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Do Your Clients’ Confidences Go Out the Window When Your Employees Go Out the Door?

by

KELLY A. RANDALL*  

Lawyers traditionally have employed lay personnel, such as secretaries, paralegals, and law clerks, to assist them with their work. As the employment of lay personnel has increased as a means of reducing the cost of providing legal services, ethical questions have arisen regarding their role in the lawyer’s representation of clients. Because lay personnel are not governed by the same ethical rules that govern attorneys,¹ a client currently has no assurance that a member of her attorney’s support staff will not go to work for her adversary or her adversary’s counsel.

Although the expanded use of lay personnel has been praised as a means of delivering legal services more efficiently,² it increases the nonlawyers’ exposure to confidential and privileged information. One commentator notes, “Given the time and volume pressures on a practicing attorney, it is submitted that there is almost nothing, short of actual court appearances, that a lawyer will not delegate to a competent paralegal . . . .”³ Some examples of what assistants may do under a lawyer’s supervision include: Perform legal research; draft legal documents such as pleadings, briefs, subpoenas, and affidavits; attend client conferences; analyze and index documents; answer docket calls when no argument is necessary; interview prospective witnesses; prepare financial records; assist in trial preparation; and sign letters.⁴

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[1667]
When clients seek the assistance of an attorney, they enter into a confidential relationship, in which they are entitled to know that the attorney will vigorously represent them and protect their interests. Generally, there are three sources of protection for clients in this area. First, the attorney-client privilege gives the client an absolute right to prevent the disclosure of communications made to or by the attorney. Five attorneys also have an independent obligation to protect their clients' "confidences" and "secrets." Six Second, the conflict of interest rules provide that attorneys will not take a position adverse to the client's interests. Thus, conflict of interest rules ensure: that neither party has an unfair advantage in litigation; that a lawyer does not violate her duty of loyalty; that a lawyer will not use confidential information to the disadvantage of a client; and that the integrity of the judicial system is not harmed. Eight, third, the attorney work product privilege helps assure that the attorney is able to represent the client vigorously, and that an adversary is not able to take advantage of the attorney's theories and strategies.


Although there are provisions in both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct dealing with the responsibilities of a lawyer in supervising her support staff, neither effectively places responsibility on the hiring attorney to ensure that conflicts of interest do not exist when she hires an assistant. In addition, very few states have confronted the issue of nonlawyer side-switching. The protection of the clients' secrets and confidences, as well as attorneys' work product, demands legislation that effectively regulates support staff's ability to switch sides during litigation.

This Note focuses on the importance of such legislation for clients, attorneys, and nonlawyers. Part I discusses attorneys' ethical responsibilities in their relationships with clients and staff. Part II reviews the conflict of interest rules currently governing attorneys. Part III summarizes the different approaches taken by states regarding support staff conflicts of interest and analyzes their effectiveness. Finally, Part IV proposes a new rule that would require lawyers to protect clients from support staff conflicts of interest.

I. Legal Ethics—Whose Responsibility Is It?

The American Bar Association (ABA) has promulgated two sets of model regulations concerning legal ethics: the Model Code of Professional Responsibility (Model Code) and the Model Rules of Professional Conduct (Model Rules). The Model Code was passed first, but in 1983, the ABA replaced the Model Code with the Model Rules. As of 1989, thirty-three states had amended their professional re-

10. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(D) (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.3 (1989); see also infra notes 26-35 and accompanying text.


responsibility rules to correspond with the Model Rules, and five states were using a combination of the two structures.\textsuperscript{13}

These regulations serve two main purposes: they are a guide to lawyers in their professional capacities, and they provide a basis for discipline by state bar associations.\textsuperscript{14} The Model Code has three components: Canons—nine broad principles of lawyers’ ethical obligations; Ethical Considerations (ECs)—aspirational guidelines to which lawyers should conform their conduct; and Disciplinary Rules (DRs)—mandatory rules governing lawyers’ professional conduct.\textsuperscript{15} The Model Rules are comprised of rules and comments. Some of the rules are mandatory obligations, a breach of which will result in discipline; others are permissive and generally define a lawyer’s role in the legal system.\textsuperscript{16} The comments to each rule explain its meaning and provide guidance to attorneys, but “do not add obligations to the Rules.”\textsuperscript{17}

These model regulations apply only to members of the bar, and although they cannot regulate nonlawyers’ conduct directly, they can make attorneys responsible for their employees’ conduct.\textsuperscript{18} Unfortunately, neither ethical nor disciplinary regulations control whether one law firm may hire an employee of another law firm that represents opposing parties. There are provisions in both the Model Code and the Model Rules, however, that specifically relate to an attorney’s responsibilities when working with nonlawyers. For example, an attorney cannot assist a nonlawyer in the unauthorized practice of law,\textsuperscript{19} share legal fees with a nonlawyer,\textsuperscript{20} or form a law partnership with a nonlawyer.\textsuperscript{21}

\textsuperscript{13} Id.
\textsuperscript{14} See Preliminary Statement, supra note 1.
\textsuperscript{15} Id.
\textsuperscript{16} MODEL RULES OF PROFESSIONAL CONDUCT, Scope, para. 1 (1989).
\textsuperscript{17} Id.
\textsuperscript{18} See Preliminary Statement, supra note 1.
\textsuperscript{19} MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5(b) (1989); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-101(A) (1981); see also Florida Bar v. Bowles, 480 So. 2d 636, 636-7 (Fla. 1985) (allowing nonlawyer employee to counsel clients constituted aiding the unauthorized practice of law); In re Schelly, 94 Ill. 2d 234, 240, 446 N.E.2d 236, 239 (1983) (disbarred lawyer working as law clerk constituted unauthorized practice of law); In re Abbott, 167 A.D.2d 617, 621, 563 N.Y.S.2d 848, 850-51 (N.Y. App. Div. 1990) (lawyer suspended for aiding nonlawyer in unauthorized practice of law); see generally Hunter & Klonoff, A Dialogue on the Unauthorized Practice of Law, 25 VILL. L. REV. 6 (1979-1980).
\textsuperscript{21} MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(b) (1989); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-103(A) (1981); see also Infante v. Gottesman, 233 N.J. Super.
This does not mean, of course, that attorneys are prohibited from delegating work to nonlawyers. The *Model Code* expressly encourages the use of lay personnel, but cautions that lawyers must be responsible for the nonlawyers' work.22 Ethical Consideration 3-6 states:

A lawyer often delegates tasks to clerks, secretaries, and other lay persons. Such delegation is proper if the lawyer maintains a direct relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal services more economically and efficiently.23

Ultimately, then, attorneys are subject to some regulation in their professional relationships with employees. The two main fields of regulation that would be addressed in a conflict of interest analysis are the duty to preserve client confidences and the duty to supervise and assume responsibility for nonlawyers' work. The following sections review each of these subjects and discuss why they are ineffective at protecting clients from support staff conflicts of interest.

A. Duty to Preserve Client Confidences

Lawyers are responsible for ensuring that confidential client information remains confidential.24 This obligation extends to all information about a client learned as a result of the representation and thus is even broader than the attorney-client privilege, which only protects *communications* between a lawyer and client.25 The attorney also has an independent obligation to supervise employees to ensure that a client's confidences are not exposed.26 Ethical Consideration 4-2 notes:

310, 315, 558 A.2d 1338, 1341 (1989) (alleged partnership agreement between claims investigator and attorney invalid).


23. *Id.*

24. Canon 4 of the *Model Code of Professional Responsibility* provides: "A Lawyer Should Preserve the Confidences and Secrets of a Client." The term "confidences" covers "information protected by the attorney-client privilege," and the term "secrets" includes "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." *Model Code of Professional Responsibility* DR 4-101(A) (1981).

The Model Rules are broader and protect more information than the Model Code. *Model Rules of Professional Conduct* Rule 1.6(a) (1989) prohibits a lawyer from revealing any "information relating to representation of a client." Although this phrase is not defined, the ABA has stated that it covers all information gained during the course of the representation, whether or not disclosure would be embarrassing or detrimental to the client's interests. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1526, at 2 n.1 (1988).


26. *Model Code of Professional Responsibility* DR 4-101(D) (1981). This Rule provides, in pertinent part: "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 . . . ." *Id.*
It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to nonlawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be preserved.27

Although the duty to preserve client confidences provides some protection for clients, it does not deal effectively with the issue of nonlawyer side-switching. The major defect is that once the assistant leaves the lawyer’s employ, the lawyer can no longer effectively regulate the employee’s ethical conduct. Additionally, the hiring firm is not obligated to ensure that confidential information acquired by the employee at her previous firm is not revealed.

B. Duty to Supervise and Assume Responsibility for Nonlawyers’ Work

Model Rule 5.3 defines a lawyer’s responsibilities in supervising lay personnel. It requires that partners and supervising lawyers in a law firm make reasonable efforts to ensure that their employees’ conduct complies with their own professional responsibilities.28 The rule also makes lawyers responsible for an employee’s misconduct if she ordered or ratified the misconduct, or if she is a partner or supervising lawyer and failed to take corrective action after the misconduct was discovered.29 More importantly, even if a lawyer is unaware of the

28. MODEL RULES OF PROFESSIONAL CONDUCT Rules 5.3(a)-(b) (1989). These rules provide:
   (a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer;
   (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; . . .

Id.
29. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.3(c) (1989). This rule provides:
   [A] lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if:
   (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
   (2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Id.; see also Connecticut Bar Ass’n, supra note 2, at 432 ("Lawyers have assumed professional ethics responsibility for the conduct of paralegals if the lawyers order the conduct, ratify it, or as partners or supervisors know of the conduct in time to prevent any adverse consequences."); In re Craven, 267 S.C. 33, 225 S.E.2d 861 (1976) (attorney's knowledge that employee was engaged in solicitation resulted in discipline).
misconduct, she still may be disciplined if her lack of knowledge is based on her failure to supervise. For example, if a nonlawyer employee solicits legal business without her employer's knowledge, the lawyer-employer nevertheless may be disciplined if reasonable supervision would have disclosed the misconduct.

Courts also often hold attorneys responsible for failing to supervise employees who engage in illegal or negligent conduct. For example, in Florida Bar v. Mitchell, the court applied Florida's new Rule of Professional Conduct 4-5.3 and held an attorney responsible for fraud committed by his secretary. Mitchell's secretary had forged the signature of an assistant state attorney on several clients' plea agreements. In upholding Mitchell's suspension for fifteen days, the court noted:

The misconduct in this case, although caused by a nonlawyer employee of Mitchell, involves both fraud upon the court and neglecting the best interest of clients. We regard this as highly serious. Had these acts been committed by Mitchell himself, they would have warranted much more severe discipline. Based on this record, we must conclude at a minimum that Mitchell is guilty of negligently

30. See In re Galbasini, 163 Ariz. 120, 124, 786 P.2d 971, 975 (1990) (lawyer suspended for six months when two independent contractors solicited legal business on behalf of the lawyer); cf. In re Corace, 390 Mich. 419, 424-25, 213 N.W.2d 124, 127 (1973) (lawyer not vicariously liable for employee's misconduct absent finding that he was aware or should have been aware of the impropriety and did nothing to guard against it); see also Lawyers' Manual, supra note 12, at 91:203 (1987). In some cases, a lawyer also may incur vicarious civil liability for the misconduct of an employee if the employee's acts are within the scope of employment. See, e.g., DeVaux v. American Home Assurance Co., 387 Mass. 814, 820, 444 N.E.2d 355, 358-59 (1983) (attorney who places employees in position that may deceive clients into believing an attorney-client relationship has been formed may be liable for malpractice based on the negligence of those employees); Bockian v. Esanu Katsky Korins & Siger, 124 Misc. 2d 607, 610-11, 476 N.Y.S.2d 1009, 1012-13 (Sup. Ct. 1984) (attorney cannot be held vicariously liable for conduct of process server, since process server was not an agent or employee of the attorney).

31. See, e.g., Galbasini, 163 Ariz. at 124, 786 P.2d at 975.

32. See, e.g., In re Scanlan, 144 Ariz. 334, 337, 697 P.2d 1084, 1087 (1985) (lawyer suspended for negligently supervising employee who embezzled funds from trust accounts); Florida Bar v. Mitchell, 569 So. 2d 424, 424 (Fla. 1990) (attorney suspended for failing to supervise secretary who had forged opposing attorney's name on plea agreements); In re Berkos, 93 Ill. 2d 408, 413, 444 N.E.2d 150, 152 (1982) (lawyer suspended for failing to supervise secretary who engaged in malfeasance); Attorney Grievance Comm'n v. Goldberg, 292 Md. 650, 656, 441 A.2d 338, 341 (1982) (lawyer suspended for failing to take "the simple precaution of running his eye over bank statements at the end of the month"); Oklahoma Bar Ass'n v. Braswell, 663 P.2d 1228, 1232 (Okla. 1983) (lawyer suspended for failing to supervise law clerk who let statute of limitations run); In re Rude, 88 S.D. 416, 423, 221 N.W.2d 43, 48 (1974) (lawyer could not escape responsibility for mishandling clients' funds by blaming employees).

33. 569 So. 2d 424 (Fla. 1990).

supervising the activities of his workers, which constitutes an ethical breach.\textsuperscript{35}

Thus, even though Mitchell’s conduct was not negligent or illegal, he was disciplined for allowing his employee to engage in illegal conduct.

The problem with Model Rule 5.3 is that it fails to take into account situations that arise after a nonlawyer has left the firm. A lawyer cannot have a duty to supervise a former employee. As a result, it is inadequate to protect a client’s confidences where a nonlawyer switches sides.

Both the \textit{Model Code} and the \textit{Model Rules} make it clear that lawyers are responsible for legal ethics. Lawyers, not lay personnel, have a duty to preserve client confidences and a duty to ensure compliance with professional ethics. Although there is a growing movement to create a regulated class of “paraprofessionals” capable of providing many of the same services lawyers perform,\textsuperscript{36} state bar associations currently have no control over the conduct of nonlawyers.\textsuperscript{37}

Thus, lawyers must be responsible for clients’ interests, and although the above regulations afford clients some protection, they are inadequate for dealing with an employee’s conflict of interest. In this era of increased employment of nonlawyers, it is time for states to adopt a support staff conflict of interest rule, similar to that governing attorneys, which will afford clients more specific protection of their interests.

\section*{II. Attorney Conflict of Interest}

Generally, an attorney is prohibited from representing a client whose interests are adverse to, or in conflict with, either an existing\textsuperscript{38}

\textsuperscript{35} Mitchell, 569 So. 2d at 424.


\textsuperscript{37} See Preliminary Statement, \textit{supra} note 1.

\textsuperscript{38} \textit{Model Rules of Professional Conduct} Rule 1.7 (1989); \textit{Model Code of Professional Responsibility} DR 5-105(A) (1980). Model Rule 1.7 provides:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be
or a former client, without the clients' informed consent. When such an ethical violation occurs, courts are faced with numerous questions: Should the court sanction or discipline the attorney, or disqualify her from the new representation? How does the court determine whether an ethical violation actually occurred or a client's interests actually were harmed? What happens to the attorney's associates when an attorney is disqualified? Although courts do not provide uniform answers to these questions, some general rules do exist. The following sections review the conflict of interest rules and examine how they are applied.

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materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

1. the lawyer reasonably believes the representation will not be adversely affected; and
2. the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Model Rules of Professional Conduct Rule 1.7 (1989). The Model Code requires a lawyer to decline proffered employment if the lawyer's "independent professional judgment in behalf of a client will be or is likely to be adversely affected" by acceptance of the employment, or if the acceptance of the employment will require her to represent "differing interests." Model Code of Professional Responsibility DR 5-105(A) (1980).


a. A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

b. A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

1. whose interests are materially adverse to that person; and
2. about whom the lawyer had acquired information protected by Rules 1.6 [confidentiality] and 1.9(c) that is material to the matter; unless the former client consents after consultation.

c. A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

1. use information relating to the representation to the disadvantage of the former client except as Rule 1.6 [confidentiality of information] or Rule 3.3 [candor toward the tribunal] would permit or require with respect to a client, or when the information has become generally known; or
2. reveal information relating to the representation except as Rule 1.6 or 3.3 would permit or require with respect to a client.

Id.

The Model Code does not expressly prohibit a lawyer from representing interests adverse to a former client. However, it does include three provisions that implicitly prohibit such conduct:

1. the requirement that a lawyer preserve the confidences and secrets of a client under DR 4-101 (see supra note 24); (2) the conflict-of-interest rules of DR 5-105 (see supra note 38); and (3) the general rule that a lawyer should avoid even the appearance of impropriety in Canon 9 (see infra note 91). Lawyer's Manual, supra note 12, § 51:2002 (1987).
A. Disqualification

A trial court may disqualify an attorney on the basis of the court’s obligation to control the conduct of its ministerial officers. Nevertheless, courts generally conclude that ethical violations should be addressed by the disciplinary committee of the state bar, unless the violation has tainted a trial’s fairness or threatened the integrity of the judicial process. If an attorney’s conduct does “taint” the litigation, the opposing party may make a motion, or the court may determine, sua sponte, to disqualify the attorney.

Because disqualification motions often are used as a purely tactical tool, courts must balance competing policy considerations when assessing such motions. The public’s interest in the integrity of the

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40. See, e.g., CAL. CTY. PROC. CODE § 128(a)(5) (West Supp. 1991) (“Every court shall have the power to . . . control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.”); Trust Corp. of Montana v. Piper Aircraft Corp., 701 F.2d 85, 87 (9th Cir. 1983) (“court has the responsibility for controlling the conduct of attorneys practicing before it”); Nemours Found. v. Gilbane, 632 F. Supp. 418, 421 (D. Del. 1986) (court has power “to supervise the ethical activities of the attorneys who practice before it and, if necessary, disqualify those whose conduct breaches the norms as established by the bar”).


[D]isqualification is proper where, as a result of a prior representation or through improper means, there is a reasonable probability counsel has obtained information the court believes would likely be used advantageously against an adverse party during the course of the litigation. Though such information cannot be unlearned, and the lawyer who obtained it cannot be prevented from giving it to others, disqualification still serves the useful purpose of eliminating from the case the attorney who could most effectively exploit the unfair advantage.

Id. at 309, 254 Cal. Rptr. at 865 (citing Chronometrics, Inc. v. Sysgen, Inc., 110 Cal. App. 3d 597, 607-08, 168 Cal. Rptr. 196, 202-03 (1980)).

judicial process and the parties’ interest in the integrity of the particular proceeding must be weighed against a party’s interest in selecting the counsel of her choice and the potential for substantial hardship if her attorney is disqualified.44 Nevertheless, most courts hold that the right to counsel of choice must yield to upholding the integrity of the judicial system.45 As one court stated, “a court must not hesitate to disqualify an attorney when it is satisfactorily established that he or she wrongfully acquired an unfair advantage that undermines the integrity of the judicial process and will have a continuing effect on the proceedings before the court.”46 The next section will discuss the process used by courts in analyzing conflict of interest breaches and the differences between the standards applied for conflicts with a former as opposed to an existing client.

B. Conflict of Interest Standards

If an attorney violates the conflict rules, the original client may seek to have the attorney disqualified from the new representation. In determining whether to grant the motion, courts use different standards depending on whether the conflict is with a former or an existing client.

(1) Former Clients

When faced with a motion to disqualify an attorney for taking a position adverse to a former client, most courts use the “substantial relationship” test.47 A party moving to disqualify a law firm does not need to show that her former attorney currently is involved in identical litigation for the other side; she need only show that a lawyer-client relationship previously existed and that there is a “substantial relationship” between the former and current representations.48 But courts

44. Gregori, 207 Cal. App. 3d at 300, 254 Cal. Rptr. at 858.
45. Id. at 301, 254 Cal. Rptr. at 858; see also; In re Paradyne Corp., 803 F.2d 604, 611 n.16 (11th Cir. 1986); Glueck v. Jonathan Logan, Inc., 653 F.2d 746, 750 (2d Cir. 1981); Comden v. Superior Court, 20 Cal. 3d 906, 915, 576 P.2d 971, 975, 145 Cal. Rptr. 9, 13, cert. denied, 439 U.S. 981 (1978).
48. T.C. Theatre Corp., 113 F. Supp. at 268 ("the former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him.")
and commentators have struggled to formulate a definition of "substantial relationship." Generally, courts will require proof that either the legal issues or the subject matter of the two representations are similar; yet the standards are not clear.

Some courts require a determination that the legal issues involved in the two representations be "identical" or "essentially the same." If the actual issues, and not just the subject matters, are not extremely similar, the inquiry ends. In *Government of India v. Cook Industries, Inc.*, for example, an attorney worked for a firm that defended Cook in a lawsuit and did a substantial amount of work on the case. He later went to work for a firm that represented a different plaintiff in a different lawsuit against Cook. The court disqualified the lawyer and his new firm because the two suits raised the same claims against the same defendant and involved virtually identical legal issues.

A problem with the "legal issues" approach is that it is often difficult to determine all the issues involved in a lawsuit at its outset. And in a nonlitigation context issues may never be defined as clearly as in a lawsuit. Because of the difficulty in determining the legal issues involved in a representation, a former client's burden of proving a substantial relationship between two representations may be insurmountable under this approach.

Other courts compare the factual backgrounds of each representation to determine if a substantial relationship exists. The Seventh Circuit formulated a three-part test to determine whether two representations are substantially related:

1. Initially, the trial judge must make a factual reconstruction of the scope of the prior legal representation. Second, it must be determined whether it is reasonable to infer that the confidential information

49. See Note, *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. 1244, 1325 (1981) ("Case law provides an uncertain definition of the term ['substantial relationship'] to concerned attorneys."); see also *Silver Chrysler Plymouth*, 518 F.2d 751, 754 (2d Cir. 1975) ("the cases furnish no applicable guide as to what creates a 'substantial' relationship").


53. Id. at 739-40.


55. See id.

56. See, e.g., *Smith v. Whatcott*, 757 F. 2d 1098, 1100 (10th Cir. 1985); *Trone v. Smith*, 621 F.2d 994, 998 (9th Cir. 1980); *Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc.*, 607 F.2d 186, 190 (7th Cir. 1979).
allegedly given would have been given to a lawyer representing a client in those matters. Finally, it must be determined whether that information is relevant to the issues raised in the litigation pending against the former client.57

Because it is easier for a client and her attorney to reconstruct the factual background of the attorney’s representation than to determine in advance the legal issues involved, this approach is the better one.

Once the former client establishes a substantial relationship between the two representations, the court makes two presumptions. First, the court presumes that the attorney received confidential information during the prior representation; second, it presumes that those confidences will be used on behalf of the new client and shared with other members of the law firm.58 The courts have applied these presumptions inconsistently. Although some courts have held that the first presumption is irrebuttable,59 most permit the presumption to be rebutted by evidence that the attorney did not, in fact, receive any confidential information during the previous representation.60 This is the approach followed by the Model Rules.61 Whether or not the second presump-

57. Novo Terapeutisk, 607 F.2d at 190.
When a substantial relationship has been shown to exist between the former representation and the current representation, and when it appears by virtue of the nature of the former representation or the relationship of the attorney to his former client confidential information material to the current dispute would normally have been imparted to the attorney or to subordinates for whose legal work he was responsible, the attorney’s knowledge of confidential information is presumed. 144 Cal. App. 3d at 489, 192 Cal. Rptr. at 613.
60. See, e.g., LaSalle Nat’l Bank v. County of Lake, 703 F.2d 252, 256 (7th Cir. 1983); Silver Chrysler Plymouth, 518 F.2d at 754; Global Van Lines, 144 Cal. App. 3d at 489, 192 Cal. Rptr. at 613.
61. Model Rules of Professional Conduct Rule 1.9(b) (1989); see supra note 39. The comment to this Rule notes that some lawyers have access to the files of all clients, in which case it should be presumed that these lawyers acquired confidential information about all clients. Some lawyers in a firm, however, may have access to only a limited number of clients’ files, and “in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other
tion is rebuttable involves the issue of vicarious disqualification of the firm, which is discussed below.62

(2) *Existing Clients*

Generally, courts apply a stricter standard in cases involving conflicts between existing clients than in cases involving former clients.63 This is because the rules prohibiting a lawyer from representing a client with interests adverse to another client are based not only on the protection of confidences and secrets, but also on the lawyer's duty of loyalty to her client.64 This duty of loyalty requires attorneys to pursue their "client's interests diligently and vigorously within the limits of the law."65 Thus, a lawyer may not represent a client if that representation will have an adverse effect on the lawyer's independent judgment or her relationship with another client.66

Although the *Model Code* and *Model Rules* do not define "adverse effect," courts will presume an adverse effect when an attorney represents an interest that conflicts with interests of a present client.67 For example, if a law firm defends a client in a lawsuit brought by one plaintiff, it cannot represent a different plaintiff against that client even if the suits are not substantially related and even if the two cases are handled by different offices of the firm.68 This is true even if the representations are totally unrelated.69 As a result, most courts hold that the representation of two clients with adverse interests is improper

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62. See infra Part II.C.
64. Unified Sewerage, 646 F.2d at 1345; Cinema 5, Ltd., 528 F.2d at 1386.
67. Unified Sewerage, 646 F.2d at 1345 (court presumes adverse effect when law firm represents a client suing an existing client).
68. Cinema 5, Ltd., 528 F.2d at 1387.
69. E.g., Ransburg Corp. v. Champion Spark Plug Co., 648 F. Supp. 1040, 1045 (N.D. Ill. 1986) (it is unethical for an attorney to sue one client on behalf of another client without the consent of the parties, "even if the subject matter of the representations is unrelated").
on its face and, therefore, the substantial relationship test is inappropriate.\textsuperscript{70}

\section*{C. Vicarious Disqualification}

When a lawyer is disqualified for violating the conflict of interest rules, it often results in the vicarious disqualification of the entire firm.\textsuperscript{71} This rule is based on the premise that all lawyers in a law firm have access to confidential information about all the firm's clients and on the principle that each lawyer in a law firm has a duty of loyalty to all clients represented by the firm.\textsuperscript{72} When the conflict involves an existing client, no attorney in the firm can represent the adverse interest.\textsuperscript{73} When the conflict involves a former client, the issue of vicarious disqualification arises when a new lawyer joins a firm that is either currently representing, or later begins representing, interests adverse to a former client of the lawyer. In the former client case, courts presume that the attorney with the conflict will use or share the client's information at the new firm.\textsuperscript{74} The reason for this presumption is that parties seeking disqualification should not have to prove what disclosures actually were made. In \textit{Woods v. Superior Court},\textsuperscript{75} for example, the court noted, "'[T]he test does not require the 'former' client to show that actual confidences were disclosed. That inquiry would be improper as requiring the very disclosure the rule is intended to protect. It is the possibility of the breach of confidence, not the fact of the breach, that triggers disqualification.'"\textsuperscript{76}

Traditionally, courts have applied a per se rule of vicarious disqualification. If a lawyer with actual knowledge of a client's confi-

\textsuperscript{70} Cinema 5, Ltd., 528 F.2d at 1387; see also Unified Sewerage, 646 F.2d at 1345 (no specific adverse effect need be shown); International Business Mach. Corp. v. Levin, 579 F.2d 271, 280 (3d Cir. 1978) (same).

\textsuperscript{71} Model Rules of Professional Conduct Rule 1.10 (1989). This Rule provides in pertinent part, "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 . . . ."

\textsuperscript{72} Under the Model Code, DR 5-105(D) provides: "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."

\textsuperscript{73} Unified Sewerage, 646 F.2d at 1345; Cinema 5, Ltd., 528 F.2d at 1387.

\textsuperscript{74} In re Corrugated Container Antitrust Litig., 659 F.2d 1341, 1346 (5th Cir. 1981).

\textsuperscript{75} 149 Cal. App. 3d 931, 197 Cal. Rptr. 185 (1983).

\textsuperscript{76} \textit{Id.} at 934, 197 Cal. Rptr. at 188.
delicious information joins a firm opposing that client in a substantially related matter, an irrebuttable presumption arises that the lawyer will share that information with other lawyers in the new firm.\footnote{See, e.g., In re Corrugated Container, 659 F.2d at 1347 (irrebuttable presumption of transfer of client's confidences to other partners in law firm); Hull v. Celanese Corp., 513 F.2d 568, 572 (2d Cir. 1975) (when a lawyer actually has received confidential information, court must disqualify both the lawyer and the new firm to preserve confidentiality); Weglarz v. Bruck, 128 Ill. App. 3d 1, 5, 470 N.E.2d 21, 24 (1984) (attorney can rebut presumption only when she shows "clearly and effectively" that she in fact did not receive any confidential information at the first firm); State ex rel Freezer Servs., Inc., 235 Neb. at 992, 458 N.W.2d at 252 ("irrebuttable presumption of shared confidences"); see also C. Wolfram, Modern Legal Ethics § 7.6.4. at 401-04 (1986) (impracticalities of screening and inability to detect breach call for irrebuttable presumption).} This is the approach taken by the \textit{Model Rules}.\footnote{See \textit{Model Rules of Professional Conduct} Rules 1.9, 1.10 (1989). Rule 1.9(b) makes the law firm's vicarious disqualification dependent upon the transferring lawyer's actual knowledge of information of protected by Rules 1.6 (confidentiality of information) and 1.9(c) (see \textit{supra} note 39). Thus, if the lawyer rebuts the first presumption of the substantial relationship test—that the lawyer acquired confidential information from the former client—and shows that she was not privy to any confidential information about the former client, neither the lawyer nor the new firm will be disqualified. \textit{Model Rules of Professional Conduct} Rule 1.9 comment (1989). One commentator has observed that "'[t]he courts have not gone so far as to adopt a 'double imputation' theory . . . . The imputation of knowledge of client confidences therefore stops with the partners (past or present) of one with \textit{actual} knowledge, while the partners of an attorney with imputed knowledge remain free from taint." Liebman, \textit{The Changing Law of Disqualification: The Role of Presumption and Policy}, 73 \textit{Nw. U.L. Rev.} 996, 1000 n.18 (1979) (emphasis in original).} The rationale for this rule appears to be that even the most well-intentioned and scrupulous lawyer may inadvertently use confidential information or disclose such information to other lawyers in the firm.\footnote{See, e.g., \textit{Emle Indus., Inc. v. Patentex, Inc.}, 478 F.2d 562, 571 (2d Cir. 1973).}

Some courts, however, refuse to irrebuttably presume that the lawyer will disclose the protected information at her new firm.\footnote{Manning v. Waring, 849 F.2d 222, 224 (6th Cir. 1988) (screening devices can be effective to rebut presumption of shared confidences); Schiessle v. Stephens, 717 F.2d 417, 421 (7th Cir. 1983) (entire firm disqualified only because no screening mechanism was set up to avoid vicarious disqualification); Geisler v. Wyeth Laboratories, 716 F. Supp. 520, 526 (D.}
fore, even if the court disqualifies the lawyer, the firm need not withdraw or be disqualified so long as the lawyer does not disclose any confidential information at her new firm. In the leading case of Schiessle v. Stephens, the Seventh Circuit adopted a three-step test to determine whether a firm may continue to represent a client after one of the lawyers in the firm has been disqualified for a conflict of interest: (1) determine whether a substantial relationship exists between the subject matter of the prior and present representations; if so, (2) ascertain whether the presumption that the lawyer obtained confidences of the client at the previous firm has been rebutted; and if not, (3) determine whether the presumption that the lawyer shared those confidences at the present firm has been rebutted. Although not universally followed, the Schiessle test is gaining popularity due to increasing concern with the abuse of disqualification motions and with safeguarding the right to the counsel of one’s choice.

Law firms most commonly rebut the presumption of shared confidences by screening the disqualified lawyer from any and all involvement in the matter. The Model Rules expressly approve the use of an “ethical wall,” but only in the case of a government lawyer moving into private practice. Many courts, however, have extended this rule to private attorneys who relocate. For example, in Nemours

Kan. 1989) (firm-wide disqualification unnecessary when disqualified attorney effectively screened); Nemours Found. v. Gilbane, 632 F. Supp. 418, 428 (D. Del. 1986) (appropriate screening mechanism may rebut the presumption of shared confidences under Model Rule 1.10, even though reliance on screening has been expressly sanctioned only in Model Rule 1.11 governing former government attorneys); Lemair v. Texaco, Inc., 496 F. Supp. 1308, 1310 (E.D. Tex. 1980) (presumption of shared confidences is rebuttable).

81. 717 F.2d 417 (7th Cir. 1983).
82. Id. at 420-21.
83. See Huntington v. Great W. Resources, Inc. 655 F. Supp. 565, 571 (S.D.N.Y. 1987) (disqualification is automatic where attorney represents a client against former client in a substantially related matter, where attorney “was likely to have had access to confidential information of former client”); Weglarz v. Bruck, 128 Ill. App. 3d 1, 6, 470 N.E.2d 21, 25 (1984) (where substantial relationship shown, presumption of shared confidences is irrebuttable); State ex rel Freezer Servs., Inc. v. Mullen, 235 Neb. 981, 992-93, 458 N.W.2d 245, 252-53 (1990) (rejecting rebuttability of presumption of shared confidences).
85. Many courts and commentators refer to this screening mechanism as a “Chinese Wall.” An excellent discussion of the defense is found in Moser, Chinese Walls: A Means of Avoiding Law Firm Disqualification When a Personally Disqualified Lawyer Joins the Firm, 3 Geo. J. L. Ethics 399 (1990). Nevertheless, to avoid any ethnic or racial connotations, the phrase “ethical wall” will be used in this Note to refer to screening an attorney from a particular matter.
Foundation v. Gilbane, the court held that the law firm opposing a motion to disqualify could rebut the presumption of shared confidences by setting up an ethical wall even though the transferring lawyer came from a private firm. Although the attorney with the conflict was disqualified, the firm was able to continue representing its client. Formal screening, however, is not the only way to rebut the presumption of shared confidences, and courts generally determine on a case-by-case basis whether or not confidences actually were shared.

The conflict of interest rules, although not uniformly applied, serve to protect the interests of clients, the fairness of litigation, and the integrity of the judicial process. But without protection against support staff conflicts of interest, these rules leave a major loophole. Employees change law firms quite often, and it is time to recognize that this, too, can create a risk of conflict.

III. Support Staff Conflict of Interest

Established law in the area of nonlawyer side-switching is very limited. What little there is has not been applied consistently by the courts and ethics panels. The cases and ethics opinions regarding this problem can be broken down roughly into three categories: those that rely solely on the appearance of impropriety, those that use a combination of attorney confidentiality rules and the appearance of impropriety, and those that apply attorney conflict of interest rules to the nonlawyer. Within a given category, however, the approach is not always uniform. This Part will delineate the various approaches taken by courts and ethics panels in dealing with the issue of nonlawyer side-switching and analyze their effectiveness.

A. Appearance of Impropriety

Courts struggle with two problems when faced with the issue of whether to disqualify an attorney on the basis of an employee's conflict of interest. First, the ethical rules that apply to lawyers do not apply to their nonlawyer employees. Second, the ethical rules do not

88. Id.
89. See, e.g., Panduit Corp. v. All States Plastic Mfg., 744 F.2d 1564, 1580 (Fed. Cir. 1984) (firm may rebut presumption with testimonial evidence, even without formal screening); Kapco Mfg. Co. v. C & O Enters., 637 F. Supp. 1231, 1240 (N.D. Ill. 1985) (absence of formal ethical wall does not per se require disqualification), aff'd 886 F.2d 1485 (7th Cir. 1989); Lemaire v. Texaco, Inc., 496 F. Supp. 1308, 1310 (E.D. Tex. 1980) (uncontradicted testimony that no confidences have been or will be shared is sufficient to rebut presumption).
prohibit a lawyer herself from receiving confidential information from a former employee of an adversary.\textsuperscript{90} Canon 9 of the \textit{Model Code}, however, broadly prohibits the "appearance of impropriety."\textsuperscript{91}

This Canon is, theoretically, the only canon or ethical rule that applies to the hiring lawyer; in hiring an employee from an opponent's law firm, she creates an appearance of impropriety in violation of the Canon. In a very thorough analysis of nonlawyer conflicts of interest, the court in \textit{Williams v. Trans World Airlines, Inc.}\textsuperscript{92} relied solely on the appearance of impropriety in granting the defendant's motion to disqualify the plaintiffs' law firm from several actions against the defendant.\textsuperscript{93} Although this case did not involve an employee moving from one firm to another, it did involve similar conflict of interest problems. The plaintiffs' firm previously had represented two clients in an age discrimination suit against TWA. One of TWA's employees had assisted the firm in the defense of these claims. More than one year after the litigation began, the employee was laid off and subsequently brought her own discrimination suit against TWA. The employee hired the firm representing the original two plaintiffs to represent her as well. TWA then moved to disqualify the plaintiffs' firm because it had acquired confidential information from TWA's former employee.\textsuperscript{94} In granting the motion, the court observed that a nonlawyer may be more likely to reveal confidential information than a lawyer, because the nonlawyer lacks the lawyer's awareness of the ethical obligation to preserve the confidences and secrets of her clients.\textsuperscript{95} The court stated:

Non-lawyer personnel are widely used by lawyers to assist in rendering legal services. Paralegals, investigators, and secretaries must have ready access to client confidences in order to assist their attorney employers. If information provided by a client in confidence to an attorney for the purpose of obtaining legal advice could be used against the client because a member of the attorney's non-lawyer support staff left the attorney's employment, it would have a devastating effect both on the free flow of information between client and attorney and on the cost and quality of the legal services rendered by an attorney. Every departing secretary, investigator, or paralegal would

\begin{footnotesize}
\begin{enumerate}
\item A disqualification case involving support staff side-switching is yet another "square peg which does not fit into the round holes of the rules most commonly applied in attorney disqualification cases." William H. Raley Co. v. Superior Court, 149 Cal. App. 3d 1042, 1049-50 n.3, 197 Cal. Rptr. 232, 238 n.3 (1983) (partner in plaintiff's law firm was on board of directors of bank that was trustee of all of defendant's stock).
\item This Canon provides: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." \textit{Model Code of Professional Responsibility} Canon 9 (1981).
\item 588 F. Supp. 1037 (W.D. Mo. 1984).
\item \textit{Id.} at 1046.
\item \textit{Id.} at 1040.
\item \textit{Id.} at 1043.
\end{enumerate}
\end{footnotesize}
be free to impart confidential information to the opposition without effective restraint. The only practical way to assure that this will not happen and to preserve public trust in the scrupulous administration of justice is to subject these "agents" of lawyers to the same disability lawyers have when they leave legal employment with confidential information.96

If the court's holding were taken literally, it could have extremely far reaching effects. It is not hard to imagine using this rationale to hold that an employee who works for a company on legal issues can never sue her former employer because her attorney would always receive confidential information. It is also not hard to imagine using this rationale to hold that an attorney who does represent an employee in a suit against her former employer can never bring any other suits against that company that are substantially related.

Needless to say, the opinion has not been stretched that far. To the contrary, the above quote is often cited in employee side-switching cases. In this respect, the opinion has been very influential.

For example, in Lackow v. Walter E. Heller & Co.,97 the court relied on Canon 9 and Williams in holding that a secretary's switching sides during litigation, and the resultant appearance of impropriety, was a sufficient basis for disqualifying the hiring law firm.98 Drawing its rationale from doctrines governing attorney conflicts, the court set out a strict rule pertaining to nonlawyer conflicts of interest: once the moving party proves that the nonlawyer was privy to confidential information regarding the instant litigation through her previous employment with the opposing counsel's firm, the court must disqualify the hiring firm to avoid any appearance of impropriety.99

Although California does not have an "appearance of impropriety" standard,100 in Gregori v. Bank of America,101 the plaintiffs' law firm was disqualified because one of its attorneys began a secret, intimate relationship with a secretary of the defendant's law firm.102

96. Id. at 1044.
98. Id. at 1123.
99. Id. ("Whether [the secretary] actually violated or would violate the confidences is not a subject of inquiry."). But see Esquire Care, Inc. v. Maguire, 532 So. 2d 740, 742 (Fla. Dist. Ct. App. 1988) (disapproving Lackow's irrebuttable presumption that confidences have been or will be disclosed). For a discussion of Esquire, see infra notes 145-149 and accompanying text.
100. California has not adopted either the Model Rules or the Model Code. The attorney conflict rules are found at CAL. RULES OF PROFESSIONAL CONDUCT Rule 3-310 (1989). Rule 3-310(D) provides: "A member shall not accept employment adverse to a client or former client, where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment except with the informed written consent of the client or former client." CAL. RULES OF PROFESSIONAL CONDUCT Rule 3-310(D) (1989).
102. Id. at 313, 254 Cal. Rptr. at 867. In Gregori, The Court of Appeal affirmed the trial
The court noted that attorney conflict of interest rules do not apply to cases in which the attorney is not representing any adverse interests and that none of the other provisions of California's ethical rules "explicitly proscribe" the attorney's conduct. Thus, the defendant could argue only that the conduct had given rise to an appearance of impropriety. Although the court agreed that the behavior was unethical, it found that the record did not contain sufficient evidence to support a holding that the attorney had, in fact, acquired any useful information from the secretary, and remanded the case for further findings.

Although some courts have held that an appearance of impropriety alone is sufficient to support the disqualification of counsel, most courts criticize using Canon 9 as the sole basis for disqualification. One court noted that "[t]he standard is too imprecise to furnish a reliable judicial guideline. For one thing, it is unclear as to whom the conduct in question must appear improper." Since courts are reluctant to rely solely on Canon 9 to support disqualification, it cannot be relied on to protect the client.

B. Confidentiality Rules and the Appearance of Impropriety

Although most courts hesitate to disqualify an attorney or her law firm because of an appearance of impropriety, some courts will rely on the court's denial of disqualification but ordered further discovery on the extent of the relationship and the amount of confidential information that might have been revealed. *Id.* On remand, the trial court found a "reasonable probability" that the attorney had received valuable confidential information from the secretary and ordered disqualification. *See Aronson, Counsel Axed for Dating Adversary's Secretary, San Francisco Recorder, Sept. 13, 1989, at 1, col. 1.*

*Gregori,* 207 Cal. App. 3d at 299 n.3, 254 Cal. Rptr. at 858 n.3.

*Id.* at 302, 254 Cal. Rptr. at 859 (emphasis in original).

*Id.* at 309, 254 Cal. Rptr. at 864-65. *See supra* note 102.


*See, e.g.,* Board of Educ. v. Nyquist, 590 F.2d 1241, 1247 (2d Cir. 1979) (the mere appearance of impropriety "is simply too slender a reed on which to rest a disqualification order.") Gabianelli v. Azar, 777 P.2d 1167, 1169 (Alaska 1989) (appearance of impropriety alone is insufficient to support disqualification except in the rarest cases); *Gregori,* 207 Cal. App. 3d at 307, 254 Cal. Rptr. at 863 (the appearance of impropriety standard does not provide a reliable guideline).


*Gregori,* 207 Cal. App. 3d at 307, 254 Cal. Rptr. at 863 (emphasis in original).
on a combination of Canon 9 and the duty to preserve client confidences in determining whether disqualification is appropriate. The Tennessee Court of Appeals recently confronted the issue of support staff side-switching in *King v. King*. In this divorce case, the plaintiff filed a motion to disqualify the defendant’s counsel because a former secretary of the plaintiff’s attorney left to work for the defendant’s attorneys. The trial court relied primarily on an ethics opinion that indicated the defendant’s attorneys had to be disqualified. Between the time of the trial court’s decision and the appeal, the Tennessee Board of Professional Responsibility issued another ethics opinion substantially modifying the earlier one. According to the latter opinion, courts should follow the *Schiessle* three-step test in all attorney conflict of interest cases and should apply disqualification rules and screening procedures to law clerks, paralegals, and legal secretaries as well.

Although giving this opinion thorough consideration, the *King* court did not follow it, noting:

The interpretations by the Board of Professional Responsibility of the Rules of the Supreme Court which it was created to enforce are entitled to weight and consideration by the Courts, but no authority is found requiring the Courts to enforce such an interpretation except in a review of disciplinary action by the Board.

The court instead based its analysis of the issue on DR 4-101 and Canon 9. Because the evidence did not show that the secretary either received

109. See, e.g., Arkansas v. Dean Food Prods. Co., 605 F.2d 380, 385 (8th Cir. 1979) (Canon 4 is “inextricably wedded to Canon 9”), overruled on other grounds sub nom. In re Multi-Piece Rim Prods. Liab. Litig., 612 F.2d 377 (8th Cir. 1980), vacated sub nom. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 757 (2d Cir. 1975) (“Although Canon 9 dictates that doubts should be resolved in favor of disqualification . . . it is not intended completely to override the delicate balance created by Canon 4 and the decisions thereunder.”); King v. King, No. 89-46-11 (Tenn. Ct. App. 1989) (LEXIS, States library, Tenn. file No. 675) (most courts “consider both Canon 4 and Canon 9 when confronted with the dilemma created by a law firm representing interests potentially antagonistic to a former client”).


111. *Id.* at *3.


114. *See supra* text accompanying notes 81-82.


116. King v. King, No. 89-46-11 (Tenn. Ct. App. 1989) (LEXIS, States library, Tenn. file No. 675, at *15). *But see* the concurring opinion of Judge Koch, who notes: “Even though the formal ethics opinions do not have the weight of precedent, their importance should not be denigrated by judicial indifference because, like the Code of Professional Responsibility, they represent the acknowledged standards of the profession.” *Id.* at *29-30. Judge Koch would apply the *Schiessle* three-step analysis to disqualification cases involving nonlawyers. *Id.* at *36-37.
confidential information from the plaintiff or revealed any to the defendant’s attorneys, the court held that disqualification was inappropriate.\textsuperscript{117}

The Arkansas Supreme Court reached a similar result in \textit{Herron v. Jones}.\textsuperscript{118} In \textit{Herron}, a secretary for the plaintiffs’ firm went to work for the defendant’s firm. The evidence established that the secretary had been warned not to discuss confidential information about the case, that she did not work on the case at the new firm, and that the file was kept away from her in the attorney’s own office. Therefore, the court reasoned, the secretary could not have received any confidential information.\textsuperscript{119} The court held that, although the duty to preserve the confidences of clients “applies to all the employees of a law firm,” Canon 9 applies only to lawyers and does not by itself constitute a sufficient basis on which to order disqualification.\textsuperscript{120} The court further noted that any presumption of impropriety resulting from the secretary’s changing firms during litigation clearly had been rebutted by the evidence that the secretary had not revealed any secrets.\textsuperscript{121}

C. Attorney Conflict of Interest Rules

While courts recognize that attorney conflict of interest rules apply only to lawyers,\textsuperscript{122} some follow a similar analysis when confronting conflict of interest issues involving nonlawyers. These cases fall into two categories—those that apply the \textit{Schiessle v. Stevens}\textsuperscript{123} three-step analysis and those that do not.

\textbf{(1) Application of the Schiessle Three-Step Analysis}

In \textit{Kapco Manufacturing Co. v. C & O Enterprises, Inc.},\textsuperscript{124} the court applied \textit{Schiessle} to resolve a motion to disqualify a firm for hiring a secretary-office manager from an adversary.\textsuperscript{125} Under the \textit{Schiessle} test, the court first must determine whether a substantial relationship exists between the lawyer’s prior and present representations. As the \textit{Kapco} court noted, however, the secretary in this case

\textsuperscript{117} Id. at *20-22.
\textsuperscript{118} 276 Ark. 493, 637 S.W.2d 569 (1982).
\textsuperscript{119} Id. at 496, 637 S.W.2d at 571.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} See Preliminary Statement, \textit{supra} note 1.
\textsuperscript{123} 717 F.2d 417 (7th Cir. 1983). For a discussion of \textit{Schiessle}, see \textit{supra} text accompanying notes 81-82.
\textsuperscript{124} 637 F. Supp. 1231 (N.D. Ill. 1985).
\textsuperscript{125} Id. at 1236.
did not "represent" either client. Therefore, the court concluded, the correct inquiry was whether a "substantial nexus" existed between the work performed by the secretary for her former employer and the work she performed for her current employer. Second, the court must determine whether the hiring firm has rebutted the presumption that the secretary received confidences at her prior firm. If so, the secretary's employment with the adversary can have no improper effect on the outcome of the litigation. If not, the court must proceed to the third step and determine whether the hiring firm has rebutted the presumption that the secretary has shared confidences with her new employer. In concluding that the second presumption of the Schissle test should apply to the case of a nonlawyer, the Kapco court relied on Williams v. Trans World Airlines, Inc. for the proposition that an employee may be more likely than an attorney to disclose confidences inadvertently. Finding that the hiring firm effectively had rebutted this presumption, the Kapco court denied the motion for disqualification.

This three-step approach also was adopted by the ABA in an informal ethics opinion. The ABA opinion was solicited by a firm that wanted to hire a paralegal who had worked on a lawsuit with her former employer against a client of the hiring firm. The Standing Committee on Ethics and Professional Responsibility concluded that the firm would not be disqualified as long as it "strictly adhere[d]" to screening procedures designed to prevent protected information from being revealed. The Committee expressly noted that once the moving

126. Id. at 1237 n.13.
127. Id.
128. Id. at 1237.
129. Id.
132. Id. at 1241. The court also held that a hiring firm may rebut this presumption even though it has not set up a formal ethical wall. Id. at 1240.
133. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1526 at 1 (1988), holds:

A law firm that employs a nonlawyer who formerly was employed by another firm may continue representing clients whose interests conflict with the interests of clients of the former employer on whose matters the nonlawyer has worked, as long as the employing firm screens the nonlawyer from information about or participating in matters involving those clients and strictly adheres to the screening process described in this opinion and as long as no information relating to the representation of the clients of the former employer is revealed by the nonlawyer to any person in the employing firm.

The opinion further comments that if the nonlawyer actually reveals any confidential information to the hiring firm, or if screening would not be effective, the firm should withdraw or be disqualified. Id. at 4.
134. Id. at 2.
party establishes that the employee obtained confidences from her prior firm, the burden shifts to the hiring firm to rebut the presumption that those confidences will be shared at the new firm. This opinion makes great strides toward resolving employee conflict of interest questions, but, while influential, it is not binding on state courts.

(2) No Formal Three-Step Test Applied

Some courts apply an attorney conflict of interest analysis to non-lawyers, but do not adopt the formal three-step test or its corresponding presumptions. In the recent California case of Widger v. Owens-Corning Fiberglas Corp. (In re Complex Asbestos Litigation), the court upheld the disqualification of a law firm from nine asbestos cases because the law firm hired a paralegal who previously worked for an asbestos defense firm. Because this was a case of first impression in California, the court gave a very thorough analysis to the problem of nonlawyer side-switching. The court based its analysis on cases involving the question of whether an entire law firm should be vicariously disqualified for hiring an attorney with a conflict of interest. The court held:

The party seeking disqualification must show that its present or past attorney's former employee possesses confidential attorney-client information materially related to the proceedings before the court. . . . Once this showing has been made, a rebuttable presumption arises that the information has been used or disclosed in the current employment. . . . To rebut the presumption, the challenged attorney has the burden of showing that the practical effect of formal screening has been achieved.

The ruling is important for several reasons. First, it recognizes that, although the duty to protect client confidences belongs to the attorney

135. Id. (citing Kapco Mfg. Co. v. C & O Enter., Inc., 637 F. Supp. 1231 (N.D. Ill. 1985)).

136. No. A047921, slip op. (Cal. Ct. App. Jul. 19, 1991) The trial court originally disqualified the attorney from twenty cases, but amended its order to include only those cases pending in San Francisco Superior Court. See id. at 11; Hall, S.F. Decision on Paralegal Conflict May Plague Firms: 'Pandora's Box' Opened?, L.A. Daily Journal, Sept. 25, 1989, at 1, col. 2. Both parties appealed. The disqualified attorney claimed he should not have been disqualified from any cases; defendants cross-appealed claiming he should have been disqualified from all asbestos cases against them in the state. The author helped research the defendants' cross-appeal last summer, and that is where she got the idea for this Note. The disqualified attorney has indicated that he intends to appeal the order to the California Supreme Court. Carrizosa, Asbestos Plaintiffs Firm's Disqualification Is Affirmed, San Francisco Daily J., July 22, 1991, at 1, col. 2. As of the date of this publication, however, no notice has been filed.

137. Id. at 2-3.

138. Id. at 25.

139. Id. at 30-31.
representing the client, it reasons that attorneys who hire employees from opposing counsel must be regulated. Second, the court expressly rejected the substantial relationship test as a means of presuming that the employee acquired confidential information while employed at the former firm. Understandably, the court felt that this was too broad a rule for support staff. What the court really was rejecting, however, was the presumption itself and the that the two representations had to be substantially related. Finally, the court applied a rebuttable presumption, adapted from vicarious disqualification cases, that the employee would use or disclose confidential information at the new firm. This case is by far the most comprehensive analysis of the risks posed by employee conflicts of interest and should be adopted in other states.

In *Esquire Care, Inc. v. Maguire*, the court refused to disqualify the plaintiffs' law firm after the firm hired a secretary from the defendant's law firm in the midst of ongoing litigation. The *Esquire* court recognized that a conflict of interest could arise in such situations and noted:

In determining whether an individual is privy to attorney-client confidences, a court should not look to what tasks the employee performs so much as to his or her access to the same types of privileged materials that lawyers would receive. That a secretary may make no lawyerlike decisions, or counsel clients, does not mean he or she is not privy to confidential communications.

The *Esquire* court expressly distinguished *Lackow v. Walter E. Heller & Co.* and refused to presume that the secretary would disclose any confidential information. Absent any proof that the secretary's change of employment created an unfair advantage in the litigation, disqualification would not be proper.

Other courts have held that, if a law firm hires a nonlawyer who has obtained confidential information as an employee at another firm

140. *Id.* at 16.
141. *Id.* at 28-29.
142. *Id.* at 29-30. The court required that the information be "materially related" to the new representation. Given the difficulty courts have in defining a "substantial relationship," it opens a whole new question to define "material relationship."
143. *Id.* at 26.
144. 532 So. 2d 740 (Fla. Dist. Ct. App. 1988).
145. *Id.* at 741.
147. *Esquire*, 532 So. 2d at 742.
148. *Id.; see also* Florida Bar Professional Ethics Comm., Formal Op. 86-5 (1986) (placing joint responsibility on the former law firm and the hiring law firm to prevent client confidences and secrets from being disclosed). The *Esquire* court considered this opinion in reaching its conclusion. See 532 So. 2d at 742.
that represents adverse interests, the hiring firm automatically must be disqualified; no screening mechanism is allowed to rebut any presumption of shared confidences.\textsuperscript{149} In \textit{Glover Bottled Gas Corp. v. Circle M. Beverage Barn, Inc.},\textsuperscript{150} the court summarily disqualified the hiring firm without discussing whether the employee revealed confidential information.\textsuperscript{151} A paralegal had left the plaintiff's law firm and gone to work for the defendants' attorneys. The evidence showed that the paralegal had worked on the litigation and had interviewed the plaintiff's manager while employed by the former firm.\textsuperscript{152} The \textit{Glover} court held that the \textit{Code of Professional Responsibility} requires attorneys to ensure that their employees' conduct complies with the \textit{Code}, and it disqualified the defendant's firm for a conflict of interest.\textsuperscript{153}

In 1989 the Alabama State Bar Disciplinary Commission issued two opinions addressing similar issues: one involved the potential disqualification of the hiring firm where a legal secretary had switched sides;\textsuperscript{154} the other involved a legal investigator who had switched sides.\textsuperscript{155} In both opinions, the Commission concluded that it would be unethical for the hiring firm to continue to represent clients in cases on which the nonlawyer previously had worked for the opponent.\textsuperscript{156} The Commission relied on the fact that each of the nonlawyers occupied a position of trust and had access not only to client confidences, but also to confidences and secrets regarding trial strategy and tactics.\textsuperscript{157} In the case involving the legal investigator, the Commission noted that the situation was so serious that the "mere erection of an ethical wall" would be insufficient.\textsuperscript{158}

\begin{itemize}
  \item \textsuperscript{149} \textit{Glover Bottled Gas Corp. v. Circle M. Beverage Barn, Inc.}, 129 A.D.2d 678, 514 N.Y.S.2d 440 (N.Y. App. Div. 1987); see also \textit{Hull v. Celanese Corp.}, 513 F.2d 568, 572 (2d Cir. 1975) (court dis disqualified attorney without any inquiry into whether or not the employee in fact disclosed any confidences); \textit{Williams v. Trans World Airlines, Inc.}, 588 F. Supp. 1037, 1043 (W.D. Mo. 1984) ("To hold a hearing on whether [the employee] has conveyed confidential information would very likely compromise the confidences."); \textit{Lackow v. Walter E. Heller & Co.}, 466 So. 2d 1120, 1123 (Fla. Ct. App. 1985) ("Whether [the secretary] actually violated or would violate the confidences is not a subject of inquiry.").
  \item \textsuperscript{151} \textit{Id.} at 679, 514 N.Y.S.2d at 441.
  \item \textsuperscript{152} \textit{Id.}
  \item \textsuperscript{153} \textit{Id.}
  \item \textsuperscript{154} \textit{Ala. State Bar Disciplinary Comm.,} Op. 81 (1989) [hereinafter Opinion 81].
  \item \textsuperscript{155} \textit{Ala. State Bar Disciplinary Comm.,} Op. 89-41 (1989) [hereinafter Opinion 41].
  \item \textsuperscript{156} \textit{Id.} at 2; Opinion 81, supra note 154, at 2.
  \item \textsuperscript{157} Opinion 81, supra note 154, at 2; Opinion 41, supra note 155, at 2.
  \item \textsuperscript{158} Opinion 41, supra note 155, at 2; cf. Opinion 81, supra note 154, at 2 ("While it may be possible to build a [n ethical wall] around certain employees or to screen employees from information so as to prevent disqualification, such did not occur in this case, and, \textit{in any event, probably would be impractical in this or a similar scenario.}"). (emphasis added).
\end{itemize}
It appears, then, that a uniform analysis has not been developed for nonlawyer employee conflicts of interest. Although most courts that confront the issue recognize that a problem exists, there is no readily available, satisfactory remedy. The next Part proposes that states adopt legislation that explicitly regulates support staff conflicts of interest. It also proposes a method of analysis for courts to apply when confronted with the issue. This would provide both a bright line rule to follow and a workable test to apply when that line is crossed.

IV. What Rules Should Apply?

The recurring theme in cases involving nonlawyer side-switching is the lack of guidance under existing state ethical rules, which generally have incorporated the provisions of either the Model Code or Model Rules, as to when an apparent conflict of interest mandates disqualification of the hiring attorney or firm. Courts often are trapped by an obvious ethical breach and the lack of means to remedy it. At the same time, any disqualification motion can disrupt the litigation, resulting in unnecessary delay and undue hardship on the parties involved. Lawyers are in a difficult position because they need to employ legal assistants, secretaries, investigators, and other nonlawyer support staff in order to be more efficient, but they must be wary of their employees leaving to work for another lawyer and disclosing damaging, confidential information. On the opposing side, lawyers involved especially in complex, prolonged litigation cannot risk hiring new, experienced staff for fear a conflict may arise, forcing them to withdraw or be disqualified. Finally, lay personnel are torn because of their desire for increased work responsibility and respect. But with responsibility and respect come increased exposure to confidential information and, consequently, limits on employees' mobility. Lay


160. Id. at 309, 254 Cal. Rptr. at 865 ("There is no doubt that [the attorney's] acts 'were the essence of unprofessionalism and poor judgment.' However, it is one thing to say [the attorney's] conduct was unprofessional and showed bad judgment and quite another to say, as the trial court did not, that it warrants his disqualification.").

161. See Hall, supra note 136 (discussing trial court’s order in Widger v. Owens-Corning Fiberglas Corp.. For a discussion of Widger, see supra notes 136-143 and accompanying text.

162. See, e.g., Albert, supra note 36, at 36, 37.
personnel need to know about their ethical responsibilities so they can relocate without risk to their new employers or to themselves.

This Note proposes that states adopt legislation that prohibits attorneys from hiring nonlawyer support staff from an adversary to work on a matter substantially related to work performed for the adversary.\textsuperscript{163} If a law firm does employ a lay person with such a conflict of interest, this Note proposes that the hiring firm must withdraw from the representation or be disqualified, unless it can prove that the lay person has not and will not use or disclose any confidential or privileged information.

Under the present system, attorneys are responsible for using reasonable efforts to ensure that the conduct of their employees complies with ethical rules and guidelines.\textsuperscript{164} The proposed rule simply would add the requirement that attorneys use preventative measures to ensure that no breaches of confidentiality occur. Such a requirement would let lawyers and lay personnel alike know what is permitted and what is not. It would decrease disqualification motions by providing a clear rule to guide lawyers and nonlawyers in their conduct, thereby lessening the likelihood of allegations of ethical breach. The following sections discuss the implications arising from such a rule and guidelines for its application.

A. Joint Responsibility

This Note proposes that both the hiring firm and the former firm should have joint responsibility for protecting client information and the integrity of the litigation. Only if both firms use preventative measures to dispel potential conflicts of interest will the clients be adequately protected. The bulk of the responsibility, however, must lie with the hiring firm.

Whenever an employee with prior legal experience joins a firm, that firm should perform a conflict check, similar to that performed

\textsuperscript{163} The rule could be termed: "A lawyer or a law firm shall not employ a nonlawyer to work on a client matter if:

(1) The nonlawyer previously worked for a lawyer or law firm that represented a client in the same or a substantially related matter;
(2) The new lawyer's or law firm's client has interests materially adverse to the former lawyer's or law firm's client; and
(3) The nonlawyer acquired confidential information about the former lawyer's or law firm's client or the representation while employed at the former firm."

The legislation should take the form of a statute governing the legal professional because rules of professional conduct serve as a basis of disciplinary action, not civil enforcement. Because the author believes that \textit{Widger v. Owens-Corning Fiberglas Corp. (In re Complex Asbestos Litig.)} was correctly decided, she would advocate adopting that rule either judicially or legislatively.

\textsuperscript{164} \textit{Model Rules of Professional Conduct} Rule 5.3 (1989); \textit{Model Code of Professional Responsibility} DR 4-101(D) (1981); \textit{supra} Part I.B.
as part of the hiring of a new associate. The *Model Rules* provide that, when hiring a new lawyer, a law firm should use "reasonable procedures" to detect whether any conflicts of interest might arise.\(^{165}\) Because an employee may not always know the names of all clients for which she worked, "a firm's conflict checking system should include the identity of adverse counsel to enable a search for those matters where the prospective employee's former employer is or was adverse."\(^{166}\) The hiring firm then should ensure that the lay person is not involved in any matter on which she performed substantial work, or about which she gained confidential or privileged information, at the former firm.

The former firm has an independent duty to protect the confidences of its clients, and thus also must bear some of the responsibility. Disciplinary Rule 4-101(D), for example, requires that lawyers use reasonable efforts to prevent disclosure of confidential information by an employee.\(^{167}\) Furthermore, the *Model Code*’s ethical considerations note that a lawyer carefully must select and train her employees "so that the sanctity of all confidences and secrets of [her] clients may be preserved."\(^{168}\) Finally, the *Model Rules* require that lawyers give reasonable supervision and training to their nonlawyer employees regarding ethical conduct and "specifically the obligation not to disclose information relating to representation of the client."\(^{169}\)

However, because a lawyer cannot control the conduct of an employee after the employee leaves the firm, the former employer cannot be held responsible for disclosures subsequently made by that employee. Thus, if a lawyer learns that an employee with confidential or privileged information is going to work for an opposing law firm, the lawyer *at that time* should advise the hiring firm of the conflict and request that screening procedures be implemented.\(^{170}\) The responsibility then shifts to the hiring firm to guarantee that the new employee does not use or divulge information regarding a client of the former firm.


\(^{167}\) *Model Code of Professional Responsibility* DR 4-101(D) (1981); see supra notes 26-27 and accompanying text.

\(^{168}\) *Model Code of Professional Responsibility* EC 4-2 (1981); see also EC 4-5 ("a lawyer should be diligent in his efforts to prevent the misuse of [information acquired in the course of the representation of a client] by his employees and associates").


B. Standards for Disqualification

This Note proposes a four-part test for analyzing a disqualification motion. When an employee leaves a law firm and subsequently works for another firm, creating a conflict, the court must disqualify the hiring firm from any cases in which the following criteria are met: (1) The employee was a "key employee" of the former employer; (2) the work of the employee at the previous firm was the same or substantially related to the work at the hiring firm; (3) the employee received client confidences or privileged information (attorney-client or attorney work product) at her previous employment; and (4) the hiring firm has failed to rebut the presumption of shared confidences.

(I) Key Employees

In attorney conflict of interest cases, the moving party first must establish the existence of an attorney-client relationship in the former representation.\(^1\) The same analysis should apply in the case of non-lawyers. Although a lay person cannot "represent" a client or form an attorney-client relationship, a lay person acting within the scope of her employment is the lawyer's agent.\(^2\) As such, she owes a duty to her employer's clients to hold inviolate their confidential information.

Not all employees, however, can be treated the same. Although this Note does not distinguish between secretaries, legal assistants, case clerks, office managers, or other employees, it does distinguish employees in a position of trust from others. Before the proposed conflict of interest rule will apply, the employee must have had access to communications and writings that are confidential or protected by the attorney-client or the work product privileges.

The attorney-client privilege authorizes a client to refuse to disclose, and to prevent others from disclosing, confidential communications between the attorney and the client.\(^3\) A client does not waive the privilege simply by making the communication in the presence of a third person, so long as that person is a representative of the client or lawyer, or present to further the interest of the client.\(^4\) One court has held that communications by an attorney to a client "in the pres-


\(^{172}\) The presence of a nonlawyer employee during a client conference, for example, will not destroy the attorney-client privilege. See infra notes 173-174 and accompanying text.

\(^{173}\) See supra note 5.

\(^{174}\) See, e.g., CAL. EVID. CODE § 952 (West Supp. 1991); NEV. REV. STAT. ANN. §§
ence of, or disclosed to, clerks, secretaries, interpreters, physicians, spouses, parents, business associates, or joint clients, when made to further the interest of the client or when reasonably necessary for transmission or accomplishment of the purpose of the consultation, remain privileged.' Thus, the client has a privilege to prevent non-lawyers from disclosing confidential communications.

Moreover, the work product doctrine provides both an absolute and a qualified privilege for an attorney's work in preparing for litigation. The Federal Rules of Civil Procedure state, "[D]ocuments and tangible things . . . prepared in anticipation of litigation" are only discoverable upon a showing of substantial need by the party seeking discovery, and an attorney's thoughts, impressions, opinions, conclusions or legal theories are not discoverable under any circumstances. Courts have held that the work product privilege includes the memoranda and notes of an attorney's employee. Thus, if an employee has created "work product" or has had access to the attorney's work product, she should not be entitled to use that information later on behalf of a new firm engaged in litigation against the former firm's client.

Therefore, the first question the court must ask is: Did the employee have access to confidential or privileged information while employed at the former firm? If so, then a potential conflict of interest exists. If not, then neither the employee nor the hiring firm is prohibited from working on the litigation. As one court noted, it is irrelevant that an employee makes no "lawyerlike decisions" so long as she has access to confidential information to which lawyers also have access.

(2) Substantial Relationship

As with attorney conflict of interest rules, for a nonlawyer conflict of interest to arise, a substantial relationship must exist between the representation at the previous firm and the representation at the

49.065-49.095 (Michie 1986); N.M. STAT. ANN. § 38-6-6(B) (1987); OKLA. STAT. ANN. tit. 12, § 2502 (West 1980); OR. REV. STAT. § 40.225 (1988); S.D. CODED LAWS § 19-13-2 (1987); WIS. STAT. ANN. § 905.03 (West 1975).


176. FED. R. CIV. P. 26(b)(3). See also supra note 9.

177. FED. R. CIV. P. 26(b)(3).

178. See, e.g., Insurance Co. of North Am., 108 Cal. App. 3d at 771, 166 Cal. Rptr. at 888.

new firm. This does not mean that the employee must work on identical litigation; the substantial relationship test is met if the information acquired by the employee at the first firm could disadvantage the client if disclosed to the hiring firm. As the court in Kapco Manufacturing Co. v. C & O Enterprises, Inc.\textsuperscript{180} stated, the substantial relationship test is satisfied if a "substantial nexus exists between the subject matter of the ‘prior and present’ relationship of the [employee] and her former and current places of employment."\textsuperscript{181} States should adopt the "substantial nexus" approach, asserted by the Kapco court, in support staff conflict of interest analysis.

Courts should require a substantial relationship to exist for two reasons. First, a support staff conflict of interest rule based on the substantial nexus test would not be overbroad. Courts have voiced concern that applying conflict of interest rules to nonlawyers would restrict the mobility of lay personnel and create an insurmountable burden on hiring firms to clear conflicts.\textsuperscript{182} Two measures would help allay such fears: restricting the rule to "key employees," and applying the rule only to situations in which a "substantial nexus" exists between representations. These conditions will restrict application of the rule to circumstances in which the employee received information at the prior firm, disclosure of which could disadvantage the prior firm’s client. Second, a rule predicated on the substantial nexus test would not be underinclusive. Clients should not have to prove that the employee is working on the identical matter for the opponent. However, an employee may learn confidential information about a client from one matter that could be used against that client in a different, but related, matter. It therefore is essential that a substantial relationship test be included in the rule proposed by this Note.

\section{(3) Actual Receipt of Confidential or Privileged Information}

In attorney conflict of interest cases, once the former client establishes the requisite substantial relationship, the court presumes that the attorney acquired confidential information from her firm’s former client.\textsuperscript{183} If applied to nonlawyers, this presumption may result in un-

\textsuperscript{180} 637 F. Supp. 1231 (N.D. Ill 1985).
\textsuperscript{181} Id. at 1237 n.13; see supra notes 125-128 and accompanying text.
\textsuperscript{183} See supra notes 58-60 and accompanying text.
due hardship. Nonlawyers often are exposed only to confidential information about the matters on which they worked, whereas lawyers are presumed to have access to confidential information about all the firm’s clients. This is especially true when the employee comes from a large firm because she may have had no involvement with the case posing the conflict.

A more equitable approach would be to require the moving party to prove that the nonlawyer employee actually had access to confidential information. This burden of proof is not insurmountable. The former employer can testify to what the employee’s responsibilities were in the office and for which clients the employee worked. And the moving party only need prove that the employee attended client meetings, drafted correspondence or pleadings, performed legal research, assisted in trial preparation, or had any other access to confidential or privileged information while working for the former employer.

Although this may appear an easy burden to meet, it should not require proof of which confidences the employee actually received. Courts should be mindful of attorney conflict of interest decisions voicing concern over requiring disclosure of the very information the rule is intended to protect.\(^{184}\) It is enough for the moving party to prove that the type of work the employee performed exposed her to confidential information.

(4) Presumption of Shared Confidences

Once the moving party proves that the nonlawyer employee was exposed to confidential or privileged information at her prior firm, the burden shifts to the opposing party to rebut the presumption of shared confidences. The moving party should not be required to prove that the hiring firm’s policies are inadequate; it is the hiring firm that should have the burden of proving what precautions, if any, it has taken to avoid a conflict of interest. If, however, the nonlawyer has worked on a substantially related matter or has discussed the matter with another member of the firm, the damage has occurred and disqualification should follow.

Screening is the most effective way to rebut this presumption.\(^{185}\) The employee should not work on the matter; she should not be exposed to any of the work or files; and she should be admonished not

\(^{184}\) See, e.g., Woods v. Superior Court, 149 Cal. App. 3d 931, 934, 197 Cal. Rptr. 185, 187 (1983); see also supra text accompanying note 76.

\(^{185}\) See supra notes 85-89 and accompanying text.
to discuss the case with anyone in the office, including other non-
lawyers. Such an ethical wall might not be sufficient to protect con-
fidential information in a small law firm with only a few nonlawyer
employees, but it should be effective in a larger firm with more staff
available to work on conflicting representations. When determining
whether a screening mechanism is sufficient to rebut the presumption
of shared confidences, a court should examine a variety of factors:\textsuperscript{186}

(1) The screening must take place immediately; once any information
is divulged, the firm should be disqualified;
(2) The files involved in the conflict should be either physically seg-
egrated or marked so that they are easily identifiable at a distance;
(3) The employee should not discuss the lawsuit with any of the law-
yers or any of the lay personnel in the hiring firm;
(4) The hiring firm should send a memo to all its lawyers and lay
personnel who are involved in the litigation, instructing them not to
discuss the case with the employee; and
(5) The hiring firm should inform the former employer of the sit-
uation and of the steps it has taken to avoid a conflict of interest.

If the hiring firm takes these steps, it should be able to continue
its representation without any risk of disqualification. If, however, the
hiring firm does not effectively screen the nonlawyer employee, or if
a breach of confidentiality nevertheless occurs, the law firm may have
to withdraw from representation or risk disqualification.\textsuperscript{187}

\textbf{Conclusion}

When a nonlawyer employee moves from one law firm to another
law firm that represents adverse interests, a potential conflict of in-
terest arises. The hiring law firm should not be permitted to gain an
unfair advantage in the matter by putting the employee to work on
the opposite side of the case. Currently, the law is unclear as to whether
the hiring firm should be disqualified or allowed to continue its rep-
resentation.

Conflict of interest rules serve many purposes. They allow clients
to discuss matters freely with their lawyers, secure in the knowledge
that the information they reveal will remain private. They reaffirm the

\textsuperscript{186} For examples of the factors courts have used to determine whether an ethical wall is
effective, see Nemours Found. v. Gilbane, 632 F. Supp. 418, 421 (D. Del. 1986); Kovacevic
v. Fair Automotive Repair, Inc., 641 F. Supp. 237, 244 (N.D. Ill. 1986); Moser, \textit{supra} note
1988, at 47, 48.

\textsuperscript{187} Moser, \textit{supra} note 85, at 411.
duty of loyalty that lawyers owe to clients. They allow lawyers to develop and record trial tactics and strategies without fear that their work product will be divulged. They help ensure that neither party obtains an unfair advantage in the litigation. And they uphold the integrity of the judicial process.

On the other hand, disqualification motions can delay litigation, deny a party the right to her counsel of choice, or injure a law firm’s reputation. In addition, both courts and ethics committees have expressed concern that nonlawyers should not be unduly restricted from changing their employment. Conflict of interest rules must strike a balance between these competing concerns.

The fairness and integrity of the judicial process can best be protected by adopting a conflict of interest rule, similar to that currently in force for attorneys, for cases involving nonlawyers who go to work for adversaries. Adoption of such a rule would provide certainty and clarity, by giving lawyers and their employees more comprehensive guidelines for ethical conduct. States must recognize that nonlawyers often are privy to as much confidential information as their employers and provide appropriate protections. The adoption of a rule like the one delineated in this Note would be a step in the right direction.

188. Id. at 404; see also supra notes 43-44 and accompanying text.
189. See supra note 182 and accompanying text.