CONFLICTS OF INTEREST IN THE MEGA-FIRM

I. INTRODUCTION

Merger Mania,[1] *Firms Test Growth Alternatives,*[2] and *Urge to Merge*[3] are the titles to just a few of the numerous articles dealing with law firm growth. These titles are indicative of the unprecedented size expansion of law firms today. According to a 1986 survey, the largest firm in the country has over 800 attorneys.[4] The emergence of the mega-firm has increased the number of clients available to firms[5] and increased the firms' capacity to serve these clients.[6] A large firm can offer a "broad range of specialized services" to their clients.[7] In the midst of this law practice evolution there is one big drawback emerging: big is not always better.[8] "Lawyers around the country say the trend toward[s] larger law firms . . . is leading to more conflicts of interest."[9]

II. CONFLICTS OF INTEREST AND ETHICAL STANDARDS

These conflicts of interest can arise because of lawyer mobility, multi-departmental firms, multi-city firms, or a combination thereof. As an attorney moves from one firm to another, it is possible that a client from the old firm could be an adverse party to a client at the new firm. In large departmentalized firms, one department could be representing one client who is an adverse party to a client represented by another department. In firms with offices in more than one city, an office in one city could have a client who is an adverse party of a client represented by the firm in another city. In all of these situations, the attorneys involved and their firms could be disqualified because of a conflict of

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1. 16 Nat'l L.J., Sept. 12, 1983, at 12, col. 1.
2. Graham, 4 Legal Times of Washington, Dec. 14, 1981, at 3, col. 1.
3. Girdner, 95 L.A. Daily J., Aug. 16, 1982, at 1, col. 6.
4. 9 Nat'l L.J., Sept. 22, 1986, at S4, col. 1.
5. Girdner, *Urge to Merge: 'Marriages' Bring Law Firms More Clients, Flexibility,* 95 L.A. Daily J., Aug. 16, 1982, at 1, col. 6.
6. Rose, *Merging of Firms Increases Capacity to Serve Clients,* 193 N.Y.L.J., March 23, 1985, at 31, col. 1.
7. Hildebrandt, *An Analysis of the Urge to Merge Law Firms,* 183 N.Y.L.J., May 13, 1980, at 4, col. 1.
8. Tybor, *Conflicts: When Big Isn't Better,* 1 Nat'l L.J., May 7, 1979, at 1, col. 4.
9. *Id.*

interest. The courts will generally strive to "preserve a balance, delicate though it may be, between an individual's right to his own freely chosen counsel and the need to maintain the highest ethical standards of professional responsibility."[10]

When ethical considerations arise, state bar associations, law firms and courts are guided by the standards of conduct set forth by the ABA Model Code of Professional Responsibility[11] ("Model Code") and the ABA Model Rules of Professional Conduct ("Model Rules").[12] When utilizing the Model Code, the courts have generally used a balancing test consisting of balancing the values set forth in Canons 4, 5, and 9.[13] These canons provide that the confidences and secrets of a client shoud be preserved,[14] that a lawyer can exercise independent professional judgement on behalf of a client,[15] and that an attorney should guard against even the appearance of professional impropriety.[16] The development of this balancing process, its effect on large firms and possible solutions to the problem is the focus of this article.

III. DISQUALIFICATION STANDARDS

"In establishing a rule for attorney disqualification, the conflicting interests of the attorney, the client and the legal profession must be balanced."[17] The attorney is interested in mobility and the choice to join a firm of the size he wishes and the client wants representation by the attorney of his choice. These two important interests, at times, have to defer to the ethical standards set forth in the Model Code and Model Rules.

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10. Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 753 (2d Cir. 1975) (quoting Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 564-65 (2d Cir. 1973)).

11. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1983) [hereinafter MODEL CODE].

12. MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter MODEL RULES].

13. *See, e.g.*, La Salle National Bank v. County of Lake, 703 F.2d 252 (7th Cir. 1983); Armstrong v. McAlpin, 606 F.2d 28 (2d Cir. 1979); Fund of Funds Ltd. v. Arthur Anderson & Co., 567 F.2d 225 (2d Cir. 1977); Schloetter v. Railoc of Indiana, Inc., 546 F.2d 706 (7th Cir. 1976); *Silver Chrysler*, 518 F.2d at 751.

14. MODEL CODE Canon 4 provides that "a lawyer should preserve the confidences and secrets of a client."

15. MODEL CODE Canon 5 provides that "a lawyer should exercise independent professional judgement on behalf of a client."

16. MODEL CODE Canon 9 provides that "a lawyer should avoid even the appearance of professional impropriety."

17. Note, *Attorney Disqualification: The Case For An Irrebuttable Presumption Rebutted*, 44 ALB. L. REV. 645, 646 (1980).

For many years, the standards used to disqualify attorneys were very strict. Attorneys were disqualified per se whenever the possibility of a conflict of interest arose. The appropriate standard to be used in these situations, the substantial relationship test, was established in *T.C. & Theatre Corp. v. Warner Brothers Pictures.*[18] All that has to be shown is that a substantial relationship exists between the former representation and the subsequent adverse representation.[19] The court will then assume that confidences were disclosed to the attorney during the former representation.[20] This assumption of shared confidences will then render the attorney disqualified from the present action because of the conflict of interest between the former and subsequent clients.[21] The decision in *T.C. & Theatre Corp.* was viewed as holding that the presumption of shared confidences between a former client and attorney was an irrebuttable one. Even if no confidential information was shared, the attorney in question was not allowed to disprove the presumption. During the past ten years, courts have begun to realize the unfairness of the irrebuttable presumption;[22] especially in view of the increase in law firm size and attorney mobility. "[T]he rigid rule of total disqualification is premised in the day when firms, when they existed, were very small . . . ."[23]

Today, an attorney may rebut the presumption of confidential information, even where a substantial relationship exists between the subjects of the past and present representation. Disqualification will be unnecessary where the attorney shows clearly and effectively that he has no knowledge of the confidences and secrets of the clients.[24] The court may look at a number of factors when deciding this issue, including the size of the law firm, the area of specialization of the attorney, the attorney's position in the firm, and the demeanor and credibility of witnesses at the evidentiary hearing.[25] In allowing attorneys to rebut

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18. 113 F. Supp. 265 (S.D.N.Y. 1953).

19. *Id.* at 268.

20. *Id.*

21. *Id.*

22. *E.g., La Salle*, 703 F.2d at 252 (7th Cir. 1983); Freeman v. Chicago Musical Instrument Co., 689 F.2d 715 (7th Cir. 1983); Nemours Foundation v. Gilbane, Aetna, Federal Insurance Co., 632 F. Supp. 418 (D. Del. 1986); City of Cleveland v. Cleveland Electric Illuminating Co., 440 F. Supp. 193 (N.D. Ohio 1977).

23. *City of Cleveland*, 440 F. Supp. at 196 (N.D. Ohio 1977) (quoting Note, *Unchanging Rules in Changing Times: The Canons of Ethics and Intra-firm Conflicts of Interest*, 73 YALE L.J. 1058 (1964)).

24. *E.g., La Salle*, 703 F.2d at 257; *Freeman*, 689 F.2d at 723.

25. *La Salle*, 703 F.2d at 257; *Freeman*, 689 F.2d at 723.

this presumption of knowledge, courts are beginning to recognize that in our modern legal society, large firms, numerous clients, and attorney mobility are more the norm than the exception. It would have been impractical and unjust to continue to automatically disqualify an attorney because of the possibility of an "appearance of impropriety."[26] If the attorney can prove that he has no knowledge which would harm his former client's case, then there seems to be no ethical reason why the attorney cannot continue to work for his present client, especially when the attorney is the client's choice for counsel.

When a conflict of interest exists, not only can the attorney in question be disqualified, but the attorney's entire firm can also be disqualified. When using the balancing test to determine attorney disqualification, the same ethical standards have been extended to the entire firm with which the attorney is associated. The presumption of shared confidential knowledge that was found to exist in *T.C. & Theatre Corp.*[27] was imputed to all the members of the disqualified attorney's firm in *Consolidated Theatres v. Warner Brothers Circuit Management Corp.*[28] Imputed disqualification of a firm is still the first response to a conflict of interest as seen in Model Rule 1.10.[29] This rule prohibits a firm from representing a client where a member of that firm has previ-

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26. MODEL CODE Canon 9 (1983).

27. *See supra* note 18 and accompanying text.

28. 216 F.2d 920 (2d Cir. 1954).

29. Rule 1.10 Imputed Disqualification: General Rule

(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 prescibed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

ously represented a party adverse to the client in a substantially related matter. Several courts, however, have begun to recognize that this too can be a rebuttable presumption.[30]

IV. CHINESE WALL DEFENSE

One method of defense that firms have used to try and refute this presumption of imputed knowledge is the Chinese wall defense. This screening device is designed to isolate the disqualified attorney from the conflicting case. There are several different procedures used to "wall in" or "screen" a tainted attorney. These include keeping the attorney from having any connection with the case or receiving any part of the fees from the case, forbidding any type of discussion of the case with the attorney, restricting the attorney's access to the files, informing all the members of the firm of the importance of the wall, and separating, both organizationally and physically, the attorneys working on the conflicting issues.[31]

In the past, courts have looked with disfavor on the Chinese wall defense because of Canon 9's mandate to avoid even the appearance of impropriety.[32] Generally, courts have refused to examine the protective steps taken by a firm with any real depth at all. In *Westinghouse Electric Corp. v. Kerr-McGee Corp.*,[33] the Seventh Circuit found that a conflict of interest existed where the Chicago branch of a firm was representing a client who was an adverse party to a client represented by the Washington, D.C. branch of the firm.[34] The court refused to recognize the wall theory as a viable defense and the firm was disqualified.[35] As a result, not only were millions of dollars lost, but the clients were deprived of their choice of counsel. In firms of this size, an automatic imputation of knowledge does not seem feasible, but the court in *Westinghouse* observed that "there is no basis for creating separate disqualification rules for large firms even though the burden of comply-

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30. *E.g.*, *La Salle*, 703 F.2d at 252 (7th Cir. 1983); Novo Terapeutick Laboratium v. Baxter Travenol Laboratories, Inc., 607 F.2d 186 (7th Cir. 1979) (en banc); Kesselhaut v. United States, 55 F.2d 791 (Ct. Cl. 1977); *Silver Chrysler*, 518 F.2d at 751; *Nemours Foundation*, 632 F. Supp. at 418.

31. Note, *The Chinese Wall Defense to Law-Firm Disqualification*, 128 U. PA. L. REV. 677, 678 (1980).

32. *Armstrong*, 606 F.2d at 28 *Westinghouse*, 580 F.2d at 1311; *Fund of Funds*, 567 F.2d at 225; *Schloetter*, 546 F.2d at 706.

33. 580 F.2d 1311 (7th Cir. 1978).

34. *Id.* at 1321.

35. *Id.*

ing with ethical considerations will naturally fall more heavily upon their shoulders."[36] The question to be answered is how practical is this ruling? It seems highly unlikely that the members of a multi-city law firm would be involved to any great extent with the activities of a firm branch in another city. Screening measures were used in *Westinghouse*, but the court refused to consider them.[37] This holding is a reflection of the court's unwillingness to accept the premise that large firms do pose special ethical problems and deserve special solutions to those problems.

The legal profession's view towards the Chinese wall defense has become more accepting over the last few years. The ABA Committee on Ethics and Professional Responsibility has helped this trend in Formal Opinion 342[38] by accepting a screening process in a situation where a former government attorney is disqualified from participating in the particular matter in controversy and sharing in the fees attributable to it.[39] The ABA has also shown its acceptance of screening devices by incorporating the holding of Opinion 342 into Model Rule 1.11 which allows screening devices to be used to insulate a disqualified attorney who has formerly worked for the goverment.[40] Both Opinion 342 and Model Rule 1.11 consider screening measures to be used when the firm of a former government attorney is representing an adverse party to the agency for whom the attorney formerly worked. At least 2 cases have held that the Chinese wall built in this type of situation suffices to keep the entire firm from being disqualified.[41]

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36. *Id.*

37. In *Westinghouse*, Judge Fairchild noted that he would find the Chinese wall defense acceptable if it could be proven. The majority opinion, however, did not consider it as a defense. *Westinghouse*, 580 F.2d at 1321 n.28.

38. Formal Op. 342, 62 A.B.A. J. 517 (1975).

39. *Id.* at 521.

40. Rule 1.11 Successive Government and Private Employment:

> (a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
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> (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
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> (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule . . . .

41. Greitzer & Locks v. Johns-Manville Corp., No. 81-1379, slip op. (4th Cir. Mar.

The next issue to be decided by the courts is that if these screening measures can be used for former government attorneys, can they also be used for former private attorneys? At least two courts have said yes.[42] In *INA Underwriters Insurance Co. v. Rubin*,[43] the court said:

> 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 disqualified attorney's previous employment was private and not public. To hold fast to such a proposition would logically require a belief that privately employed attorneys are inherently incapable of being effectively screened, as though they were less trustworthy or more voluble than their ex-government counterparts. If former government attorneys can be screened effectively, it follows that former private attorneys can too.[44]

Even though courts are increasingly beginning to accept the Chinese wall defense, instances will nevertheless exist where the entire firm will have to be disqualified. The courts should examine the timing of the screening, the physical characteristics of the screening, the size of the firm, the nature of the prior involvement of the tainted attorney, and the extensiveness of the screening to determine the necessity of disqualification.[45] As the use of screening measures grows, the large firm must take extra precautions to protect themselves by timely implementing these measures. The firms must recognize the possibility of a conflict of interest in every situation so as to avoid disqualification.

V. CONCLUSION

Formerly, attorneys and firms were disqualified when there was any hint of a conflict of interest. As firms have become larger and more diversified, the legal profession's treatment of conlicts of interest has changed. The change was inevitable. Treating the mega-firm the same as a small firm is an unrealistic way to approach the conflict of interest problem. The logical method is to allow the presumption of shared confidences to be rebutted by the attorney or firm in question. This gives them the opportunity to refute any charges against them. If there

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5, 1982); *Kesselhaut*, 55 F.2d at 791.

42. *Nemours Foundation*, 632 F. Supp. at 418; INA Underwriters Insurance Co. v. Rubin, 635 F. Supp. 1 (E.D. Pa. 1983).

43. 635 F. Supp. 1 (E.D. Pa. 1983).

44. *INA Underwriters*, 635 F. Supp. at 5 (quoting Note, *supra* note 30, at 677).

45. *Nemours Foundation*, 632 F. Supp. at 428.

were no shared confidences originally, then there are no ethical problems and the attorney and firm should have the opportunity to prove that.

The Chinese wall, while not always appropriate, is a reasonable defense. If a firm can show that a tainted attorney is kept completely separate from the action in question, then there is no impropriety and no reason for disqualifying the attorney.

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