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Attorney Disqualification and Work Product Availability: A Proposed Analysis

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COMMENTS

ATTORNEY DISQUALIFICATION AND WORK PRODUCT AVAILABILITY: A PROPOSED ANALYSIS

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I. INTRODUCTION¹

An attorney or law firm who represents a client whose interests are

1. All references in this comment to Canons, Disciplinary Rules (DRs), or Ethical Considerations (ECs) refer to the Model Code of Professional Responsibility of the American Bar Association unless otherwise indicated. Because the Canons are very broad statements of the ethical duties placed upon attorneys, a parallel citation to their counterpart in the proposed final draft of the Model Rules of Professional Conduct is not provided. When there is a reference to an EC or a DR, parallel citations to the Missouri Supreme Court Rules and the Model Rules of Professional Conduct will be given where practical. In addition, because the cases decided prior to 1970 were decided under the 1908 ABA Canons of Professional Ethics, the relevant counterparts of present Canons 2, 4, 5, and 9 are listed below:

ABA CODE	ABA CANONS OF PROFESSIONAL ETHICS
Canon 2	Canons 4, 7, 16, 37, 44.
Canon 4	Canons 5, 6, 37.
Canon 5	Canons 6, 44.
Canon 9	Canons 29, 36.

adverse to those of a present² or former³ client faces conflicting ethical duties regarding the second representation.⁴ The prior client expects that his attorney will continue to represent him in substantially related matters or at least refrain from representing a competitor. The subsequent client expects to obtain the services of the attorney of his choice. The lawyer is caught in the middle.

The United States Court of Appeals for the Second Circuit perhaps said it best when it observed that no client can "reasonably expect to foreclose either all lawyers formerly at the firm or even those who have represented it on unrelated matters from subsequently representing an opposing party."⁵

2. Where a lawyer has an adverse representation conflict with a present client, the lawyer's duty of undivided loyalty imposed by MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1, DR 5-105 (1979) prevents continuation of the representation unless the lawyer obtains the consent of the affected client under *id.* DR 4-101(c), DR 5-105(c). The attorney has the burden of proving client consent after full disclosure. This burden is extremely difficult to meet. *See* Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 227-29 (7th Cir. 1978); *In re Hansen*, 586 P.2d 413, 415 (Utah 1978). When a conflict with a present client exists, there is little chance that the attorney will be permitted to continue the adverse representation because few rational clients will consent to allow their former attorney to represent interests adverse to their own after disclosure of such a conflict. *See* Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 227-29 (7th Cir. 1978); IBM Corp. v. Levin, 579 F.2d 271, 282-83 (3d Cir. 1978). *But see* Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339, 1345-46, 1349 (9th Cir. 1981) (client found to have consented to counsel's adverse representation).

3. A lawyer can be involved in an adversity of interests conflict when his own interests conflict with those of a client. *See generally* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101, DR 5-102, DR 5-103, DR 5-104 (1979). Conflicting interests also arise where the interests of two or more clients are in opposition. *See generally id.* DR 5-105, DR 5-106. *See also id.* DR 5-107. The adversity of interests conflict dealt with in this Comment is confined to conflicting interests between two or more clients. Although it is obvious that the same law firm could not ethically represent both sides in the same litigation, conflicting interests can also present themselves indirectly. *See generally Developments in the Law, Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244 (1981).

4. The ethical considerations presented by the existence of an adverse representation conflict are presently considered by the courts to arise from MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4, Canon 5, & Canon 9 (1979). Canon 4 requires an attorney to "preserve the confidences and secrets of a client." Canon 5 requires that "a lawyer should exercise independent professional judgment on behalf of a client." Canon 9 cautions attorneys to "avoid even the appearance of professional impropriety." The Ethical Considerations (ECs) and Disciplinary Rules (DRs) which follow the Canons expand on the duties and provide mechanisms for their enforcement. Canon 2 and especially DR 2-110 (ethical duties of attorneys in withdrawal situations) also have an important impact upon the adverse representation conflict. *See* note 106 and accompanying text *infra*.

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

In a later case, the same court affirmed an order dismissing counsel, stating:

[T]here is a particularly trenchant reason for requiring a high standard of proof on the part of one who seeks to disqualify his former counsel, for in disqualification matters we must be solicitous of a client's right freely to choose his counsel—a right which of course must be balanced against the need to maintain the highest standards of the profession. . . . A client whose attorney is disqualified incurs a loss of time and money in being compelled to retain new counsel who in turn have to become familiar with the prior comprehensive investigation which is the core of modern complex litigation. The client moreover may lose the benefit of its longtime counsel's specialized knowledge of its operations.⁶

It is necessary to strike a delicate balance between the right of a former client to preserve the confidentiality of his past communications and the right of the present client to counsel of his choice.⁷

This Comment analyzes the issue of attorney disqualification and the related problem of the disqualified attorney's work product.⁸ The first part of this Comment examines the current mode of analysis used in these cases (traditional analysis) and its problems. Of particular importance is the conflict between the withdrawing lawyer's ethical duties under Canon 2 to "avoid foreseeable prejudice to the rights of his client" and the duties imposed by other Canons⁹ to preserve client confidences.

The second part of this Comment proposes a method of analysis that attempts to reconcile the conflicting ethical duties imposed by the ABA Model

6. *Government of India v. Cook Industries*, 569 F.2d 737, 739 (2d Cir. 1978).

7. The right to freely obtain counsel of one's choice is given great weight by the courts. *See, e.g.*, *Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339, 1349 (9th Cir. 1981); *Novo Terapeutisk Laboratorium v. Baxter Travenol Laboratories*, 607 F.2d 186, 197 (7th Cir. 1979); *Board of Education v. Nyquist*, 590 F.2d 1240, 1248 (2d Cir. 1979) (Mansfield, J., concurring); *Central Milk Producers Coop. v. Sentry Food Stores*, 573 F.2d 988, 992 (8th Cir. 1978); *Government of India v. Cook Industries*, 569 F.2d 737, 739 (2d Cir. 1978); *Gas-A-Tron of Arizona v. Union Oil Co.*, 534 F.2d 1322, 1325 (9th Cir. 1976), *cert. denied*, 429 U.S. 861 (1980); *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 757 (2d Cir. 1975); *Lemaire v. Texaco, Inc.*, 496 F. Supp. 1308, 1310 (E.D. Tex. 1980).

8. The term "attorney work product" has a specialized meaning. Normally, it is used where opposing counsel is seeking to obtain access to information in his adversary's file. *See generally Hickman v. Taylor*, 329 U.S. 425 (1947). In the context of this Comment, attorney work product covers the same kind of information, but it is the client of a disqualified attorney, not the adversary, who is seeking access to the information. *See also* note 31 and accompanying text *infra*.

9. *See generally* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1979) (duty to preserve client confidences); *id.* Canon 5 (duty to prevent impairment of professional judgment by avoiding conflicting representations); *id.* Canon 9 (duty to avoid the appearance of impropriety).

Code of Professional Responsibility.¹⁰ The proposal separates disqualification questions into several categories, which are intended to clarify judicial reasoning and improve the uniformity and predictability of decisions.¹¹ The proposal would, among other things, channel disqualification issues into the bar's disciplinary machinery or separate malpractice actions, avoiding litigation of these issues prior to trial of the underlying cause of action.¹²

II. TRADITIONAL ANALYSIS

The early decisions laying the foundation for attorney disqualification in multiclient conflict of interest cases recognized both the need to protect client confidences and the need for judicial flexibility to avoid undue interference with the right of other clients to obtain counsel of their choice. The courts that struggled with difficult adverse representation cases eventually reached a rough consensus on the proper method of analyzing them. Today, the client who seeks to disqualify his former attorney need only demonstrate:

that the subject matters embraced within the pending suit wherein the former attorney appears on behalf of his adversary are substantially related to the matter or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation.¹³

The first part of this is the "substantial relationship test" which forms the theoretical basis of traditional analysis.¹⁴ There are three steps to traditional analysis. First, there must be a substantial relationship between the two

10. See Part IV. *infra*.

11. See note 82 and accompanying text *infra*.

12. Although the question of whether an attorney will be allowed to continue to participate in litigation is relevant to the underlying cause of action, availability of a disqualified attorney's work product and his professional misconduct are side issues. The appropriateness of using pending litigation for resolving these issues is considered in Part IV.C. *infra*.

13. T. C. Theatre Corp. v. Warner Bros. Pictures, 133 F. Supp. 265, 268 (S.D.N.Y. 1953).

14. See generally *Novo Terapeutisk Laboratorium v. Baxter Travenol Laboratories*, 607 F.2d 186 (7th Cir. 1979); *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975); *Laskey Bros. v. Warner Bros. Pictures*, 224 F.2d 824 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956); *Realco Services v. Holt*, 479 F. Supp. 867 (E.D. Pa. 1979). Another reason for disqualification of counsel has been Canon 9's mandate to avoid the appearance of impropriety. See generally *Kramer, The Appearance of Impropriety Under Canon 9: A Study of the Federal Judicial Process Applied to Lawyers*, 65 MINN. L. REV. 243 (1981); O'Toole, *Canon 9 of the Code of Professional Responsibility: An Elusive Ethical Guideline*, 62 MARQ. L. REV. 313 (1979); Note, *Disqualification of Counsel for the Appearance of Professional Impropriety*, 25 CATH. U.L. REV. 343 (1976); 94 HARV. L. REV., *supra* note 3, at 1319; *Appearance of Impropriety as the Sole Ground for Disqualification*, 31 U. MIAMI L. REV. 1516 (1977).

representations. Second, the court will presume that the lawyer received confidences from the first client. Third, the court will determine whether the disqualified attorney's work product may be given to the second client.

A. *Substantial Relationship*

A former client must first establish the existence of a prior attorney-client relationship between himself and the attorney sought to be disqualified. Next, he must demonstrate a substantial relationship between the two representations.¹⁵ The court looks at the subject matter of both representations to determine whether the issues and facts are substantially identical in both and whether the second representation is, in fact, adverse to the first.¹⁶ Finally, it determines whether the representations are so similar that confidences given in one would be relevant in the other.¹⁷

B. *Presumption of Confidences*

Once substantial relationship has been established, the court will presume that during the prior representation the former client disclosed confidences relevant to the attorney's subsequent adverse representation.¹⁸ This presumption protects the former client against revealing the very confidences he is seeking to protect by using the disqualification motion.¹⁹ Though the presumption is sometimes considered irrebuttable,²⁰ many courts allow rebuttal if the attorney can show that he received no relevant confidences from the former client.²¹ If the presumption is not rebutted, the attorney's

15. See cases cited note 14 *supra*.

16. See, e.g., *T. C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265, 268 (S.D.N.Y. 1953).

17. See *Duncan v. Merrill Lynch, Pierce, Fenner & Smith*, 646 F.2d 1020, 1028-29 (5th Cir. 1981) (appeal pending); *Government of India v. Cook Industries*, 569 F.2d 737, 739-40 (2d Cir. 1978); *Realco Services v. Holt*, 479 F. Supp. 867, 871-72 (E.D. Pa. 1979).

18. See, e.g., *T. C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265, 268 (S.D.N.Y. 1953); *Reardon v. Marlayne, Inc.*, 83 N.J. 460, 468, 416 A.2d 852, 856 (1980).

19. See generally *T. C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265 (S.D.N.Y. 1953); 94 HARV. L. REV., *supra* note 3, at 1315.

20. See *Duncan v. Merrill Lynch, Pierce, Fenner & Smith*, 646 F.2d 1020, 1028 (5th Cir. 1981) (irrebuttable presumption arises when substantial relationship shown to exist) (appeal pending); *Arkansas v. Dean Food Products Co.*, 605 F.2d 380, 384 (8th Cir. 1979) (irrefutable presumption arises when substantial relationship shown to exist), *overruled on other grounds*, *In re Multi-Piece Rim Products Liability*, 612 F.2d 377 (8th Cir.), *vacated on same grounds sub nom. Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1980); *Reardon v. Marlayne, Inc.*, 83 N.J. 460, 473, 416 A.2d 852, 859 (1980) (presumption of access to and knowledge of confidences may not be rebutted).

21. See *Novo Terapeutisk Laboratorium v. Baxter Travenol Laboratories*, 607 F.2d 186, 197 (7th Cir. 1979); *Laskey Bros. v. Warner Bros. Pictures*, 224 F.2d

continued participation in the case is tainted due to the risk of revelation or misuse of the former client's confidences. This threat of taint to the underlying trial requires that the attorney be disqualified.²²

If one attorney in a law firm represented a former client and an affiliated attorney²³ engages in a subsequent representation adverse to the former client's interest, the courts apply the concept of vicarious disqualification.²⁴ Traditional analysis again applies the substantial relationship test and presumes that confidences were given.²⁵ The court further presumes that the attorney who represented the former client discussed that client's con-

824, 827 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956); *Realco Services v. Holt*, 479 F. Supp. 867, 872 n.4 (E.D. Pa. 1979). Attorneys have successfully rebutted the presumption of knowledge of former client confidences. *See, e.g.*, *Gas-A-Tron of Arizona v. Union Oil Co.*, 534 F.2d 1322, 1324-25 (9th Cir. 1976), *cert. denied*, 429 U.S. 861 (1980); *Lemaire v. Texaco, Inc.*, 496 F. Supp. 1309, 1310 (E.D. Tex. 1980).

22. *See, e.g.*, *In re Asbestos Cases*, 514 F. Supp. 914, 922 (E.D. Va. 1981).

23. The duty to preserve a client's confidences and secrets imposed upon a lawyer by Canon 4 extends to the attorney's associates and employees as well. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(D) (1979) states "A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client . . ." MO. SUP. CT. R. 4, DR 4-101(D) is identical. *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-5, DR 5-105(D) (1979); MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.6, 1.8(b), 1.9(b), 5.1 (Proposed Final Draft 1981). This duty to preserve client confidences continues after termination of the attorney's employment by the client. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-6 (1979) ("The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment . . ."). MO. SUP. CT. R. 4, EC 4-6 is identical. *See also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (Proposed Final Draft 1981).

24. Vicarious disqualification is the disqualification of attorneys who are partners, associates, or affiliates of an attorney who is required to decline or withdraw from employment. An attorney who creates the possibility of disqualification due to an adverse representation conflict is considered to be tainted by his knowledge of a prior client's confidences. Vicarious disqualification is implemented by MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D) (1979) which states: "If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner or associate, or any other lawyer affiliated with him or his firm may accept or continue such employment." *See, e.g.*, *In re Asbestos Cases*, 514 F. Supp. 914, 922 (E.D. Va. 1981). MO. SUP. CT. R. 4, DR 5-105(D) limits vicarious disqualification to situations where an attorney is required "to decline or withdraw from employment under DR 5-105." *See also* MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.10, 1.11(c), 1.12(c) (Proposed Final Draft 1981). For a discussion of vicarious disqualification and its impact, see Comment, *The Disqualification Dilemma: DR 5-105(D) of the Code of Professional Responsibility*, 56 NEV. L. REV. 692 (1977); 94 HARV. L. REV., *supra* note 3, at 1319.

25. *See* note 14 and accompanying text *supra*.

fidences with affiliated attorneys. This makes all attorneys in a law firm privy to the former client's confidences and subject to vicarious disqualification.²⁶

Some courts allow rebuttal of the presumption of shared confidences between affiliated attorneys.²⁷ Most courts allow a law firm employing a former government attorney to rebut the presumed sharing of the former client's confidences if an effective "Chinese Wall"²⁸ is erected within the firm. Failure to rebut the presumed sharing of confidences results in disqualification of both the tainted attorney and the firm in question.²⁹ Disqualification is required to prevent a taint to the underlying trial from the possible revelation or misuse of the former client's confidences.³⁰

C. *Work Product*

When counsel has been disqualified, the question becomes whether his work product³¹ will be made available to substitute counsel. The courts

26. See *Novo Therapeutisk Laboratorium v. Baxter Travenol Laboratories*, 607 F.2d 186, 197 (7th Cir. 1979) ("it is reasonable to presume that members of a law firm freely share their client's confidences with one another"); *Arkansas v. Dean Food Products Co.*, 605 F.2d 380, 385 (8th Cir. 1979) ("confidences imputed to the attorney are presumed shared among his partners and employees associated with him at that time"), *overruled on other grounds*, *In re Multi-Piece Rim Products Liability*, 612 F.2d 377 (8th Cir.), *vacated on same grounds sub nom.* *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1980).

27. See cases cited note 21 *supra*.

28. See notes 54-58 and accompanying text *infra*.

29. See *In re Asbestos Cases*, 514 F. Supp. 914, 922 (E.D. Va. 1981).

30. When a law firm hires a new associate or a new partnership is created, the law firm should consider what impact the new attorney's presence has upon the firm's existing clientele. The law firm may be "hiring a conflict," which could cause the firm to lose a longstanding client due to disqualification under DR 5-105(D). See note 24 *supra*. See also *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225, 235-36 (2d Cir. 1977) (law firms containing tainted attorney and co-counsel both disqualified); *Cinema 5 Ltd. v. Cinerama, Inc.*, 528 F.2d 1348, 1385-87 (2d Cir. 1976) (law firm disqualified because partner of plaintiff's firm was also partner in defendant's firm); *Consolidated Theatres v. Warner Bros. Circuit Mgmt. Corp.*, 216 F.2d 920, 924, 926-27 (2d Cir. 1954) (plaintiff's law firm disqualified due to former affiliation of plaintiff's attorney with defendant's law firm).

31. The term "attorney work product" was coined in *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). In *Hickman*, opposing counsel sought to discover information from his adversary contained in his adversary's work product. The work product of an attorney is the sifting of information during the preparation of a case and involves the development of legal theories and strategy, all of which is reflected in interviews, statements, memoranda, etc., prepared by an attorney. Work product is normally thought of as an extension of the evidentiary privilege. In contrast to the *Hickman* work product availability situation is the issue of the availability of an attorney's work product to a client from whose representation the attorney was disqualified. In the latter situation, the attorney is under an ethical duty to turn over his work product to the client he represented prior to disqualification even though the work product is at least intangibly infected by the attorney's taint.

recognize no clear standardized test for resolution of the problem; they appear to decide cases on an ad hoc, case-by-case basis, according to the equities in a given case.³²

A theoretical inconsistency is created by the use of traditional analysis to resolve the work product issue. There is a direct conflict between the disqualified attorney's duty under DR 2-110(A) to avoid prejudice to his current client by turning over his work product and Canon 4's mandate to protect the confidences of the former client.³³ Disqualification due to presumed knowledge of the former client's confidences creates the further presumption that the attorney's knowledge colored his judgment, at least intangibly, in his preparation of even routine legal work for the current client. A strict application of traditional analysis requires withholding the presumptively tainted work product from the current client. The work product issue would thus be decided by the decision to disqualify counsel.³⁴ This effectively ignores the current client's rights and gives total emphasis to protection of the former client's confidences.

Traditional analysis is not always applied so mechanically. In *First Wisconsin Mortgage Trust v. First Wisconsin Corp.*,³⁵ the United States Court of Appeals for the Seventh Circuit rejected strict application of the analysis.

The work product . . . if "tainted" in the present case [is] only so by virtue of the application of a per se sanction flowing from the disqualification [of counsel], and relating back in extent to the beginning of the cause for disqualification. They are not "tainted" by virtue of having been based on confidential knowledge or other advantage gained during or from the dual representation.³⁶

The court instead opted for a broader standard, applied on a case-by-case basis.

The movant who claims that its opponent should be denied the work product . . . should be in the best possible position to point out to the district court the facets of the relationship which it had with the disqualified counsel which would somehow give an improper advantage against it . . . Such matters, of course, if protection thereof is needed, can be addressed to the court on an in camera basis.³⁷

The *First Wisconsin* test requires the former client to reveal his confidences

32. See note 34 *infra*.

33. See note 106 and accompanying text *infra*.

34. Traditional analysis would make disqualification and work product availability a single question. Production of a disqualified attorney's work product effectively reveals the prior client's confidences because the disqualified attorney's taint would necessarily infect the work product. See, e.g., *Reardon v. Marlayne, Inc.*, 83 N.J. 460, 478, 416 A.2d 852, 862 (1980). But see *First Wisconsin Mortgage Trust v. First Wisconsin Corp.*, 584 F.2d 201, 210 (7th Cir. 1978) (court rejected argument that work product issue must be in *pari materia* with disqualification).

35. 584 F.2d 201 (7th Cir. 1978).

36. *Id.* at 207.

37. *Id.* at 209.

to the court so that it can determine whether they are disclosed in the disqualified attorney's work product. Traditional analysis rejects this test as repugnant to Canon 4's mandate to "preserve the confidences and secrets of a client."³⁸ The test also undermines the purpose of the presumptions that arise on satisfaction of the substantial relationship test, creating more inconsistency.³⁹

III. PROBLEMS WITH TRADITIONAL ANALYSIS

There are four major problems with traditional analysis. First, the courts' need for flexibility creates inconsistent and unpredictable results due to case-by-case modifications. Second, attorneys are treated differently based on whether they become tainted in government service or private practice. Third, inflexible application results in overinclusion of attorneys subject to disqualification. Fourth, it fails to reconcile the conflicting ethical duties imposed on attorneys by the ABA Model Code of Professional Responsibility.

A. Uncertainty

Clients legitimately expect that their attorneys will not act adversely to them in subsequent related matters.⁴⁰ From the attorney's perspective, a client does not have a justifiable expectation that a law firm with thousands of clients will examine each file before accepting a new client. Passage of time and changes in personnel occasionally allow adverse representation conflicts to arise inadvertently. Both the courts and the bar recognize this, at least tacitly, because courts often disqualify counsel while carefully noting that disqualification in itself does not imply misconduct.⁴¹

Client expectations and the courts' need for flexibility have led to case-

38. See note 34 *supra*.

39. See Part II.B. *supra*.

40. The present ABA Model Code of Professional Responsibility does not deal specifically with the conflict between duties owed to current and former clients. The Working Draft of the Model Rules of Professional Conduct, however, "would incorporate, almost unchanged, the substantial relationship test with its two requirements as developed at common law." 94 HARV. L. REV., *supra* note 3, at 1318 n.169. To be more precise, the client has the right to expect that his attorney's loyalty will prevent the attorney from accepting future representations adverse to the client's interests in substantially related matters. This expectation finds support in MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1, EC 4-6, EC 5-1, EC 5-14, DR 5-105(B) (1979). MO. SUP. CT. R. 4, EC 4-1, EC 4-6, EC 5-1, EC 5-14 are identical. *Id.* DR 5-105(B) omits the following language contained in the Model Code: "or if it would be likely to involve him in representing differing interests." See also MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.6(a), 1.7(a), 1.8, 1.9(a) (Proposed Final Draft 1981).

41. See *Cinema 5 Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1385-86 (2d Cir. 1976) (no "actual wrongdoing" by plaintiff's attorney but disqualified for appearance of impropriety). *But see* *Realco Services v. Holt*, 479 F. Supp. 867, 875 (E.D. Pa. 1979) (attorneys have "a duty to actively seek out possible conflicts").

by-case modifications of traditional analysis since its origin.⁴² In *Laskey Brothers v. Warner Brothers Pictures*,⁴³ for example, the presumed receipt of client confidences was made rebuttable.⁴⁴ The question of whether and when the presumption can be rebutted is still litigated, as evidenced by *Arkansas v. Dean Food Products*.⁴⁵ In *Dean Food*, the United States Court of Appeals for the Eighth Circuit apparently opted for an irrebuttable presumption, noting that under Canon 4, "[t]he attorney-client relationship raises an irrefutable presumption that confidences were disclosed."⁴⁶ Nonetheless, the court's desire for flexibility apparently influenced it to affirm the district court's refusal to disqualify the tainted attorney's co-counsel.⁴⁷ *Dean Food*, while making the presumption irrebuttable as to the tainted attorney, may offer a large exception for attorneys subject to vicarious disqualification.⁴⁸

The decision of the United States Court of Appeals for the Tenth Circuit in *Redd v. Shell Oil Co.*⁴⁹ raises another troubling question. The court affirmed the summary denial of a disqualification motion although it stated that serious consideration of the motion would have been warranted had it been filed earlier.⁵⁰ Disqualification motions *can* be used as a delaying tactic,⁵¹ but if courts are truly concerned with the protection of client confidences and avoiding taint to the judicial process, the timing of the motion arguably should not affect its disposition.⁵²

42. This approach originated in *T. C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265, 268 (S.D.N.Y. 1953).

43. 224 F.2d 824 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956).

44. *Id.* at 827. The court stated: "It will not do to make the presumption of confidential information rebuttable and then to make the standard of proof for rebuttal unattainably high." *Id.*

45. 605 F.2d 380 (8th Cir. 1979), *overruled on other grounds*, *In re Multi-Piece Rim Products Liability*, 612 F.2d 377 (8th Cir.), *vacated on same grounds sub nom.* *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1980).

46. *Id.* at 384.

47. *Id.* at 386-87. The *Dean Food* court further held that only the members of the disqualified Assistant Attorney General's staff actively involved in the underlying litigation need also be disqualified. *Id.*

48. *Dean Food* implies that only the members of a law firm who actually participated in a case with a tainted attorney are subject to disqualification. The problem with this argument is that the Office of the Attorney General was involved in *Dean Food* and practical necessity prevented disqualification of the entire staff. Thus, the value of *Dean Food* as authority for this argument is questionable.

49. 581 F.2d 311 (10th Cir. 1975).

50. *Id.* at 315. The court stated that the late filing of the disqualification motion "fully justified the summary rejection of the motion." *Id.*

51. *See, e.g.*, *Board of Education v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979).

52. Allowing late filing to justify summary denial of the motion as a method of docket control raises the question whether Canon 4's mandate to preserve client confidences should predominate over the other Canons. If docket control, for example, is a legitimate basis for denial of a disqualification motion, it is possible that

These cases illustrate some of the uncertainty and unpredictability caused by traditional analysis. In attempting to balance and ameliorate the hardships in each case, the courts have strayed from the basic ethical underpinning of the analysis.⁵³

B. *Preferential Treatment*

Traditional analysis provides preferential treatment for former government attorneys over those in private practice. Courts permit a law firm to employ a tainted former government attorney *and* continue to participate in the subsequent case if the firm erects a "Chinese Wall"⁵⁴ around the tainted attorney. A Chinese Wall is basically a screening device to shield the tainted former government attorney from any contact with the firm's conflicting representation.⁵⁵ Where the courts find an effective Chinese Wall, the taint of the attorney is not imputed to other members of the firm.⁵⁶

This is a modification of traditional analysis, made to permit government entities to get qualified attorneys and to allow those attorneys to return to private practice in the field of expertise they developed in government service. Attorneys who change affiliation in the private sector are not per-

Canon 4 should be subordinate to other Canons where both would be applicable. This argument is strengthened by reference to the exceptions of DR 4-101(C) which particularize the circumstances under which an attorney may reveal his client's confidences. If DR 4-101(C)(2) (lawyer may reveal "[c]onfidences or secrets when permitted under Disciplinary Rules or required by law or court order") and DR 2-110(A)(2) (withdrawing attorney must deliver to his client "all papers and property" to which he is entitled) are read together, a disqualified attorney could reveal confidences contained in his work product under DR 4-101(C)(2) because DR 2-110(A)(2) requires him to deliver his work product to his former client upon disqualification. *See also* note 106 *infra*.

When courts express the opinion that a motion to disqualify would have warranted serious consideration had it been filed on time, *see, e.g.*, *Central Milk Producers Coop. v. Sentry Food Stores*, 573 F.2d 988, 992 (8th Cir. 1978); *Redd v. Shell Oil Co.*, 518 F.2d 311, 315 (10th Cir. 1975), the failure to timely file could have malpractice ramifications.

53. *See* note 4 *supra*.

54. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975), *reprinted* in 62 A.B.A. J. 517 (1976), set up the criteria for the construction of a Chinese Wall. Without the Chinese Wall exception to vicarious disqualification, traditional analysis would disqualify a law firm hiring a tainted former government attorney under DR 5-105(D). For a discussion of vicarious disqualification under DR 5-105(D), *see* note 24 and accompanying text *supra*.

55. For a discussion of the use of the Chinese Wall, *see* generally Comment, *Disqualification of the Former Government Attorney and the Affiliated Firm: Allegiance to Form Over Substance?*, 84 DICK. L. REV. 669 (1980); Comment, *The Chinese Wall Defense to Law-Firm Disqualification*, 128 U. PA. L. REV. 677 (1980); *Disqualification—"Screening" to Rebut the Automatic Law Firm Disqualification Rule*, 82 DICK. L. REV. 625 (1978).

56. *See, e.g.*, *Armstrong v. McAlpin*, 625 F.2d 433, 445 (2d Cir.), *vacated on other grounds*, 449 U.S. 1106 (1980). *See also* note 98 *infra*.

mitted to use the Chinese Wall,⁵⁷ though it appears that a firm employing a tainted former legal services attorney may be allowed to use it.⁵⁸

C. *Overinclusiveness*

Strict adherence to traditional analysis has disqualified attorneys who have no knowledge of any confidences or secrets of the client.⁵⁹ This overinclusiveness is particularly troublesome because the increasing mobility of attorneys, within the private sector and between governmental or quasi-governmental⁶⁰ and private sectors, places an exceptionally heavy

57. See, e.g., *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1321-22 (7th Cir.), cert. denied, 439 U.S. 955 (1978); 94 HARV. L. REV., *supra* note 3, at 1365. But see *Lemaire v. Texaco, Inc.*, 496 F. Supp. 1308, 1309-10 (E.D. Tex. 1980). Although Chinese Wall was not directly discussed in *Lemaire*, a nonparticipation agreement between private sector attorneys prevented imputation of the tainted attorney's knowledge to members of the hiring firm under DR 5-105(D).

58. In *Cheng v. GAF Corp.*, 631 F.2d 1052 (2d Cir.), vacated on other grounds, 450 U.S. 903 (1981), the Second Circuit ordered disqualification of a law firm employing a tainted legal services attorney. The court indicated that the thirty-five member law firm was too small to create a Chinese Wall. *Id.* at 1057-59. This decision was summarily vacated by the United States Supreme Court, 450 U.S. 903 (1981), citing *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981) (denials of disqualification motions are not final appealable orders). However, a petition for a writ of mandamus may be an appropriate method for review of denied disqualification motions. See, e.g., *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. at 372 n.7, 378-79 n.13 (court hints that writ of mandamus may be appropriate in certain cases); *Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339, 1342 (9th Cir. 1981) (appeal from denial of disqualification motion treated as petition for writ of mandamus). See also Annot., 44 A.L.R. Fed. 709, 715-16 (1979).

In any event, if *Cheng* is followed, a new exception to vicarious disqualification will be available. Since a legal services attorney is much like an associate in a large law firm, see generally 94 HARV. L. REV., *supra* note 3, at 1363 n.392; *Professional Responsibility—Conflicts of Interest Between Legal Aid Lawyers*, 37 MO. L. REV. 346 (1972), private attorneys may successfully extend the *Cheng* decision to allow them to use a Chinese Wall. But cf. *Yaretsky v. Blum*, No. 76 Civ. 3360 (S.D.N.Y. Apr. 28, 1981), where the same former legal services attorney involved in *Cheng* disqualified his new firm. Although the *Yaretsky* court attempted to avoid *Cheng*, the decisions are parallel. References to firm size in both cases should be rejected as a basis for determining the applicability of a Chinese Wall. See *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1321 (7th Cir.), cert. denied, 439 U.S. 955 (1978) (no separate disqualification rules based on firm size).

59. See *IBM Corp. v. Levin*, 579 F.2d 271, 283 (3d Cir. 1978) (doubts about propriety of continued participation resolved in favor of disqualification); *Hull v. Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975) (same); Note, *supra* note 14, at 353; U. MIAMI L. REV., *supra* note 14, at 1519. But see *Realco Services v. Holt*, 479 F. Supp. 867 (E.D. Pa. 1979), where the court stated that "the difficulty with such a standard [resolving doubts in favor of disqualification] is the danger that it will serve as a substitute for analysis rather than as a guide to it." *Id.* at 872 n.4.

60. Quasi-governmental practice includes attorneys involved in legal services work and similar situations. See note 58 *supra*.

burden on law firms hiring these experienced attorneys.⁶¹

Canon 9's mandate to "avoid even the appearance of professional impropriety"⁶² has been the main theoretical justification for overinclusive disqualification orders. The court in *Dean Food*, for example, asserted that Canon 4 is "inextricably wedded" to Canon 9.⁶³ The marriage of these canons is an inappropriate substitute for analysis and results in the overinclusion of attorneys subject to disqualification.⁶⁴ Accordingly, the United States Court of Appeals for the Fifth Circuit, in *Woods v. Covington County Bank*,⁶⁵ stated that "congressional policy . . . simply requires [that] Canon 9 disqualification orders be based on a specifically identifiable appearance of impropriety."⁶⁶ The court articulated a test for Canon 9 disqualification:

[A]n attorney need not be disqualified even where there is a reasonable possibility of improper professional conduct. As we have seen, a court must also find that the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case. Under Canon 9, an attorney should be disqualified only when both of these standards have been satisfied.⁶⁷

The "social interests" the court refers to are the right of a client to freely choose his counsel and the prevention of delays in the litigation process.⁶⁸ Even under this test, these interests are often found to be outweighed by the need for disqualification, perhaps because of the tremendous discretion given courts to speculate about the degree of public awareness of the possible conflicts in a particular case.⁶⁹

D. *Ethical Conflicts*

Traditional analysis fails to address the conflicting ethical duties sur-

61. See note 30 *supra*.

62. MO. SUP. CT. R. 4, Canon 9 is identical.

63. 605 F.2d at 385. *Accord* *Reardon v. Marlayne, Inc.*, 83 N.J. 460, 470, 416 A.2d 852, 857 (1980). See also notes 45-48 and accompanying text *supra*.

64. See *American Can Co. v. Citrus Feed Co.*, 436 F.2d 1125, 1128-29 (5th Cir. 1971); *Realco Services v. Holt*, 479 F. Supp. 867, 872 n.4 (E.D. Pa. 1979); *Kramer*, *supra* note 14, at 255; *O'Toole*, *supra* note 14, at 322; 94 HARV. L. REV., *supra* note 3, at 1326. See also comments to MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7, 1.9, 1.10, 1.11(a), 1.12(a) (Proposed Final Draft 1981). The comments appear to reject the appearance of impropriety standard as too rigid.

65. 537 F.2d 804 (5th Cir. 1976).

66. *Id.* at 812 (involving qualified exemption from Canon 9 to active naval personnel).

67. *Id.* at 813 n.12. See also *Church of Scientology v. McLean*, 615 F.2d 691, 693 (5th Cir. 1980) (Canon 9 test requires "showing of a reasonable possibility that some specifically identifiable impropriety occurred and the likelihood of public suspicion must be weighed against the interest in retaining counsel of one's choice"). Both tests allow great leeway for the courts to speculate about possible public suspicion.

68. 537 F.2d at 810.

69. See 94 HARV. L. REV., *supra* note 3, at 1319.

rounding the availability of a disqualified attorney's work product.⁷⁰ The term "work product" was coined in *Hickman v. Taylor*,⁷¹ where the United States Supreme Court observed that sifting of information, preparation of legal theories, and planning of strategies is reflected in "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways,"⁷² all of which are included in work product. *Hickman* involved counsel seeking to discover information contained in his opponent's file.⁷³ In contrast, the issue created by disqualification is whether the client can get access to his *own* file.⁷⁴

Court-ordered disqualification of an attorney brings into play the mandatory withdrawal duties of DR 2-110.⁷⁵ The rule requires that an attorney, prior to withdrawal, take steps to "avoid foreseeable prejudice" to his client and deliver to him "all papers and property to which the client is entitled."⁷⁶ This obligation conflicts with Canon 4's duty to preserve the former client's confidences. Traditional analysis fails to address this conflict.⁷⁷

In *First Wisconsin Mortgage Trust v. First Wisconsin Corp.*,⁷⁸ the work product issue was resolved by rejecting strict application of traditional analysis in favor of a case-by-case determination. The court allows the moving party the opportunity to show what relevant confidences might be contained in the work product, and the court then screens the work product to see if it is tainted by those confidences.⁷⁹ Strict traditional analysis, on the other hand, deems the work product of a disqualified attorney to be *per se* tainted.⁸⁰ This is necessary because allowing any of the work product to be made available is irreconcilably inconsistent with the theoretical basis of traditional analysis.⁸¹

70. See note 31 *supra*.

71. 329 U.S. 495 (1947).

72. *Id.* at 511.

73. *Id.* at 509.

74. See note 31 *supra*.

75. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(B)(2) (1979) requires an attorney to withdraw from employment if "[h]e knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule." MO. SUP. CT. R. 4, DR 2-110(B)(2) is identical. See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(a)(1) (Proposed Final Draft 1981); note 106 *infra*.

76. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(A) (1979). MO. SUP. CT. R. 4, DR 2-110(A) is identical. See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(d) (Proposed Final Draft 1981).

77. See note 108 and accompanying text *infra*. See also 94 HARV. L. REV., *supra* note 3, at 1318 n.169.

78. 584 F.2d 201, 201 (7th Cir. 1978).

79. *Id.* at 209.

80. See note 34 *supra*.

81. Because the purpose of disqualification is to protect the confidences and secrets of the prior client under Canon 4, an attorney sufficiently tainted to require disqualification would at least intangibly infect his work product with the same taint. See note 34 *supra*. It should be noted that, in fact, work product often is turned over

IV. A PROPOSED ANALYSIS

The deficiencies inherent in traditional analysis are apparent. The following proposed analysis provides a practical method for resolving adverse representation conflicts. The proposal separates the question of attorney disqualification from that of work product availability.⁸² Treating the issues separately helps strike the necessary balance between the competing social and ethical considerations.

A. *The Decision to Disqualify*

The first step of the proposed analysis is to determine whether the attorney or law firm involved is attempting to represent both sides in the same litigation. This clearly would be impermissible⁸³ and automatic disqualification is warranted.⁸⁴ If the attorney or firm is not attempting simultaneous representation of adverse clients, further analysis is required.

to substitute counsel under traditional analysis without considering the inconsistency in order to ameliorate the harsh effects of disqualification on the client. *See, e.g., IBM Corp. v. Levin*, 579 F.2d 271, 283 (3d Cir. 1978). In addition, even if the court screens the work product for taint, the court must effectively decide whether the attorney had knowledge of relevant confidences. Where the court finds no actual knowledge, Canon 4 no longer requires disqualification because there is no danger of tainting the trial by misuse of client confidences. Thus, if the work product is made available, then the attorney's disqualification was unnecessary. This also defeats the purpose of the presumed receipt of confidences because the former client had to disclose those confidences in his effort to exclude the work product.

82. In *First Wisconsin Mortgage Trust v. First Wisconsin Corp.*, 584 F.2d 201, 208 (7th Cir. 1978), the court noted that disqualification is primarily a sanction against the attorney, but withholding the work product punishes the client. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (Proposed Final Draft 1981) separates attorney disqualification from work product availability. Basically, Model Rule 1.9(a) adopts the substantial relationship test for use in determining whether the attorney need be disqualified. Model Rule 1.9(b) frames the work product availability issue in terms of use of information to the disadvantage of the attorney's former client. The former client must give informed consent to the use of confidential information before the work product can be turned over to substitute counsel. Although the rule attempts to separate the two issues in a manner similar to the proposed analysis, it appears to be a mere restatement of the traditional analysis of work product availability. The problem with Model Rule 1.9 is that it fails to consider the duty imposed on the withdrawing attorney by MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(A) (1979) to turn over his work product to his current client. In addition, the former client consent provision, allowing a disqualified attorney's work product to be made available to substitute counsel, would seldom be helpful because few rational clients would be willing to consent to an adverse use of their confidences.

83. *See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-15* (1979). MO. SUP. CT. R. 4, EC 5-15 is identical. *See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7* (Proposed Final Draft 1981).

84. Where a law firm has several offices in different cities, the ability to screen a tainted attorney is greater than in a single office. It may be that the marriage of

The second step is to determine whether the subjects of the conflicting representations are substantially related.⁸⁵ If no substantial relationship exists, the court will deny the motion to disqualify.⁸⁶ Where a substantial relationship between the conflicting representations exists, the court must carefully scrutinize the tainted attorney's degree of participation and potential access to confidential information to determine whether a presumption that he has knowledge of the former client's confidences is warranted.

If a substantial relationship is shown, the third step is to classify the situation into one of two categories: (1) the same firm is conducting the second representation, or (2) a different firm is conducting the second representation, but it has an attorney who was a member of the firm that conducted the first representation.

Where the same firm undertakes both representations, the duties imposed by Canons 4, 5, and 9 justify per se disqualification. The prior client's file is in the possession of the law firm and, although professional integrity should prevent the opening of the file, there is a substantial possibility that the prior client's confidences will be revealed.⁸⁷ This may be true even where the attorney who actually represented the prior client has left the firm.⁸⁸ Just as an attorney may not represent both sides within the same litigation, a law firm should be prohibited from advocating a position adverse to one it previously asserted on behalf of a client if that client's interest might be adversely affected by the subsequent litigation.

When a different law firm is involved, automatic disqualification of the firm is not justifiable.⁸⁹ The firm defending against a disqualification motion should be allowed to establish either that the tainted attorney has no

Canon 4's duty to preserve confidences and Canon 9's duty to avoid the appearance of impropriety can justifiably be used to prevent two branches of the same firm from conducting both sides of the same litigation. This is one situation where appearances convey such an undesirable image to the general public that an absolute rule against such representation should be adopted. For an example of problems arising within a law firm maintaining offices in two cities, see *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978).

85. See notes 15-17 and accompanying text *supra*.

86. *Government of India v. Cook Industries*, 569 F.2d 737, 739 (2d Cir. 1978).

87. See cases cited note 26 *supra*. Practically speaking, the fact that a law firm is involved in subsequent rather than simultaneous representations of adverse interests does not justify changing the per se disqualification rule. See note 84 and accompanying text *supra*. A firm attempting successive adverse representations should not be permitted to use screening to avoid the conflict since the same entity represented both interests.

88. If the attorney who represented the prior client has left the firm and the law firm can establish that no remaining members of the firm have knowledge of the prior client's confidences, then the per se rule should revert to a rebuttable presumption.

89. Basically, the second category contains law firms who hire an attorney having a conflict of interest with a present client or with clients coming to the firm after the new attorney is employed by the firm.

actual knowledge of the prior client's confidences or that the tainted attorney has been effectively screened from participation in the second representation.⁹⁰ The question then becomes whether the tainted attorney in fact participated in the representation of both clients.

Where the tainted attorney can affirmatively demonstrate that he has no actual knowledge of the prior client's confidences, both he and his firm should be permitted to continue representation of the subsequent client because there is no danger that confidences of the prior client will be revealed.⁹¹ Although this practice should not be encouraged, the right of a client to freely obtain counsel of his choice outweighs any detrimental effects of continued representation.⁹² A specific finding that the attorney lacks actual knowledge of the prior client's confidences⁹³ should be enough to dispel the suspicions of the general public.

The danger of possible revelation of confidences is apparent, however, and disqualification of both the tainted attorney and his new firm is necessary where he has attempted to participate in both representations.⁹⁴ The opportunity to discuss the case with the tainted attorney creates the possibility of an inadvertent disclosure of the prior client's confidences,⁹⁵ which justifies vicarious disqualification of the firm⁹⁶ or at least the members of the firm working on the subsequent representation at the time disqualification is ordered.⁹⁷

90. See note 84 *supra*.

91. See, e.g., *Gas-A-Tron of Arizona v. Union Oil Co.*, 534 F.2d 1322, 1324-25 (9th Cir. 1976), *cert. denied*, 429 U.S. 861 (1980).

92. For cases noting the great weight to be given the right of a client to retain counsel of his choice, see note 7 *supra*.

93. It is not unreasonable to assume that in many large law offices across the United States, one department of a law firm might be unaware of the smaller cases being handled in another department of the law firm. Where no knowledge of confidences actually exists, the imputation of taint by DR 5-105(D) should be considered rebutted. This eliminates the need for disqualification and should permit the tainted attorney to continue to participate in the litigation. See, e.g., *Gas-A-Tron of Arizona v. Union Oil Co.*, 534 F.2d 1322, 1324-25 (9th Cir. 1976), *cert. denied*, 429 U.S. 861 (1980).

94. The basis for the disqualification is the same as used by the traditional analysis—the preservation of client confidences under Canon 4 and DR 4-101. See note 23 *supra*.

95. If the tainted attorney is permitted to participate in the subsequent litigation, then the tainted attorney's new law firm benefits, at least intangibly, from the tainted attorney's knowledge of the confidences and secrets of the prior client. For a related discussion of the taint of the disqualified attorney's knowledge of his former client's confidences attaching to his work product, see notes 31-34 *supra*.

96. For a discussion of vicarious disqualification under DR 5-105(D), see note 24 and accompanying text *supra*.

97. The members of a firm who were actively involved in the litigation might be the only members of the firm to be disqualified if the apparent exception to vicarious disqualification in the *Dean Food* case is adopted. See note 48 and accompanying text *supra*.

These dangers are eliminated if the tainted attorney's new firm prevents him from participating in the subsequent representation. By erecting a Chinese Wall around the tainted attorney and barring him from sharing in the anticipated fee, the firm has taken all necessary steps to insure the preservation of the prior client's confidences.⁹⁸ Even if the tainted attorney actively participated in representing the prior client, his presence in the new firm does not present a substantial danger that he will reveal client confidences if he has been shielded from participation in the subsequent representation.

Although the no-fee requirement removes much of the economic incentive for revealing a client's confidences, its use as an absolute requirement for setting up an effective Chinese Wall, and thereby avoiding vicarious disqualification, is flawed. Most attorneys would not breach their ethical duties solely for personal gain; for those who would, there are rewards—promotion, partnership, or a larger piece of the partnership pie—beyond the fee involved in the particular case. The reliability of no-fee arrangements as an absolute standard, then, is questionable.

Nevertheless, courts seem to apply it as such. In *Lemaire v. Texaco, Inc.*,⁹⁹ the district court allowed a law firm employing a tainted attorney to continue its conflicting representation. The court based its ruling, in part, on the inclusion of a no-fee clause in a nonparticipation agreement made with the tainted attorney prior to his association with the firm.¹⁰⁰ Since a no-fee agreement does not guarantee that confidences will not be divulged, it should be merely one factor used by the courts in determining whether a law firm employing a tainted attorney should continue its participation. Thus, where the only breach of a Chinese Wall involves the sharing of the fee with the tainted attorney, the firm should be permitted to continue its representation. Because there is some additional incentive in fee-sharing, however, any additional breach of the wall should be sufficient to vicariously disqualify the entire firm.

98. This requires extension of the Chinese Wall defense to situations other than those involving a former government attorney. *See, e.g.*, *Lemaire v. Texaco, Inc.*, 496 F. Supp. 1308, 1309-10 (E.D. Tex. 1980) (non-participation agreement between attorneys prior to tainted attorney's affiliation with new firm held sufficient to prevent imputation of confidences). For the general requirements of an effective Chinese Wall, see ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975), reprinted in 62 A.B.A. J. 517 (1976); Comment, *The Chinese Wall Defense to Law-Firm Disqualification*, 128 U. PA. L. REV. 677, 692 (1980). Attorneys who have worked in the private sector present no greater danger of revealing confidences upon the erection of an effective Chinese Wall than do tainted former government attorneys. *See* *Armstrong v. McAlpin*, 625 F.2d 433, 453 (2d Cir.) (Meskill, J., concurring & dissenting) ("I do not see why a Chinese Wall should be thought more impervious to information that originated from a government investigation than to information learned from a client with adverse interests."), *vacated on other grounds*, 449 U.S. 1106 (1980).

99. 496 F. Supp. 1308 (E.D. Tex. 1980).

100. *Id.* at 1309-10.

Disqualification should be considered case-by-case. Timing of the motion to disqualify should not determine the disposition of the motion,¹⁰¹ though late filings should be scrutinized closely since they can be effective delaying tactics. Courts would be justified in awarding costs and attorneys' fees for defense of a disqualification motion filed shortly before trial if it lacks merit or if the conflict should have been discovered and raised earlier.¹⁰² Professional courtesy should prevent the practice of filing disqualification motions shortly before trial; barring that, court sanctions should suffice.

B. *Work Product Availability*

Once an attorney has been disqualified, the issue becomes whether his work product should be made available to the client it was prepared for.¹⁰³ The courts in these cases are faced with the distasteful task of deciding which of two innocent clients must bear the loss for the attorney's actions.

When the court disqualifies an attorney, he is placed in a position of

101. *But cf.* *Redd v. Shell Oil Co.*, 581 F.2d 311, 315 (10th Cir. 1975) (had motion been filed earlier, it would have warranted serious consideration); *Central Milk Producers Coop. v. Sentry Food Stores*, 573 F.2d 988, 992 (8th Cir. 1978) (same). *See also* note 52 and accompanying text *supra*.

102. MO. R. CIV. P. 77.01, 77.02 should be sufficiently broad to allow Missouri courts to award the costs of defending untimely motions to disqualify which are found to have been interposed for delay and to be without merit. *See also* FED. R. CIV. P. 11, 54(d).

103. Attorney disqualification due to the existence of an adverse representation conflict also raises the question of the entitlement of the disqualified attorney to a fee. Classification of the disqualification order as either a discharge for cause or a discharge not for cause determines the attorney's entitlement to a fee. In Missouri and most jurisdictions, the client has an absolute right to discharge his attorney at any time. *In re Downs*, 363 S.W.2d 679, 686 (Mo. En Banc 1963). If the attorney has a contingent fee contract with his client and is discharged not for cause by his client, the attorney may elect to sue in quantum meruit or wait until the client obtains a judgment and then sue for the full contingent fee. *Id.* In *In re Hansen*, 586 P.2d 413 (Utah 1978), the disqualified attorney was held not entitled to any fee due to the attorney's acceptance of employment adverse to the interests of a current client without obtaining the client's consent. *Id.* at 417.

Under traditional analysis, where a client is denied access to his disqualified attorney's work product, the disqualification order should be classified as discharge for cause and the disqualified attorney would therefore be denied a fee. *See id.* at 417. If access to the disqualified attorney's work product is allowed, then a claim against the client should lie for the reasonable value of the services rendered by the disqualified attorney in preparation of the work product. In this instance, the disqualified attorney's quantum meruit claim should be permitted to prevent unjust enrichment, but a full contingent fee should be denied because the attorney's own conduct created the need for disqualification. Under the proposed analysis, the work product of a disqualified attorney would always be made available to the client so the quantum meruit claim for developing the work product should usually be available.

mandatory withdrawal under DR 2-110. Subsection (A) requires that a lawyer not withdraw "until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including . . . delivering to the client all papers and property to which the client is entitled."¹⁰⁴ When the court denies a client access to his file, it has effectively forced the attorney into choosing between a violation of DR 2-110(A) and a contempt citation.¹⁰⁵

Assume that attorney *A* has been actively involved in representing *C1* and later undertakes to represent *C2* in a substantially related matter adverse to *C1*'s interests. Because *A* has been actively involved in representing *C1*, it is easy to presume that *A*'s work product is tainted, at least intangibly, by his knowledge of *C1*'s confidences. If *C1* seeks access to *C2*'s file at this point, a traditional work product question arises. When the court disqualifies *A*, and *C2* then seeks access to *his own* file, the question is different. Although *A*'s work product is tainted by *C1*'s confidences, the file should nonetheless be given to *C2*.¹⁰⁶ This approach can be contrasted with strict traditional

104. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(A) (1979). *Id.* EC 7-8 states, "A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so." See also MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.2, 1.4, 2.1 (Proposed Final Draft 1981).

105. If the attorney opts for the contempt citation, he may also be subjecting himself to disciplinary action for violation of MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(A) (1979) for disregarding a ruling of the court. MO. SUP. CT. R. 4, DR 7-106(A) is identical. See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(c) (Proposed Final Draft 1981).

106. The decision to disqualify counsel triggers the ethical duties imposed on the disqualified attorney by MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110 (1979). Court-ordered disqualification of counsel falls into the mandatory withdrawal category of *id.* DR 2-110(B)(2):

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

. . . .

- (2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.

A lawyer who continued to participate in litigation after a court ordered his disqualification from the case would violate *id.* DR 7-106(A) (disregard of a ruling tribunal). When a lawyer is faced with a mandatory withdrawal situation, *id.* DR 2-110(A)(2) places general duties upon the attorney to perform prior to withdrawal: "In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, . . . delivering to the client all papers and property to which the client is entitled . . ." See also *Goldsmith v. Pyramid Communications*, 362 F. Supp. 694, 698 (S.D.N.Y. 1973) (court granted motion to withdraw, ordering counsel to "deliver copies of all papers and materials in their possession relating to the action or to the proposed cross-claim to their successor attorneys, on demand, against receipt."). See generally

analysis, where the work product is deemed per se tainted and unavailable to C2.¹⁰⁷ Traditional analysis ignores not only C2's right to have A explain the way his case was being handled but his right to gain access to his file before disqualification.

During the existence of the attorney-client relationship, the attorney is under an ethical duty to keep the client thoroughly informed about the status of the representation. Although this duty is implied by the ABA Model Code of Professional Responsibility,¹⁰⁸ a much clearer and more definitive statement is found in the Model Rules of Professional Conduct:

(a) A lawyer shall keep a client reasonably informed about a matter by periodically advising the client of its status and progress and by promptly complying with reasonable requests for information.

(b) A lawyer shall explain the legal and practical aspects of a matter and alternative courses of action to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.¹⁰⁹

Prior to A's disqualification, then, he had a duty to inform C2 about the status of the representation. If A was, in fact, tainted, the information already given to C2 was at least intangibly infected with his taint.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-32 (1979), which amplifies the DR 2-110 duties.

Because the ethical duties imposed upon attorneys in withdrawal situations conflict with Canon 4's mandate to preserve the confidences and secrets of a client, a rule of priority must be established to resolve the conflicting ethical duties. The proposed analysis makes the Canon 4 duty to preserve confidences subservient to the DR 2-110(A) duty to deliver to clients all papers and property before a lawyer withdraws from a case. This result is supported by reading the DR 2-110(A) requirements into DR 4-101(C)(2), which permits revelation of client confidences "when permitted under Disciplinary Rules." The DR 4-101(C) exceptions allowing disclosure of client confidences also indicate that the duty to preserve a former client's confidences should not be read to require prejudice to the rights of another client by denying access to the attorney's work product. Any harm resulting from the disclosure of the prior client's confidences can be adequately redressed by a malpractice action, the disciplinary machinery of the bar, or both. See notes 113-14 and accompanying text *infra*. In addition, a finding that the Canon 4 duty to preserve client confidences takes priority over DR 2-110(A)'s duty to deliver all papers and property prior to withdrawal has numerous undesirable results. See, e.g., *First Wisconsin Mortgage Trust v. First Wisconsin Corp.*, 584 F.2d 201, 208-09 (7th Cir. 1978).

107. See note 34 and accompanying text *supra*.

108. The ABA Model Code of Professional Responsibility does not specifically state that the attorney has the affirmative duty to explain the case to his client. A reading of MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(a)(3), DR 9-102(B)(1), EC 7-8, EC 9-2 (1979) discloses that the duty does exist. See also Annot., 80 A.L.R.3d 1240 (1977).

109. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (Proposed Final Draft 1981).

If none of *C1*'s confidences are contained in *C2*'s file, there is no compelling reason to withhold the file. If there are confidences contained in the file, the subsequent client should already be aware of them.¹¹⁰ Because the disqualified attorney has already breached *C1*'s confidences in his reports and explanations to *C2*, the only purpose served by denying access is to harm the innocent subsequent client.¹¹¹

Ideally, neither client should be required to answer for the misconduct of his attorney. When one client is injured by such misconduct, the harm is not lessened by punishing the other.¹¹² In giving the subsequent client access to his file, the court gives him nothing that he did not already know or have the right to know. The burden of misconduct should fall on the attorney, not the clients.

C. Remedies

By giving the subsequent client access to his file, the prior client is only denied a remedy within the pending litigation. The prior client can still bring an ethical complaint or a malpractice action against the attorney who breached his confidences. Such a breach should be a prima facie case of malpractice if the client establishes (1) the existence of a prior attorney-client relationship, (2) that the attorney received confidences relevant to the subsequent representation, (3) that the subsequent representation was adverse, (4) that the confidences were breached, and (5) that the client was materially damaged as a direct result of the breach.¹¹³ If the client has not been materially damaged, then no harm has occurred except the revelation of confidential

110. It should be noted that the ability of an attorney to assert either a charging or a retaining lien, even if prejudicial to the rights of his client, might provide a bootstrapping analogy for making Canon 4's duty to preserve client confidences superior to the DR 2-110 duty to deliver papers and property to a client prior to withdrawal. In *Academy of California Optometrists v. Superior Court*, 51 Cal. App. 3d 999, 124 Cal. Rptr. 668 (1975), the court rejected a lawyer's ability to assert a lien to the prejudice of his client's rights. The court of appeals stated, "To enforce the lien in question here would be to condone a violation of the foregoing ethical duties [e.g., those imposed by DR 2-110(A)] owed by a lawyer to his client, contrary to the public policy of this state." *Id.* at 1006, 124 Cal. Rptr. at 672. Missouri Bar Advisory Opinion 115, *reprinted in* 35 J. MO. B. 340 (1979), reaches a similar result. For a discussion of the distinction between a charging lien and a retaining lien, see Wentworth, *Attorney's Liens—A Survey and a Proposal*, 35 CONN. B.J. 191, 191-95 (1961); *Recent Developments in Missouri: Civil Practice and Procedure*, 48 UMKC L. REV. 513, 513-17 (1980).

111. See *First Wisconsin Mortgage Trust v. First Wisconsin Corp.*, 584 F.2d 201, 208 (7th Cir. 1978).

112. See generally *Board of Education v. Nyquist*, 590 F.2d 1241 (2d Cir. 1979).

113. See, e.g., *Woodruff v. Tomlin*, 593 F.2d 33, 43-44 (6th Cir. 1979), cert. denied, 449 U.S. 888 (1980); *Lieberman v. Employers Insurance of Wausau*, 84 N.J. 325, 341-44, 419 A.2d 417, 425-27 (1980).

information. The bar's disciplinary machinery is the most appropriate forum for resolution of such complaints.

By channeling these sanctions into more appropriate forums, undue delay in the litigation process is avoided. Although other methods of analyzing the work product issue have been advanced by courts and commentators,¹¹⁴ these methods fail to properly allocate the burden of responsibility for attorney misconduct. They do not consider the attorney's duty to deliver his client's file on his withdrawal from representation. They do not address the appropriateness and problems of using pending litigation to resolve issues of attorney misconduct. Other questions of attorney misconduct have historically been redressed by malpractice suits and disciplinary actions. Attorney misconduct in the context of adverse representation conflicts should be handled the same way.

V. CONCLUSION

As this Comment has demonstrated, traditional analysis does not resolve the issues of attorney disqualification and work product availability. Another method of analysis is needed, one that accommodates the court's desire for flexibility, the attorney's need for predictability, and the client's right to counsel of his choice. The proposed analysis attempts to meet these requirements. By using the analysis outlined in Part IV of this Comment, courts can increase the predictability of disqualification decisions, avoid the delays inherent in handling such disputes within pending litigation, protect the rights of subsequent clients, and put the burden of attorney misconduct where it belongs—on the attorney.

STAN THOMPSON

114. See generally Comment, *Access to Work Product of Disqualified Counsel*, 46 U. CHI. L. REV. 443 (1979); Comment, *The Availability of the Work Product of a Disqualified Attorney: What Standard?*, 127 U. PA. L. REV. 1607 (1979); Comment, *Access to the Work Product of a Disqualified Attorney*, 1980 WIS. L. REV. 105; *First Wisconsin Mortgage Trust v. First Wisconsin Corporation—Disqualification of an Attorney Does Not Compel Disqualification of His Work Product*, 1979 U. ILL. L.F. 163; *Ethics—Access of Substitute Counsel to a Disqualified Attorney's Work Product*, 15 WAKE FOREST L. REV. 806 (1979).

