shares confidences naturally, which violates no ethical rule against the disclosure of confidences. The Model Rules make the sharing presumption in the first firm rebuttable. In contrast, second firm confidence sharing can only occur when the lawyers in the firm know that the opponent is their new lawyer's former client and that sharing the confidences would constitute a violation of the ethical rule against disclosure. The Model Rules make the sharing presumption in the second firm irrebuttable. The difference in rebuttability must, therefore, rest on an assumption of unethical conduct in the second firm, a strange foundation for a rule of ethics.

Finally, as a *rule*, the screening solution to the former government lawyer successive conflict makes little sense. It does not prevent an intentional violation of a nondisclosure rule. It constitutes merely an affectation regarding proof and an indulgence of the courts' presumed ability to ensure against disclosure by examining law firm procedures. As an *ethical* matter, however, screens are not just ineffectual, they are offensive. The need to screen, considered from an ethical perspective, must presume that the former government lawyer will not adhere to the ethical rules against disclosure of confidences—an unattractive foundation for any ethical precept.

Courts have based their concern for successive conflict on a concern for confidentiality. Even if that concern for confidentiality justifies an adversary system rule against successive conflict, it might not justify a similar ethical rule for the profession. The profession has no ethical interest in the utilitarian theory emphasizing client freedom of apprehension, though it may have an interest, as a profession, in being the repository of society's secrets. If the profession has a legitimate ethical interest in its status as secret-keeper, however, the Model Code and the Model Rules can fully vindicate it without a successive conflict rule. If anything, a rule against successive conflict implies that the primary ethical prohibition against the use or disclosure of confidential information does not keep lawyers' lips sealed. Even for ethics with a disciplinary agenda, a successive conflict rule provides no remedy or assurance not al-

ready obtainable through the primary confidential information rule. While a court disqualification may create a prophylactic against breach of the confidential information rule, another ethical rule protecting confidences by prohibiting subsequent representation against a former client merely provides a choice of bases for the disciplinary action.

Rather than protecting confidences, a concern for loyalty and the appearance of professional propriety present better reasons for ethically prohibiting subsequent representation against a former client. While the characterization of the representation as subsequent made loyalty anomalous in the adversary system context,¹⁹⁷ it does not necessarily do so in the context of ethics. Leaving aside the wisdom of doing so, the profession might well determine that from the lawyer's perspective, an attorney-client relationship lasts forever. Consistent with the proper perspective for ethical issues, the profession might insist that no ethical lawyer undertake representation against someone with whom the lawyer has had an attorney-client relationship regardless of whether confidential information existed. The profession also could, as a matter of valid ethics, hold that the appearance of that continuing relationship is important to public acceptance of the profession. The same analysis might reasonably lead to an ethical rule prohibiting subsequent representation against a client unless that client first chooses another lawyer.

The Model Rule's use of the substantial relationship distinction to determine the circumstances under which an attorney-client relationship lasts forever makes no sense under either the loyalty or appearance of impropriety analyses. Neither loyalty nor the appearance of loyalty have anything to do with confidential information, the sine qua non of the substantial relationship test. The reasons for the hypothetical ethical rule that clients last forever do not relate to the nature of the representation and do not depend on the existence of confidential information. The original Canon 6 provided a poor basis for legal rules and, by tying the idea to confidences, for an ethics precept as well. It was, however, an acceptable judgment about how the profession wanted its members to be, or at least appear to be.

Although the loyalty and appearance of loyalty theories are consistent with the perspective the profession should employ in promulgating ethics, the profession should avoid an eth-

197. See *supra* notes 21-30 and accompanying text.

ical judgment that attorney-client relationships last forever. Neither clients nor lawyers believe that such relationships do, or should, last forever. A rule against successive conflict thus embodies an assumption the public does not accept and addresses a problem the profession does not have. Similarly, the vision of the attorney-client relationship as a lifelong counselor and friend relationship exists only in a decreasing number of situations. The result of unique personal circumstances, those situations need no rules of ethics to maintain them. Moreover, the profession cannot, in a less personal world of megafirms and megaclients, convince those clients that they will forever need the same lawyer if the lifelong counselor and friend relationship does not develop naturally. Further, nothing suggests that the profession needs to increase the faith of individual clients in individual lawyers by assuring the client that the relationship will last forever. Clients do not use lawyers less nor does the surrogate system of dispute resolution, upon which lawyers rely for their existence, appear threatened by a lack of faith in lawyer constancy. Quite the contrary, the public uses and despises lawyers more today than at almost any time in history,¹⁹⁸ and neither the use nor the despising relates to a failure of constancy.¹⁹⁹ While the profession's desire to be loved provides a proper perspective from which to create an ethical rule, a successive conflict rule contains little that is likely to add to the public's reverence for lawyers.

Finally, if courts use the adversary system rule analysis this Article suggests, the profession should reject any ethical prohibition on subsequent representation, so that the profession's ethics will not prohibit what the adversary system permits. A difference between court rules and the profession's ethics, without more, does not provide sufficient reason to reject a rule with a sound ethical foundation. The question, however, is whether such a rule can survive both the courts' and the disciplinary system's failure to enforce it. A lawyer-operated disciplinary system will not likely punish an activity that courts have approved, particularly when the so-called unethical conduct vindicates the client's right to counsel of choice, a substantial value among lawyers. The result may be an ethical rule that is ridiculed because no one enforces it.

198. For a cogent discussion of why the role of the lawyer ensures a societal mistrust that grows with familiarity, see Post, *supra* note 187.

199. See Kaplan, *The NLJ Poll Results: Take Heed, Lawyers*, Nat'l L.J., August 18, 1986, at S-3, col. 1 (survey indicating public already views lawyers as loyal to clients, possibly to a fault).

There are contrary arguments. Professional disciplinary committees might try to enforce a successive conflict rule regardless of courts' attitudes.²⁰⁰ Even if disciplinary committees do not sanction violations of the rule, peer pressure for the rule within the profession may reduce substantially the incidence of subsequent adverse representation. Additionally, an ethical rule without enforcement is not necessarily a rule without good purpose. In a world in which economic and personal reality, rather than court or disciplinary rules, make, break, and control attorney-client relationships, an ethical rule against successive conflict may weigh on the side of adherence and thereby benefit both the lawyer and the lawyer's clients.

E. REMEDIES TO FIT THE PROBLEM

The dispute resolution system traditionally has limited lawyer disqualification to true concurrent conflict of interest situations, thus vindicating the system's foundation of truth through adversary representation. Subsequent representation against a former client does not present a conflict of interest. Despite the early cases' reliance on conflict of interest decisions and language about loyalty,²⁰¹ courts have recognized and occasionally admitted that the subsequent representation concern derives from courts' concern for confidential information.²⁰²

Although the lawyer's obligation not to use or disclose confidential information restricts what the lawyer may use on behalf of the present client, the obligation does not create a conflict of interest. Many rules restrict what a lawyer may do or use on behalf of a client. For example, a lawyer may not wiretap, steal documents, pay witnesses, depose the other party outside of the presence of counsel, or do a host of other things that might help the lawyer prepare and the client prevail. All of these restrictions limit how the lawyer may gain information for use in the representation and none present a conflict of interest. The rule that prohibits using a former client's confidential information simply constitutes another restriction on how the lawyer may gather information to help the current client.

200. Whether a state disciplinary system could penalize lawyer conduct that a federal court specifically allowed raises an interesting supremacy question beyond the scope of this Article. It is fair, however, to assume that until the practice rises to a level at which there is a genuine threat to the administration of the federal courts, the question will never be raised, let alone answered.

201. See *supra* notes 21-30 and accompanying text.

202. See *supra* notes 37-45 and accompanying text.

For example, the risk that a lawyer will use confidential information may exceed the risk that she will steal documents, but the nature of the prohibition is the same.

Confidential information differs from the other improper information sources only because the lawyer already has the confidential information. The possession of the confidence may cause the lawyer to be overly cautious in the use of the same information developed independently in a subsequent representation. Such a situation presents a classic conflict. The possible reduction in a lawyer's vigor in the current matter, however, does not produce a conflict of interest that justifies disqualification.

The client affected adversely by the conflict, the current client, does not want disqualification. Professor Morgan contends that the Model Rules do not deal effectively with the issue of remedy in the imputed disqualification area and that different rules may require different remedies.²⁰³ Although he was considering Rules 1.10 and 1.11 from a different perspective, his suggestion that a party should not be allowed to seek disqualification in pursuit of another's interest is useful here.²⁰⁴ The former client has no standing to complain that the lawyer's possession of the former client's confidences may restrict the vigor of the lawyer's representation of the current client.

Similarly, courts have no independent interest sufficient to give them standing to disqualify an unwilling client's lawyer. To decide that the adversary system has standing to disqualify the current client's lawyer in pursuit of the current client's right to effective representation would be unreasonably paternalistic. The disqualification remedy intrudes unjustifiably into the current client's legitimate area of influence.

Courts do have an interest in vigorous advocacy, however, for which an appropriate remedy might be fashioned. They might determine that the adversary assumption of the dispute resolution system depends on every client knowing about factors that might inhibit counsel's representation. Accordingly, courts could require a lawyer beginning a subsequent representation against a former client to file a written consultation and consent form between the lawyer and the current client.

203. See Morgan, *Conflicts of Interest and the Former Client in the Model Rules of Professional Conduct*, 1980 AM. B. FOUND. RES. J. 993, 1001. Professor Morgan also argues for a reasonable relationship between problem and remedy. *Id.*

204. *Id.* at 1002 n.3.

Although the consent form should not dictate the counsel decision for the party disadvantaged by the lawyer's possession of confidential information, it would affect it. By formalizing the conference between the handicapped lawyer and the prospective client, courts would increase the chance that the client will be fully informed when the decision is made. Further, the consultation and consent form would provide a document from which the court could make its own determination about whether the client has enough information for an informed judgment. The court might, consistent with its concern for the current client's level of information, hold a hearing to explain to the client the potential problems created by the lawyer's possession of confidential information. These suggestions would reduce subsequent representation against former clients for the right reason: a more informed current client wishes to avoid a lawyer who may not be able to provide full, vigorous representation. In any event, the court will have fulfilled any true conflict of interest obligation that it might have.

Although the court has no adversary system interest in the successive conflict beyond the informed decision of the current client, the profession has an ethics interest if lawyers use or disclose confidential information. That interest is identical to the profession's concern for any other breach of confidential information. If the profession considers the keeping of confidences critical, it has a precise mechanism—disciplinary action—for vindicating that interest. The profession can have greater influence on lawyer behavior through strong disciplinary action against lawyers who actually breach confidences during a subsequent representation than courts can have through the possibility of disqualification. Moreover, disciplinary action punishes the lawyer rather than the client. In addition, the use of strong disciplinary action should induce other lawyers to avoid the risk of discipline by avoiding successive conflict or by being extremely solicitous of confidences in subsequent representations.²⁰⁵

F. A BETTER MODEL FOR THE RULES

Regardless of whether courts choose to eliminate successive conflict disqualification, the profession should modify its

205. The disciplinary action has the added advantage of occurring after the completion of the subsequent representation and is premised on the actual breach of the confidence. It avoids the problem of having to examine, without disclosing, a confidence about which the former client is protective.

ethical rules. The profession adopted the present rules as if it were a court. All of the previous arguments that apply to courts thus apply to the profession when it adopts the courts' role.²⁰⁶ As Professor Morgan has noted, the argument that ethics rules are irrelevant to court determinations outside of disciplinary matters is "nonsense."²⁰⁷ The Model Rules are of heightened importance in the successive conflict area. Because the Supreme Court's decision barring interlocutory appeals has effectively disenfranchised appellate courts in the attorney disqualification area, the Model Rules are the only likely universal statement for the near future. If the profession withdraws the Model Rules, which mimic the Second Circuit decisions, courts will have to look elsewhere for authority. If the profession decides its ethics should be rules, it should promulgate reasoned rules.

Both reasonable rules for courts and better ethics for the profession require withdrawal of the provisions in Rules 1.9(a), representation against a former client, 1.10(b) and 1.10(c), imputed disqualification in successive conflict situations, and 1.11, former government lawyers. Withdrawal of those provisions avoids describing and enforcing a fictional, everlasting attorney-client relationship and provides better meaning to *conflict of interest* by reserving that term for the serious problem of concurrent conflict.

The profession should move Rule 1.9(b), which concerns the use of confidential information, to Rule 1.6, the confidentiality of information rule, where it belongs. The rule against the use of confidential information is as important as the rule against disclosure of that information. Placing all confidential information provisions in one rule and withdrawing rules that assume lawyers will violate prohibitions against use and disclosure of confidential information avoids the anomaly of ethical tenets based on presumed unethical behavior.

Rule 1.7, concerning conflict of interest, should contain either another section or an expanded comment to Rule 1.7(b) to address the potential conflict of interest problem when a lawyer contemplates representing a party against a former client. It should require written disclosure by the lawyer to the client of the nature of the lawyer's "responsibilities to . . . a third person."²⁰⁸ The disclosure should describe the previous

206. See *supra* notes 156-58 and accompanying text.

207. Morgan, *supra* note 203, at 1001.

208. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1984).

representation of the potentially adverse party and the possible restrictions that former representation imposes on the contemplated current employment. The disclosure should be sufficiently precise to convey the problem but sufficiently general to avoid disclosing the former client's confidences. The modified rule also should require written consent from the current client.

This Article's proposals would take the successive conflict problem, insofar as it is claimed on behalf of a former client, completely out of the area of ethics. Although adoption of the Article's proposals would have a significant beneficial effect on courts, the effect on the profession's view of itself and its clients may, in the long run, be more important. The end of successive conflict will hasten the day when lawyers and clients admit that an attorney-client relationship does not last forever. If the profession determines, however, that clients should last forever, the profession should nevertheless withdraw the tangle of substantial relationship and imputed disqualification rules and replace them with a one-line admonition: "No lawyer shall oppose a client or a former client in any matter."

CONCLUSION

More than thirty years ago, courts seized on a poor notion about ethics to create a bad rule about successive conflict. Although it took the creation of large firms and the imputed disqualification of associates to demonstrate the doctrinal flaw in the original successive conflict rule, it is now clear that the rule has caused great, unanticipated mischief in pursuit of an inappropriate value. The current abuse of the successive conflict disqualification doctrine should lead courts and the profession to reevaluate and eliminate the doctrine. They should, at the same time, reconsider their proper roles in defining how lawyers should be and how they should act, with a full understanding of the potential for doctrinal mischief and role diminution if they adopt perspectives beyond their appropriate jurisdictions.