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Are We a Profession or Merely a Business?: The Erosion of the Conflicts Rules Through the Increased Use of Ethical Walls

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ARE WE A PROFESSION OR MERELY A BUSINESS?: THE EROSION OF THE CONFLICTS RULES THROUGH THE INCREASED USE OF ETHICAL WALLS

Neil W. Hamilton*
Kevin R. Coan**

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I. INTRODUCTION

Over the past twenty-five years, there has been a dramatic increase in the use of ethical walls to circumvent the rules of imputed disqualifi-

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1. The Authors prefer to use the term “ethical wall” to describe the situation when a firm separates (screens) an attorney with a conflict of interest from the remainder of the firm. This phrase is synonymous with several other phrases used by various courts and commentators including “Chinese wall,” “cone of silence,” “screening mechanism,” and “insulation wall.” Typical elements of an ethical wall include: “physical, geographic, and departmental separation of attorneys; prohibitions against and sanctions for discussing confidential matters; established rules and procedures preventing access to confidential information and files; procedures preventing a disqualified attorney from sharing in the profits from the representation; and continuing education in professional responsibility.” Henriksen v. Great Am. Sav. & Loan, 11 Cal. App. 4th 109, 116 n.6 (1992). A firm must erect an ethical wall before the personally disqualified attorney joins the firm. See RESTATEMENT (THIRD) OF THE LAW
Throughout the history of the use of ethical walls, the legal profession and the judiciary have debated whether such a device should be allowed, and the debate continues today. This is a critical time to analyze and weigh the arguments for and against the use of ethical walls for several reasons. First, the pressure is increasing to permit ethical walls because of law firms' aggressive attitude on conflicts. Bidding by law firms for lawyers or groups of lawyers with substantial books of business is already common and probably will grow more common. This substantial lawyer mobility creates conflicts issues, and the consequent disqualification of counsel may interfere with clients' rights to counsel of choice. In addition, large law firms will continue to test the envelope on firm growth, realizing that rules on conflicts constitute one of the most important limitations on such growth, and that ethical walls could mitigate those limitations. Law firms also take an aggressive position on conflicts because of the increasing competition for business between the legal and accounting professions. The ABA Journal recently noted that while accountants can do work for clients with competing interests, self-imposed conflict rules more often than not prohibit entire law

GOVERNING LAWYERS § 204 cmt. d(iii) (Proposed Final Draft No. 1, 1996) [Editor: On May 12, 1998, the members of the American Law Institute gave final approval to the complete Restatement. It is slated for publication in September 1999.]; John Robert Parker, Comment, Private Sector Chinese Walls: Their Efficacy as a Method of Avoiding Imputed Disqualification, 19 J. LEGAL PROF. 345, 349 (1995). Ethical walls are principally a larger firm phenomena because smaller firms cannot meet these conditions. Professor Monroe Freedman points out that an ethical wall consists simply of assurances by a lawyer who has a primary disqualification and the lawyer's associates and partners that the lawyer will not work on a matter or talk about it with other lawyers in the firm. The temptations are still there, violations are virtually impossible to police, and the plaintiff's ability to prove a violation is essentially nil. See Monroe Freedman, The Ethical Illusion of Screening, LEGAL TIMES, Nov. 20, 1995, at 24.

2. The number of cases addressing the use of ethical walls continues to grow despite the United States Supreme Court ruling in Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981), which has been interpreted to disallow the appealability of orders denying motions to disqualify counsel, but to allow the appealability of motions granting disqualification of counsel. See also Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 718-20 (7th Cir. 1982) (discussing the appealability of orders granting disqualification of opposing party's counsel). Much of the recent interest in ethical walls has been in response to the current debate within the American Law Institute ("ALI") with respect to the proposed final draft of Restatement (Third) of the Law Governing Lawyers section 204, which would allow the use of ethical walls for migrating private attorneys. For a recent overview of the debate, see John Gibeaut, A Switch in Time: Courts Cool to Restatement Proposal on Lawyer Job-hopping, A.B.A. J., Nov. 1997, at 40, and infra notes 109-20 and accompanying text.


firms from undertaking such representations, even if the conflict involves only a single lawyer in the firm.

That rub—and the ABA Model Rules—likely will be the points where the conflict is joined.5

Second, the American Law Institute ("ALI") and the American Bar Association ("ABA") are reevaluating this area of conflicts. The ALI's proposed Restatement (Third) of the Law Governing Lawyers takes a more permissive approach to the use of ethical walls than the current ABA's Rules of Professional Conduct.6 The ABA has created a new Committee on the Evaluation of the Rules of Professional Conduct, or "Ethics 2000." In announcing the committee, former ABA President N. Lee Cooper said: "We believe this examination is necessary in light of changes in the legal profession, such as the increased size and mobility of law firms ...." Among other things, the ABA Committee will evaluate whether the provisions of the Restatement (Third) of the Law Governing Lawyers suggest "enhancements to the Model Rules."7 The Committee Chair, Chief Justice E. Norman Veasey of the Delaware Supreme Court, adds that the changes in the profession create "tension over professional conduct rules for lawyers relating to confidentiality and conflicts."8 Chief Justice Veasey also notes that the Model Rules dealing with confidentiality and conflicts are "near the top of the commission's work list."9

A third reason that this is a critical time to analyze and weigh the arguments for and against the use of ethical walls is that many jurisdictions have not yet reached the issue. Our survey of all federal circuit courts of appeals, state supreme and appellate courts, and state ethics rules and opinions indicates that while thirteen jurisdictions expressly approve the use of ethical walls for a migrating attorney's new firm,10

9. Id.
10. Id.
11. The Courts of Appeals for the Second, Sixth, Seventh, and Federal Circuits have expressly recognized or approved ethical walls. See Manning v. Waring, Cox, James, Sklar & Allen, 849 F.2d 222, 226 (6th Cir. 1988); EZ Paint Corp. v. Padco, Inc., 746 F.2d 1459, 1462 (Fed. Cir. 1984) (purporting to apply Eighth Circuit law); Panduit Corp. v. All States Plastic Mfg. Co., Inc.,
eight jurisdictions also expressly disallow ethical walls. The remaining jurisdictions have not reached the issue.

This Article analyzes the question of whether segments of the pro-


profession and some courts have taken the correct path in permitting ethical walls to overcome the presumption that any attorney has a primary disqualification in taking a representation, that disqualification is imputed to the attorney’s entire firm. This is called an imputed disqualification or secondary disqualification. This Article will confine its discussion to the following paradigmatic situation that seems to be becoming more and more common in the legal profession: a lawyer represents Client A in a particular matter at one firm, and then the lawyer switches firms. Subsequently, the new firm represents Client B, who is adverse to the migrating lawyer’s previous client, Client A, on a matter that is the same or substantially related to the earlier matter, so as to cause primary disqualification. In an effort to avoid secondary disqualification, the new firm then sets up an ethical wall to shield its lawyers from confidential information held by the migrating lawyer. The wall attempts to circumvent the presumption that a lawyer shares client confidences of clients with the other lawyers in a firm.

14. In deciding attorney disqualification cases, courts delineate between “rebuttable” and “irrebuttable” presumptions. The Authors will use these terms as well, however it is important to note that the traditional rules of evidence define “presumption” as describing a device that requires the trier of fact to draw a particular conclusion when the basic facts are established, in the absence of evidence tending to disprove the fact presumed. See Fed. R. Evid. 301; Black’s Law Dictionary 1185-86 (6th ed. 1990). Therefore, the term “rebuttable presumption” is redundant, while the term “irrebuttable presumption” is an oxymoron. It would be more accurate to describe an irrebuttable presumption as a principle of substantive law, couched in the language of presumptions. The United States Supreme Court has recognized that an irrebuttable presumption is, in fact, a substantive rule of law. See Michael H. v. Gerald D., 491 U.S. 110, 119-21 (1989).


16. The imputation to the attorney’s firm, and subsequent disqualification of the firm, is commonly referred to as “secondary disqualification,” although sometimes simply referred to as “imputed disqualification.” The Authors prefer the phrase “secondary disqualification,” as it is a logical counterpart to the phrase “primary disqualification.”

17. This scenario describes the typical situation where firms attempt to persuade courts to accept the establishment of an ethical wall. However, firms have also tried to convince the courts to allow an ethical wall when the attorney disqualified at the primary stage has not changed firms.
Imagine for a moment that you are a construction subcontractor who has had the same lawyer from a large firm for a number of years. Over the course of your relationship, the lawyer has represented your interests in disputes against several general contractors. Your lawyer has become very familiar with your methods of operation, your financial position, and the contracts you use in your business. Recently, your lawyer has been drafting documents and giving advice concerning your dispute with a particular general contractor, Contractor A. Now imagine that your lawyer switches firms while the dispute is still going on because of a more lucrative offer for her book of business, but you decide to stay with the same large firm. Later, you find out that your former lawyer has joined the firm representing Contractor A. Feeling a little nervous that your former lawyer, who has an abundance of confidential information about you, is now “camping with the enemy,” you call the former lawyer to request that her new firm discontinue the representation of Contractor A. She responds that the new firm has set up an ethical wall to separate her in every way from Contractor A’s case, so as to safeguard your confidential information.

Is this ethical wall enough to ensure your absolute confidence that what you shared with your attorney will not be used against you? Would you be more concerned about the efficacy of an ethical wall if the case against you involves very large fees for the law firm representing Contractor A? What if you knew that lawyers, including your lawyer, are motivated almost completely by money, and this motivation is creating bidding wars among firms for books of business? Is the lawyer’s interest in being able to freely move from firm to firm in response to the most lucrative offer more important than your interest, the legal profession’s interest, and society’s interest in maintaining confidentiality of information and the adversary system of justice? Does the other client’s (your adversary’s) right to counsel of its choice and the inconvenience that disqualification may cause this client outweigh your interest in maintaining confidentiality? Should the public’s perception of the adversary system of justice and the appearance of the impropriety of the situation be factors a court should consider? Should other factors, such as delay of the legal process, or the fear that disqualification motions can be abused, be a consideration in deciding whether the ethical wall is

and the firm wishes to represent an adverse party of one of its own attorney’s clients. See Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1266-67 (7th Cir. 1983). While the consensus among the courts is that mobility of the disqualified attorney is required, at least one appellate court judge would allow an ethical wall in this case, calling the requirement of mobility “poppycock.” Id. at 1274 (Coffey, J., dissenting).
sufficient to protect your confidential information?

These are the types of questions that courts are facing today. If you are the client here, the answers are obvious. It just does not seem right for your former lawyer to be associated with the same firm that is suing you, especially when your former lawyer has confidential information about the matter upon which you are being sued. Your trust in the efficacy of an ethical wall is undermined by the fact that many lawyers and law firms increasingly see themselves as simply businesses maximizing income. Increasingly though, courts are allowing firms to set up ethical walls in these circumstances, notwithstanding both that the rules governing professional conduct generally disallow the use of ethical walls, and that the policy arguments against ethical walls are substantially stronger than policy arguments for them.

Part II of this Article outlines the current rules regarding secondary disqualification, and Part III then analyzes the policy rationales for these current rules. Part IV examines the progression of cases that has resulted in the acceptance of ethical walls by some courts as a means to avoid secondary disqualification. Part V looks at the policies that the courts allowing ethical walls utilize in deciding that ethical walls are acceptable.

The essential story of Parts IV and V is that, prior to 1975, professional ethics prohibited a firm to which a lawyer had moved from representing a client, if that would create a conflict of interest with one of the migrating lawyer’s former clients. This policy was based on client confidentiality, a cornerstone principle of the adversary system of justice. ABA Formal Opinion 342 in 1975 carved out an exception to this principle for former government attorneys moving into a private firm if the firm created an ethical wall around the former government attorney.18 The principal rationale was to protect the former client, the government, in its interest in being able to attract the brightest recent law graduates. The cost to the government in terms of potential loss of confidentiality was to be offset by the benefit of better legal counsel.19 This Article questions the factual support for the alleged benefit to the government from this policy change. Nonetheless, courts adopted this policy, and ultimately in 1983 the ABA Model Rules of Professional Conduct also adopted it.20

Starting in 1983, some courts, some states’ ethics rules, and now

19. See id.
20. See discussion infra Part IV.
the ALI have come to allow the use of ethical walls to protect the firm
of a migrating private attorney from being disqualified because of a
conflict of interest with one of the migrating lawyer’s former clients.21
This change was not based on some compensatory benefit to the former
client, as in the instance of the migrating government attorney where the
government allegedly had a substantial interest in recruiting the bright-
est law graduates. The change was based on the lawyer choice rights of
the present and future clients of the firm that the migrating private law-
yer had joined. Without an ethical wall, the migration of a personally
disqualified lawyer would create conflict of interest issues for the law-
yers currently in the firm, and current clients of the law firm might find
their lawyers disqualified. Since the choice of lawyer issue is created
solely by the migration of a private lawyer into a law firm, the issue is
really whether the benefit of facilitating the mobility of private lawyers
is greater than the cost of undermining the principle of client confiden-
tiality.

Part VI concludes by arguing that there are fundamental contradic-
tions involved in the arguments used to support ethical walls. The prin-
cipal theme of this analysis is that the profession should resolve these
contradictions by focusing on what it means to be a profession rather
than a business. We should not support the use of ethical walls as a
means to overcome the presumption of shared confidences, as ethical
walls compromise our long-standing professional commitment to client
confidentiality. The original exception permitting ethical walls for mi-
grating government attorneys was not well justified, but in any case, the
new exception for migrating private attorneys is a ruse for protecting the
monetary interests of lawyers. Lawyers should not let their own com-
cmercial interests trump the overriding policy objective of client confi-
dentiality.

Before turning to an analysis of the ethical rules governing con-
licts of interest, we should examine briefly whether the ethics rules are
relevant in a court proceeding on a motion to disqualify. Issues regard-
ing conflicts and the use of ethical walls arise not in disciplinary pro-
cedings, but generally in a context where a former client who does not
consent to an adverse representation by a lawyer moves for a court order
to disqualify the lawyer and the lawyer’s law firm from an adversary
representation of the former client.

The ALI Restatement (Third) of the Law Governing Lawyers
points out that the preambles to the lawyer codes make careful efforts to

21. See supra note 11 and accompanying text.
limit the legal effect of the code provisions to disciplinary contexts. “However, that effort is futile, and necessarily so.”22 The lawyer codes assist in defining standards of conduct relevant to both civil liability claims against lawyers and motions to disqualify a lawyer on account of a conflict of interest.23 “The lawyer codes are an appropriate reference in answering such a question. . . . Very simply stated, the modern lawyer codes . . . are largely based upon law that was developed in the courts.”24

II. THE CURRENT RULES OF SECONDARY (IMPUTED) DISQUALIFICATION

The 1983 ABA Model Rules of Professional Conduct Rule 1.1025 on imputed disqualification provides: “While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.”26 Rule 1.9, to which Rule 1.10 refers, provides in relevant part: “A lawyer who has formerly represented a client in a matter shall not thereafter: (a) 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 . . . .”27

So, for example, if Lawyer prepares a contract for the sale of goods on behalf of Client C, and then Lawyer subsequently moves to a new firm, Lawyer would be prohibited from challenging the contract on behalf of a new client unless Client C consents after consultation. Rule 1.9(a) disallows representation against a former client concerning the same or a substantially related matter as the earlier representation unless

23. See id.
24. Id. at xxiii
25. This Article will focus on the rules of the Model Rules of Professional Conduct, as most jurisdictions use these standards.
27. Id. Rule 1.9(a). The 1969 Model Code of Professional Responsibility, while having no provision which directly prohibits subsequent adverse representation against a former client, has been interpreted to achieve the same result as Rule 1.9. The duty to maintain client confidences found in DR 4-101 has been interpreted to extend beyond the termination of representation. See Waterbury Garment Corp. v. Strata Prod., Inc., 554 F. Supp. 63, 66-67 (S.D.N.Y. 1982); Realco Serv., Inc. v. Holt, 479 F. Supp. 867, 871 (E.D. Pa. 1979). Additionally, DR 5-105, which addresses conflicts of interest, has been held to extend beyond the termination of representation. See Huntington v. Great W. Resources, 655 F. Supp. 565, 574 (S.D.N.Y. 1987); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1322 (1975).
there is client consent. 28 A former client like Client C sometimes consents to the representation, for example, to avoid delaying the case. To encourage consent from former clients, firms may create an ethical wall around the migrating lawyer. 29 Without client consent, Lawyer's new firm cannot challenge the contract on behalf of a client because of the confidential information that Lawyer knows about Client C, and that information is imputed to the lawyers in the new firm under Rule 1.10. The same result would be reached under the 1969 Model Code of Professional Responsibility. 30

With just a few exceptions, 31 all state and federal courts apply the same, or essentially equivalent, rules of imputation, which impute a new lawyer’s knowledge of the confidences of a former client to a new firm, thereby prohibiting representation by the firm of an interest adverse to the former client by one of its lawyers. 32 The Model Rules clearly do not allow a lawyer or firm to rebut the presumption of shared confidences with a screening device; in fact, the drafters of the Model Rules consid-

29. The Authors support the use of ethical walls in order to gain consent from former clients.
30. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1969) (“A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client”); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1969) (“A Lawyer Should Avoid Even the Appearance of Professional Impropriety”); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D) (1969) (“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.” (footnote omitted)); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-6 (1969) (declaring that “[t]he obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment”).
31. A few states have amended the relevant professional conduct rules to allow the use of “screens” to rebut the presumption of shared confidences to the new firm. See NATIONAL REPORTER ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY, ILLINOIS RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1998); NATIONAL REPORTER ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY, MICHIGAN RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1998); NATIONAL REPORTER ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY, OREGON CODE OF PROFESSIONAL RESPONSIBILITY Disciplinary Rule 5-105 (1998); NATIONAL REPORTER ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY, RULES OF PROFESSIONAL CONDUCT: PENNSYLVANIA Rule 1.10 (1998); NATIONAL REPORTER ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY, WASHINGTON RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1998). Additionally, Massachusetts’ proposed Rule 1.10(b) would also allow the use of ethical walls. See NATIONAL REPORTER ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY, MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT Rule 1.10(b) (1998). In addition, the ALI has proposed guidelines allowing the use of ethical walls for private attorneys. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 204 (Proposed Final Draft No. 1, 1996).
ered and rejected the idea of screening the tainted lawyer.  

The imputation rules do not apply to all lawyers however. Rule 1.11, and similarly DR 9-101(B), create a notable exception for lawyers moving from public service to the private sector:

[A] lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.  

The reason for this exception is best stated by the official comment 3 to Rule 1.11:

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33. See Model Rules of Professional Conduct Rule 1.10 cmt. (Proposed Final Draft 1981). The following is an excerpt from one of the proposed drafts of the comments to Rule 1.10. Language which was ultimately rejected in the final version has been struck out.

Confidentiality

Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm’s clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; 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 clients. Relevant factors in determining the likelihood of actual access to information relating to representation of a client include the professional experience of the lawyer in question, the division of actual responsibility for the matters involved, the organizational structure of the law firm or other association involved, the sensitivity of the information and its relevance to the affairs of the affected clients, and the nature and probable effectiveness of screening measures.

Id. The portion which was not rejected appears in comment 6 to Model Rule 1.9. See Model Rules, supra note 15, at 32.

34. See Model Rules, supra note 15, at 36. The language of DR 9-101(B) is similar, except the latter substitutes the phrase "in which he had substantial responsibility while he was a public employee" for the phrase "in which the lawyer participated personally and substantially as a public officer or employee." Model Code, supra note 15, at 229. Rule 1.12(c) of the Model Rules of Professional Conduct also permits the use of ethical walls for judges, arbitrators, and judicial clerks who move into the private sector, however this Model Rule has little bearing on the issues addressed in this Article. See Model Rules, supra note 15, at 39.
The rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.35

It is clear that the Model Rules generally do not allow a firm to set up an ethical wall around a migrating attorney, and that the only notable exception is when an attorney is moving from government service into the private sector. There are several significant policies that underlie the Model Rules and the distinctions that the Model Rules make with respect to the use of ethical walls. An analysis of these policies is necessary to an understanding of why some courts are taking the incorrect path in permitting the use of ethical walls for migrating private attorneys, despite the fact that ethical walls are impermissible under the Model Rules.

III. POLICY RATIONALE AND HISTORY OF THE CONFLICTS RULES ON PRIMARY AND SECONDARY DISQUALIFICATION

The policies that underlie the conflicts rules on primary and secondary disqualification have deep historical roots. This Article does not attempt to provide a comprehensive history of these roots; rather it will focus on the more recent history of the policies justifying the conflict rules. There is a consensus as to what policies underlie the three major disqualification areas addressed by the conflicts rules: current client and former client conflicts (which together are the most fundamental primary disqualifications) and secondary or imputed disqualification.

It is important to keep in mind that ethics rules are based almost completely on common sense or practical judgments about human nature. For example, it is a practical judgment that clients will not reveal potentially embarrassing or disparaging facts to counsel without assurances of confidentiality. The conflicts rules, in particular, turn on reasonable possibilities dictated by common sense and the practicalities of proof.36

35. MODEL RULES, supra note 15, at 37-38.
36. See generally MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 176-80 (1990) (maintaining that judgments regarding conflicts of interest are based on experience and common sense).
A. Policies of the Rules Pertaining to Current Client Conflicts

There is no question that the overriding policy of the rules against current client conflicts is that of loyalty to the client. Rule 1.7 of the Model Rules disallows current client conflicts even in wholly unrelated matters. Comments 1 and 3 to the Model Rule explain that “[l]oyalty is an essential element in the lawyer’s relationship to a client” and that “loyalty to a client prohibits undertaking representation directly adverse to that client without that client’s consent.” The rules are based on the ancient maxim that a lawyer or law firm cannot serve two masters.

While the comments to the Model Rule do not expressly mention the policy of maintaining client confidentiality, this policy does figure in when the current client conflict concerns matters that are related in some way. Confidentiality is inherently a part of the duty of loyalty in such circumstances. In 1978, the Seventh Circuit Court of Appeals noted that current client conflicts are not permitted based partly on Canon 4 of the ABA Code of Professional Responsibility—the duty to maintain client confidentiality—when the dual representation concerns related matters. However, it is generally understood that the duty of loyalty by itself makes the rule against current client conflicts necessary. In sum, throughout history and at present, the profession has valued the duties of loyalty to clients and confidentiality of information in maintaining rules against current client conflicts.

B. Policies of the Rules Pertaining to Former Client Conflicts

The idea that an individual lawyer should not represent a current client against a former client is not a twentieth century phenomenon. In 1836, David Hoffman wrote Resolutions in Regard to Professional Deportment, a textbook of sorts which he used to teach young lawyers. Resolution VIII stated: “If I have ever had any connection with a cause,
I will never permit myself (when that connection is from any reason severed) to be engaged on the side of my former antagonist."

Today, this idea is embodied in Rule 1.9 of the Model Rules of Professional Conduct, which prohibits a lawyer who has formerly represented a client in a matter from representing another person in the same or a substantially related matter in which that person’s interest are materially adverse to the interests of the former client. The comments to Rule 1.9 demonstrate that preserving client confidentiality is the primary reason for the rule.

The modern rationale for the policy of client confidentiality and the corresponding attorney-client privilege is the necessity of promoting freedom of consultation of attorneys by lessening a client’s apprehension that the attorney may reveal confidences. It can be traced back to English law in the late 1700s.

The United States Supreme Court acknowledged the importance of client confidentiality in 1826, announcing that “[t]he general rule is not disputed, that confidential communications between client and attorney, are not to be revealed at any time. The privilege, indeed, is not that of the attorney, but of the client; and it is indispensable for the purposes of private justice.”

The Court in 1888 emphasized the importance of protecting client confidences for the administration of justice: “[The privilege] is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.”

The Field Code of Procedure, adopted in New York in 1848, required a lawyer to “maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his client.”

The rules governing confidentiality make it clear that they are one
of the most, if not the most, important ethical obligations of an attorney in the adversary system of justice. Comment 2 to Rule 1.6 of the Model Rules states: “The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.”

Chapter 5 on Confidential Client Information of the ALI Restatement (Third) of the Law Governing Lawyers emphasizes that confidentiality is of great significance in both litigation practice and office practice. Moreover, the rules governing conflicts of interest... are founded on concepts of confidentiality that go beyond the attorney-client privilege and work-product immunity.

The law is molded on the premise that a greater good inheres in encouraging all clients, most of whom incline toward complying with the law, to consult freely with their lawyers under the protection of confidentiality in order to gain the benefit of frank communication.

The unstated but apparent premises upon which the duty of confidentiality rests are as follows:

1. The most fundamental goal of our adversary system is to “maintain a free society in which individual rights are central.”

2. Our adversary system, involving a neutral, competent decision-maker and the presentation of law and fact on both sides by competent and zealous counsel, is one of the major pillars of our constitutional system. The adversary system protects individual rights and individual autonomy against encroachment by others, especially government. It is our best approximation of justice.

3. In order to provide competent and zealous representation in protecting these rights, an attorney must know all potentially relevant facts. Furthermore, knowing all permits counsel to dissuade clients from violation of the law and to promote observance of the law.

4. Clients will not reveal embarrassing or damaging information to

52. MODEL RULES, supra note 15, at 18-19; see also MODEL CODE, supra note 15, at 186 (stating in Canon 4 that “A Lawyer Should Preserve the Confidences and Secrets of a Client”); ABA Comm. on Professional Ethics and Grievances, Formal Op. 155 (1936) (mandating that “[i]t is the duty of an attorney to maintain the confidence and preserve inviolate the secrets of his client”).


54. FREEDMAN, supra note 36, at 13.

the attorney without inviolate assurances of absolute confidentiality.\textsuperscript{56}

The duty of confidentiality has a long tradition in our adversary system. The lawyer-client trust which it supports is "the cornerstone of the adversary system and effective assistance of counsel."\textsuperscript{57} "[A]ttorney confidentiality is essential to sustaining public confidence in the legal profession and the legal system."\textsuperscript{58}

\textbf{C. Policies of the Rules of Imputation—The Presumption of Shared Confidences}

1. The History and Policies of the Rules of Imputation

The basic rule of imputation is that when one lawyer is disqualified for a current or former client conflict, the disqualification is imputed to the other members of the firm.\textsuperscript{59} The idea that lawyers in firms presumptively share confidences received its first official recognition by the American Bar Association in 1931 in Formal Opinion 33.\textsuperscript{60} The ABA concluded that "[t]he relations of partners in a law firm are so close that the firm, and all the members thereof, are barred from accepting any employment, that any one member of the firm is prohibited from taking."\textsuperscript{61} Today, this idea is reflected in Rule 1.10 of the Model Rules of Professional Conduct, providing that "[w]hile 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{62} While comment 6 to Rule 1.10 mentions loyalty to the client as an underlying policy, the relevant aspect of loyalty in the context of a former client conflict is the duty of confidentiality.\textsuperscript{63} Comment 1 refers to "mutual access to information concerning the clients [the associated attorneys] serve."\textsuperscript{64}

\textsuperscript{56} This is a common sense presumption. The Authors are unaware of empirical data that without such a guarantee, clients will not inform the lawyer of relevant facts. Even with such a guarantee, experienced litigators say that the client always lies. The question is how much and when the lawyer finds out. If this is true, the issue is not whether the confidentiality guarantee works so that the client will tell all—it does not. The issue is how much additional information a client will withhold without the guarantee.

\textsuperscript{57} Linton v. Perini, 656 F.2d 207, 212 (6th Cir. 1981); see also FREEDMAN, supra note 36, at 87 (arguing that client trust is the "glory of our profession").


\textsuperscript{59} See MODEL RULES, supra note 15, at 34 (quoting Canon 4).

\textsuperscript{60} See ABA Comm. on Professional Ethics and Grievances, Formal Op. 33 (1931).

\textsuperscript{61} Id.

\textsuperscript{62} MODEL RULES, supra note 15, at 34.

\textsuperscript{63} See id. at 35.

\textsuperscript{64} Id. at 34; see also FREEDMAN, supra note 36, at 180 (emphasizing partners' shared prof-
The hypothesis that lawyers in a firm share client confidences does not require that associated lawyers share every client confidence on every matter. It is based on common sense that associated lawyers talk to one another and share experience about new or difficult issues. Common sense also suggests that when the stakes to the firm and to the clients are high enough in terms of fees, client outcomes, and continuing business, the probability of shared client confidences increases substantially.

In the context of one lawyer having former client confidences useful to other lawyers in the firm who are adverse to the former client, there are obviously conflicting duties among firm members. Rule 1.10 makes the common sense assumption that in high stakes circumstances, lawyers in some firms might share such confidences. For example, a migrating attorney's new colleagues would have a substantial incentive to elicit the information, and the migrating attorney would have an incentive to prove allegiance to the new firm by cooperating. The former client whose confidences were shared would have almost no chance of proving that such communication occurred. A per se prohibition is appropriate when the injured party could never prove a violation of a less restrictive rule. Therefore, de facto, the rule must be a per se prohibition or no prohibition at all.

There is no real debate that confidentiality is one of the cornerstones of professional ethics and the adversary system of justice. The clarity of that consensus can be seen in decisions by courts that have decided against the use of ethical walls to circumvent the rules of imputed disqualification.
2. The Policies of the Imputation Rules as Applied in Current Cases Concerning the Use of Ethical Walls

The ethical rules pertaining to imputation act as guidance for the courts, yet some courts have allowed the use of ethical walls despite the clear language of the Model Rules and the policies underlying the Model Rules. However, a significant number of courts which have been faced with the issue of allowing ethical walls have declined to do so based on the mandate of the Model Rules and the important policies that underlie them. These courts have refused to dismantle the confidentiality and imputation rules for the sake of the policies of lawyer mobility and client choice. Nearly every court which has considered and rejected the use of ethical walls has done so based on the foundational importance of client confidentiality to an adversary system of justice.\(^{67}\)

Modern courts that have recognized the history and importance of client confidentiality have uniformly rejected the use of ethical walls. The federal District Court for the Southern District of West Virginia crisply characterized the dilemma of reconciling confidentiality with lawyer mobility when it held that

> the Court is troubled by the trend to dispose of centuries-old confidentiality rules solely for the convenience of modern lawyers who “move from one association to another several times in their careers.” Lawyers and law firms are more than mere business entities. . . . In an age of sagging public confidence in our legal system, maintaining confidence in that system and in the legal profession is of the utmost importance. In this regard, courts should be reluctant to sacrifice the interests of clients and former clients for the perceived business interest of lawyers.\(^{68}\)

This West Virginia district court is not alone in its criticism of the trend of allowing ethical walls at the expense of client confidentiality. Writing in 1995, a New York court declared that

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\(^{68}\) Roberts, 898 F. Supp. at 363 (citations omitted) (refusing to allow an ethical wall where client's former firm merged with a firm that was currently suing the client).
[t]he legal system was not created for the benefit of its practitioners. While the free movement of attorneys through the legal system is a goal to be cherished, it is not the essence thereof and may have to give way to what in fact is the true essence of the legal system—absolute confidence of litigants in the attorney-client privilege.69

The clear language of the rules of imputation disallows the use of ethical walls, and the history of the rules in action demonstrates that the policies of client confidentiality and loyalty are of the utmost concern. How then can some courts arrive at the conclusion that ethical walls should be permitted, despite the clear language and policies? The answer can be found by examining these decisions and making note of the policies which these courts find to be the most important.

IV. THE EROSION OF THE SECONDARY DISQUALIFICATION RULES THROUGH ALLOWING THE INCREASED USE OF ETHICAL WALLS

The erosion of the secondary disqualification rules occurred gradually. It started in 1975 with ABA approval of the use of ethical walls for migrating government lawyers based on the government’s interest in recruiting the brightest law school graduates.70 Within two years, a court had accepted an ethical wall for a migrating government attorney.71 It was not long before law firms argued that the use of ethical walls should be extended to migrating private attorneys. In 1983, the Seventh Circuit agreed with the extension to migrating private attorneys,72 and the number of courts willing to accept such an argument has been growing steadily over the past twenty-five years.

A. Screening the Former Government Lawyer

The first major approval of the use of screens came from the ABA in 1975. Formal Opinion 342 approved of the use of ethical walls for a government lawyer moving to private practice. The ABA justified this practice for several reasons. The committee emphasized that safeguarding confidentiality, avoiding the appearance of evil, and discouraging switching sides were weighty considerations against the allowance of

69. Trustco Bank New York, 625 N.Y.S.2d at 808 (refusing to allow Chinese wall for a migrating private attorney).
71. See Kesselhaut v. United States, 555 F.2d 791, 793 (Ct. Cl. 1977).
However, the opinion went on to weigh in other factors favoring fewer restrictions on a lawyer's future employment, including the government's legitimate interest in recruiting the brightest recent law school graduates, a client's right to counsel of choice, and the possibility of abuse of disqualification motions.

The overriding reason for which the ABA allowed an exception to the imputed disqualification rules for former government lawyers was to facilitate the mobility of recent graduates into and out of government service. The rationale was based on two hypotheses. First, firms would not hire former government attorneys because of the possibility of disqualification of the firm in the situation where the firm represented a client against whom the former government lawyer was an adversary while in government service. Second, the brightest law school graduates would be dissuaded from government service by fear of emerging from public service as a lawyer with specialized expertise unable to pursue all potential private firm bidders. It is true that the conflicts rules are based upon common sense judgments, but common sense does not support the hypothesis that the government would find it impossible to employ the brightest law school graduates without an exception to the imputed disqualification rules. Client confidentiality is the cornerstone of the adversary system and effective assistance of counsel. An exception to such a fundamental principle should rest on sound evidence. Yet as Professor Monroe Freedman points out, the ABA voted on this exception "[w]ithout the support of a single specific illustration—much less an objective survey." Freedman notes that former ABA president Chesterfield Smith thought that the government's assertion that it would be unable to attract good law school graduates was "pure hogwash." In fact, the data available demonstrated that at least one government agency (the Federal Trade Commission) was suffering from critically high turnover rates because "too many lawyers were using the agency merely as an entree to jobs in private practice," thereby resulting in low morale. The study went on to posit that slowing down the revolving

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74. See id.
76. FREEDMAN, supra note 36, at 209.
77. Id.
78. Id.
door might lead to better, more experienced attorneys in government service.\textsuperscript{79}

ABA Formal Opinion 342 had consequences. The 1969 ABA Model Code of Professional Conduct clearly did not permit ethical walls to overcome imputed disqualification created by a migrating government attorney, but the 1975 ABA Formal Opinion 342 opened the door for a series of cases accepting ethical walls in these circumstances.\textsuperscript{80} Ultimately, the 1983 Model Rules of Professional Conduct adopted the change in Rule 1.11(a).\textsuperscript{81}

It was a poor policy choice to sacrifice the cornerstone principle of confidentiality to lawyer mobility, particularly to an unsupported hypothesis about mobility of the brightest recent graduates. Common sense also requires recognition of the enormous increase in law school graduates in the 1980s and 1990s and the desire of many of them to enter government service as a more meaningful way to practice law. The argument for an exception to the imputed disqualification rules for government lawyers was weak, and, in any event, it applied to the unique needs of government. It seems obvious enough on both grounds that this argument cannot logically extend to the allowance of ethical walls for lawyers moving from one firm to another within the private sector. Nonetheless, it has been so extended.

The first major case to allow the use of an ethical wall to overcome the presumption of shared confidences in the situation of a former government lawyer moving to private practice was \textit{Kesselhaut v. United States}\textsuperscript{82} in 1977. While the court could have issued a narrow holding based on Formal Opinion 342 and the policy of the government’s legitimate need to recruit recent law graduates, it decided the case with some broad language that appears in later cases allowing an ethical wall for the migrating private attorney:

\begin{quote}
[A]n inexorable disqualification of an entire firm for the disqualification of a single member or associate, is entirely too harsh and should be mitigated by appropriate screening such as we now have here, when truly unethical conduct has not taken place and the matter is merely one of the superficial appearance of evil . . . .
\end{quote}

\textsuperscript{79} See \textit{id.} at 210.
\textsuperscript{81} See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(a)(1) (1983).
\textsuperscript{82} 555 F.2d 791 (Cl. Ct. 1977).
\textsuperscript{83} \textit{id.} at 793.
Despite the fact that the balance of the court’s opinion makes it clear that the overriding concern is that the government’s interest in recruiting would be hampered by the application of the imputed disqualification rules to the former government lawyer, several cases allowing an ethical wall for migrating private attorneys use this proposition to underscore that disqualification is too harsh a measure. The allowance of ethical walls for former government lawyers provided a foundation for the cases which eventually allowed the use of ethical walls for migrating private attorneys.

B. The Extension of the Use of Ethical Walls to Migrating Private Attorneys

The erosion of the secondary, or imputed, disqualification rules as they apply to private attorneys moving to new firms has continued gradually since Kesselhaut, starting with the Seventh Circuit Court of Appeals’ 1979 decision in Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc. The court had before it the question of whether the presumption of shared confidences would be rebuttable with respect to the moving lawyer’s previous firm. In ruling that the presumption that a lawyer had shared the confidences of former clients with the previous firm was no longer an irrebuttable one, the court wrote that an irrebuttable presumption of shared confidences may “deny the courts the flexibility needed to reach a just and sensible ruling on ethical matters” and that Canon 9 from the 1969 Code “does not require the courts to deny [plaintiff] the counsel of its choice.” Although the court in Novo opened the door to the use of ethical walls, it did not


85. 607 F.2d 186 (7th Cir. 1979).

86. Id. at 197.

87. Id.
engage in any serious analysis of policy considerations to support its conclusion that the presumption of shared confidences should be a rebuttable one. While the doctrine of confidentiality was a background issue, it was never given any serious consideration except in the court's conclusion that confidentiality was not breached in this particular case. The Novo court instead based its opinion in large part upon the unusual factual circumstances of the case. The court cited the Second Circuit for the proposition that

"[w]hen dealing with ethical principles, it is apparent that we cannot paint with broad strokes. The lines are fine and must be so marked. Guideposts can be established when virgin ground is being explored, and the conclusion in a particular case can be reached only after painstaking analysis of the facts and precise application of precedent." 

The court apparently ignored the "precise application of precedent," and decided that "[t]he circumstances of this case demonstrate that the presumption that [the moving attorney] shared confidences with his associates at the [prior] firm need not be irrebuttable." It is important to note that the court had before it the question of whether the presumption of shared confidences should be rebuttable with respect to a moving lawyer's previous firm, yet the court announced a general prin-

88. See id.

89. See id. The secondary presumption in this case was effectively rebutted due to the fact that the moving lawyer never asserted that he had shared confidential information. The facts of the case are somewhat unusual in that the lawyer moving for disqualification was attempting to disqualify his previous firm. The attorney began discussing the case with the defendants shortly before he left the previous firm and subsequently, the lawyer's previous firm took up representation for the plaintiff. The attorney motioning for disqualification was arguing, therefore, that his own knowledge should have been imputed to the previous firm, yet the attorney never alleged that he had shared any confidential information. See id. at 194-95, 196 n.4. Today, this situation would be governed by Model Rules of Professional Conduct Rule 1.10(b) which provides:

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

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

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

MODEL RULES, supra note 15, at 34.


91. Id.
ciple which was later applied to cases of imputed knowledge at the new firm of a moving lawyer. In essence, the decision rested on the unusual facts of the case and on the policy of a client’s right to counsel of its choice.

Now that a court had held that the presumption could be rebutted, the question presented to firms was: What can be done to rebut the presumption and prevent disqualification? The logical answer was to create an ethical wall to screen the disqualified attorney from the remainder of the firm, much the same as the type of screening device that had been approved for former government attorneys returning to the private sector.

Once again, the Seventh Circuit led the way in dismantling the imputed disqualification rules through a series of cases starting with Freeman v. Chicago Musical Instrument Co. in 1982. In Freeman, the court announced some broad principles applicable in cases involving disqualification of counsel. The court asserted that several competing considerations must be addressed in reviewing a motion to disqualify counsel, writing that while “[i]t is part of a court’s duty to safeguard the sacrosanct privacy of the attorney-client relationship,” and to “maintain public confidence in the legal profession,” a court should also recognize that disqualification of counsel may “destroy a relationship by depriving a party of representation of [its] own choosing.”

Later, in LaSalle National Bank v. County of Lake, the Seventh

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92. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975) (approving the use of screens for former government lawyers based on the government’s legitimate need to “recruit young professionals and competent lawyers”). While the opinion discussed several other policy concerns such as client choice, lawyer mobility, and the prevention of abuse of disqualification motions, the determinative policy focused on the government’s legitimate need to recruit lawyers. See id.; see also Kesselhaut v. United States, 555 F.2d 791, 793 (Ct. Cl. 1977) (constituting the first major case to approve of screening for a former government lawyer moving to a private firm and declaring that the imputed disqualification rules, if applied rigidly to former government lawyers, “would act as a strong deterrent to the acceptance of Government employment by the most promising class of young lawyers”).

93. 689 F.2d 715 (7th Cir. 1982).

94. The Freeman court discussed the question of whether a firm’s knowledge of client confidences would be imputed to a departing member of the firm or whether the departing member could demonstrate no actual knowledge of confidential information about a particular matter. See id. at 723. The case did not involve whether a new lawyer’s actual knowledge of confidences would be imputed to a new firm. These are two different issues. In the first situation, the departing lawyer arguably had no incentive to discover confidential information about matters on which he or she was not involved. In the second situation, by definition, other firm members could use the information held by the moving lawyer.

95. Id. at 721 (citations omitted).

96. Id.

97. 703 F.2d 252 (7th Cir. 1983).
Circuit allowed the use of a screening mechanism to overcome the presumption that a migrating former government lawyer had shared confidences with his new firm. In doing so, the court cited both Kesselhaut v. United States and ABA Formal Opinion 342 as authority for allowing a screen for the firm of a former government lawyer, both of which rested upon the idea that the government has an important interest in being able to recruit lawyers.\(^9\)

In 1983, the court relied heavily on its decisions in Freeman and LaSalle in the first major case to allow the use of an ethical wall to protect the firm of a migrating private attorney from being disqualified. The decision in Schiessle v. Stephens\(^9\) marked the beginning of the erosion of the rules of imputed disqualification for the migrating private lawyer. The court cited Freeman for the proposition that a delicate balance must be maintained between the confidentiality of the attorney-client relationship and the right of a client to proceed with the counsel of one's choice, and that disqualification is a drastic measure.\(^1\) The court then noted that a firm may rebut the secondary disqualification according to the holding of Novo.\(^1\) Finally, the court simply cited LaSalle for the proposition that a screening mechanism (ethical wall) can be used to rebut the presumption of shared confidences underlying secondary disqualification,\(^1\) despite the fact that the LaSalle decision dealt with a former government attorney and the government's legitimate interest in attracting the brightest recent law school graduates.\(^1\)

The Schiessle decision was a turning point for court-approved screening arrangements. Throughout the next fifteen years, numerous federal and state courts used Schiessle, its ancestors, or its progeny to support an argument for allowing the use of ethical walls for migrating private attorneys who are tainted by a primary disqualification because of former client conflict.\(^1\) In addition, seven states have actually

\(^9\) See id. at 258.
\(^9\) 717 F.2d 417 (7th Cir. 1983).
\(^1\) See id. at 420.
\(^1\) See id. at 420 n.2.
\(^1\) See id. at 421.
\(^1\) See LaSalle, 703 F.2d at 258.
\(^1\) The Courts of Appeals for the Second, Sixth, and Federal Circuits have expressly approved the use of ethical walls. See cases cited supra note 11. In addition, several district courts within the First, Second, Third, Fifth, Eighth, and Ninth Circuits have formally approved of screening measures. See cases cited supra note 13; see also Marshall v. New York Div. of State Police, 952 F. Supp. 103, 110 (N.D.N.Y. 1997) (approving of the use of ethical walls and screening devices to protect client confidentiality). Several state courts have also approved of the use of ethical walls to overcome the secondary presumption. See Queen's Quest Condominium Council v. Sea Coast Builders, Inc., Civ. A. No. 89C-OC7, 1992 WL 68912, at *3 (Del. Super. Ct. Mar. 30,
amended their professional conduct standards to accommodate the use of ethical walls in these situations, or have otherwise approved of their use through formal ethics opinions.105 As the discussions of ethical walls and the conflict rules continue, an increasing number of judges seem willing to bend the imputation rules even further. One judge for the Seventh Circuit Court of Appeals has indicated a willingness to allow the use of an ethical wall for a firm that simply switched sides on an issue.106 The Seventh Circuit has also allowed a lawyer to switch sides in the middle of litigation when an ethical wall is in place.107 One district court has even refused to order disqualification for a current client conflict, writing that other less harsh measures were available.108 Not only have the courts contributed to the erosion of the conflicts rules through the increased use of ethical walls, but the ALI has contributed as well.

The ALI’s Restatement (Third) of the Law Governing Lawyers permits the use of ethical walls, including situations involving former


106. See Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1274-75 (7th Cir. 1983) (Coffey, J., dissenting) (arguing that the holding of LaSalle National Bank allows a firm to switch sides on an issue even though there is no lawyer mobility and supporting the argument with evidence that firms are growing in size and are becoming departmentalized, requiring the law to recognize, and adapt to “the practical realities of modern day practice”).

107. See Cromley v. Board of Educ. of Lockport Township High Sch. Dist. 205, 17 F.3d 1059, 1066 (7th Cir. 1994).

108. See SWS Fin. Fund v. Salomon Bros., Inc., 790 F. Supp. 1392, 1400-01 (N.D. Ill. 1992) (finding disqualification of counsel for suing a present client to be too harsh as it would deprive an innocent party of counsel of choice, cause delay, create inconvenience and expense, and finding that other sanctions would be as effective).
client conflicts.¹⁰⁹ Proposed section 204(2) permits the removal of imputation for affiliated lawyers in a firm when the disqualification involves a former client conflict under proposed section 213, and:

[W]hen there is no reasonably apparent risk that confidential information of the former client will be used with material adverse effect on the former client because:

(a) any confidential client information communicated to the personally-prohibited lawyer is unlikely to be significant in the subsequent matter;

(b) the personally-prohibited lawyer is subject to screening measures adequate to eliminate involvement by that lawyer in the representation; and

(c) timely and adequate notice of the screening has been provided to all affected clients.¹¹⁰

Proposed section 213 of the Restatement (Third) of the Law Governing Lawyers concerns former client conflicts. It provides that:

[A] lawyer who has represented a client in a matter may not thereafter represent another client in the same or a substantially related matter in which the interests of the former client are materially adverse. The current matter is substantially related to the earlier matter if:

(1) the current matter involves the work the lawyer performed for the former client; or

(2) there is a substantial risk that representation of the present client will involve the use of information acquired in the course of representing the former client, unless that information has become generally known.¹¹¹

The comment to section 213 adds: “Substantial risk exists where it is reasonable to conclude that it would materially advance the client’s position in the subsequent matter to use confidential information obtained in the prior representation.”¹¹²

The most significant change the ALI draft makes is that section 204 screening is not limited to situations where lawyer migration creates a former client conflict through imputation. To the Authors’ knowl-


¹¹¹. Id. § 213.

¹¹². Id. § 213 cmt. d(iii).
edge, however no court has ever allowed an ethical wall in a case not involving the movement of a lawyer from one firm to another.\footnote{113}

The combination of the language in section 213 and section 204 is intended to limit the availability of screening measures to a relatively narrow band of former client conflicts. A former client conflict can be created under section 213 if “the current matter involves the work the lawyer performed for the former client.”\footnote{114} Section 204 would permit screening measures to remove imputation for a section 213 conflict if “any confidential client information communicated to the personally-prohibited lawyer is unlikely to be significant in the subsequent matter.”\footnote{115} The comment to section 204 lists five factors indicating the significance of the information for the later representation. The comment provides:

Significance of the information is determined by its probable utility in the later representation, including such factors as the following: (1) whether the value of the information as proof or for tactical purposes is peripheral or tenuous; (2) whether the information in most material respects is now publicly known; (3) whether the information was of only temporary significance; (4) the scope of the second representation; and (5) the duration and degree of responsibility of the personally-prohibited lawyer in the earlier representation.\footnote{116}

The comment to section 204 also notes that determining whether a screen is appropriate under section 204 “requires careful analysis of the particular facts.”\footnote{117}

In order for a court to consider the five factors and make a determination that the “confidential client information communicated to the personally-prohibited lawyer is unlikely to be significant in the subsequent matter,”\footnote{118} the court will have to make a “careful analysis of the particular facts.”\footnote{119} These “particular facts” include the confidential information of the former client. The Restatement does not explain how this inquiry is consistent with the central policy underlying the analytical framework of former client conflicts outlined in section 213, namely

\footnotesize{113. But see Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1274 (7th Cir. 1983) (Coffey, J., dissenting) (stipulating that dissenting judge would allow an ethical wall for a firm that switches sides in a lawsuit, characterizing the requirement of mobility as "poppycock").}

\footnotesize{114. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 213(1) (Proposed Final Draft No. 1, 1996).}

\footnotesize{115. Id. § 204(2)(a).}

\footnotesize{116. Id. § 204 cmt. d.}

\footnotesize{117. Id.}

\footnotesize{118. Id. § 204(2)(a).}

\footnotesize{119. Id. § 204 cmt. d.}
"[a] concern to protect a former client's confidential information would be self-defeating if, in order to obtain its protection, the former client were required to reveal in a public proceeding the particular communication or other confidential information that could be used in the subsequent representation."

The Restatement's approach will result in substantially greater factual inquiry and balancing of complex factors. Section 204 will not reduce vexatious motions. Moreover, the more numerous the factors that are balanced in complex equations, the less credible the analysis is to the public and the more likely that the professional's self-interest will dictate the result.

The erosion of the conflicts rules through the increased use of ethical walls initiated by the Seventh Circuit continues today, as demonstrated by current cases and by the ALI's proposed draft of section 204. While it is clear that the policies underlying the rules governing secondary disqualification clearly contradict the use of ethical walls, proponents of ethical walls have set forth competing policies.

V. POLICY ARGUMENTS USED TO SUPPORT THE EROSION OF THE SECONDARY DISQUALIFICATION RULES THROUGH THE INCREASED USE OF ETHICAL WALLS

Nearly every decision allowing the use of an ethical wall for a migrating private attorney can be traced back to the Seventh Circuit's line of cases which ultimately led that court to approve the use of ethical walls. A careful examination of the policies of the Seventh Circuit decisions, along with the policies of later decisions made by other jurisdictions, will show that the policy of lawyer mobility (including the policy of client choice as a facade for lawyer mobility) essentially was used to trump the foundational policies of confidentiality and client loyalty. While some courts give consideration to issues of the potential for abuse of disqualification motions, the prevention of delay in the

120. Id. § 213 cmt. d(iii).
121. For the history of ethical walls in the Seventh Circuit, see discussion infra Part IV and accompanying notes.
legal process, and the potential financial hardship imposed on litigants by disqualification motions, it is clear that the policies of client choice and lawyer mobility are the driving forces behind the increased use and approval of ethical walls, and that client choice and lawyer mobility are essentially two sides of the same coin.

A. The Policy of Client Choice

The policy of client choice is essentially defined as the right of litigants to choose the counsel of their choice. Client choice first gained importance in the area of law firm disqualification with the issuance of ABA Formal Opinion 342 in 1975. In describing the reasons for allowing the use of ethical walls for former government lawyers, the opinion emphasizes the need to facilitate the mobility of the brightest law graduates in and out of government service, but it also states that "the rule should not be permitted to interfere needlessly with the right of litigants to obtain competent counsel of their own choosing, particularly in specialized areas requiring special, technical training and experience."

It was not long before courts started adopting this secondary policy consideration from Formal Opinion 342 in cases concerning migrating private attorneys carrying a former client conflict. Just four years after the issuance of ABA Formal Opinion 342, the court in Novo based its decision heavily on the policy of client choice, writing that "Canon 9 does not require the courts to deny Novo the counsel of its choice." Later courts allowing ethical walls for migrating private attorneys picked up on this policy to such an extent that, if underlying policy justifications are offered, this policy is often the most important policy consideration discussed by the courts. Decisions which simply cite...
Novo and its progeny without any policy analysis presumably agree with the idea that the policy of a client’s right to counsel of his or her choice trumps former client confidentiality in importance. Courts allowing ethical walls may encourage litigants to choose firms that possess confidential information of adversaries. At least one court, however, has taken an affirmative position that the policy of client choice should have no impact whatsoever on the question of whether an ethical wall should be allowed to prevent encouraging sophisticated litigants from choosing firms that possess such confidential information.

When courts take into account the policy of client choice, at first blush, it appears as though the courts are taking on the noble task of protecting the rights of clients at the expense of attorneys. That effort is not as noble as it seems however. Lurking in the shadows of every policy discussion citing the right of client choice is the fact that the client’s dilemma in this type of conflict problem is caused exclusively by the fact that a lawyer has moved in the first place. There has been a dramatic increase in the number of motions to disqualify law firms. These growing number of motions to disqualify came about principally because of the increase in lawyer mobility that made them necessary.

129. For examples of cases which simply cite earlier cases allowing ethical walls without any significant policy consideration, see EZ Paintr Corp. v. Padco, Inc., 746 F.2d at 1459, 1461 (Fed. Cir. 1984) (purporting to apply 8th Circuit law and citing Schiessel); Marshall v. New York Div. of State Police, 952 F. Supp. 103, 110 (N.D.N.Y. 1997) (citing Manning); Thomalen v. Marriott Corp., Civ. A. No. 90-40140-NMG, 1994 WL 524123, at *2 (D. Mass. Sept. 19, 1994) (citing NFC); Haagen-Dazs Co. v. Perche No! Gelato, Inc., 639 F. Supp. 282, 287 (N.D. Cal. 1986) (citing Analytica and LaSalle); SK Handtool Corp. v. Dresser Indus., Inc., 619 N.E.2d 1282, 1290 (Ill. App. Ct. 1993) (citing Schiessel and LaSalle); Ruef v. Quinn, 2 Mass. L. Rptr. No. 21,419, 420 (Mass. Super. 1994) (citing LaSalle); King v. King, No. 89-46-11, 1989 WL 122981, at *7 (Tenn. Ct. App. Oct. 18, 1989) (citing Schiessel). Note that the Model Rules of Professional Conduct have taken the position that where one lawyer in a firm has a primary disqualification because of a former client conflict, the firm cannot rebut the secondary disqualification of its lawyers by creating an ethical wall around the tainted lawyer. See MODEL RULES, supra note 15, at 30-36 (citing Rules 1.9(b) and 1.10). Former client confidentiality will not be adequately protected by a wall. If a migrating lawyer has a primary disqualification because of a former client conflict, certainly the creation of a wall at the new firm has the same risks with respect to former client confidentiality. The implicit analysis of courts allowing ethical walls under the latter circumstances has to be that client choice trumps former client confidentiality in importance.

130. See Asyst Techs., Inc. v. Empak, Inc., 962 F. Supp. 1241, 1243 (N.D. Cal. 1997) (writing that "surely the rules of ethics are not intended to encourage litigants to choose firms that may possess confidential information belonging to their adversaries").

131. See generally Penegar, supra note 80, at 890 (explaining how the average incidence of motions to disqualify increased sixfold for the years 1986 through 1990 while the annual Increase in the filing of civil suits declined in the same time period).
but courts have exhibited an increased willingness to decide against disqualification based on the quality of client choice. The client choice rationale is necessarily a function of the policy of accommodating lawyer mobility.

Why have lawyers been moving with increasing frequency over the past twenty-five years? It is principally because of the phenomenon that money is increasingly the measure of value in the profession and that firms bid for a lawyer or a group of lawyers with lucrative books of business. The client choice rationale is thus implicitly a policy of giving more weight to lawyers' financial interests and the concept of the profession as a business.

B. The Policy of Lawyer Mobility

Some courts have cast aside the cloak of client choice and revealed the policy of lawyer mobility in their decisions to allow the use of ethical walls for migrating private attorneys. This policy has been gaining importance since the issuance of ABA Formal Opinion 342, which stated that the imputation rules when applied to former government lawyers may impose "harsh restraints upon future practice" of government lawyers. A number of courts that allow the use of ethical walls for migrating private attorneys do so based on this rationale, despite the fact that the policy was first introduced with respect to disqualification cases in an ABA Opinion dealing only with former government lawyers. The court in Manning v. Waring, Cox, James, Sklar and Allen, 3

132. See supra notes 128-29 and accompanying text.
133. See discussion infra Part VI and accompanying notes. Walt Bachman notes that, "[i]n the 1960s, it was still considered improper for one law firm to hire a lawyer away from a competitive firm. Today, the hiring of laterals, both partners and associates, is one of the biggest sources of law firm growth." WALT BACHMAN, LAW V. LIFE: WHAT LAWYERS ARE AFRAID TO SAY ABOUT THE LEGAL PROFESSION 104 (1995).
for example, wrote that “lawyers seem to be moving more freely from one association to another, and law firm mergers have become commonplace. ... Consequently, these new realities must be at the core of the balancing of interests necessarily undertaken when courts consider motions for vicarious disqualification of counsel.”

In Nemours Foundation v. Gilbane, Aetna, Federal Insurance, Co. the court stated that “[i]f the concept of imputed disqualification were defined with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another.” Additionally, the court considering INA Underwriters Insurance Co. v. Rubin wrote that “a refusal to disqualify [the firm to which the moving lawyer moved] will promote ... the policy of ... enabling attorneys to practice without excessive restrictions.”

Lawyer mobility is at the heart of every law firm disqualification case not involving government attorneys where ethical walls are considered. In fact, it seems to be the determinative factor for courts that allow an ethical wall. If other policies, for example client choice, formed the basis for allowing an ethical wall, it would naturally follow that ethical walls should be allowed when a firm simply switches sides in a lawsuit, without any lawyer mobility. In those circumstances, the same case could be made by proponents of ethical walls that the importance of a client’s right to counsel of his or her choice, the potential for abuse of disqualification motions, the potential delay of the legal process, and the potential economic hardship experienced by the litigants all override the 150 year-old cornerstone policy of client confidentiality. However, to the Authors’ knowledge, no court has ever allowed an ethical wall in a case where a personally disqualified lawyer had not moved and the firm simply switched sides. Therefore, it follows that lawyer movement is actually required before any court will allow an ethical wall.

A critical question to answer in this analysis is why are private lawyers moving with increasing frequency over the last fifteen years since the Schiessele decision? Prior to the early 1980s, there was movement of associates who were unhappy or who did not make the grade at

136. 849 F.2d 222 (6th Cir. 1988).
137. Id. at 225.
139. Id. at 425.
141. Id. at 5-6.
142. But see Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1274 (7th Cir. 1983) (Coffey, J., dissenting) (purporting to allow an ethical wall for a firm that switches sides in a lawsuit and characterizing the requirement of mobility as “poppycock”).
other firms, but the ethics rules did not permit ethical walls for these migrating associates. Since the early 1980s there has been a dramatic increase in the mobility of law firm partners.\textsuperscript{143} This is occurring because a substantial source of larger law firms’ growth during the last fifteen years has been the recruitment of laterals, including partners, who have lucrative books of business. These lawyers move for more attractive financial packages.\textsuperscript{144}

Professor Stephen Gillers poses a difficult hypothetical for advocates of lawyer mobility. Imagine a $30,000,000 case handled by a lead partner at Firm A whose partnership draw is $200,000. Should opposing counsel at Firm B be able to offer the Firm A partner a $300,000 partnership draw if the Firm A partner would join Firm B immediately and be walled off from the case?\textsuperscript{145}

The policy of taking into account lawyer mobility is in fact a policy which values a lawyer’s self-interest in a market economy. Lawyers with books of business will move to the highest bidders, thereby creating the client choice dilemma which many courts take into account when choosing to authorize the use of ethical walls. Essentially, over the past twenty-five years, acceptance of ethical walls for migrating lawyers has grown as the policy of favoring lawyer mobility and commercial self-interest has gained ground and trumped both the policy of protecting client confidences and the presumption of shared confidences within firms. The major argument for ethical walls has been that lawyer mobility is the reality of the marketplace, and the practice of law is a business that must accommodate the marketplace.

\begin{itemize}
\item \textsuperscript{145} See \textit{STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS} 115-16 (4th ed. 1995). The ABA Committee on Ethics and Professional Responsibility, Formal Opinion 96-400 requires that a lawyer negotiating for employment with an opposing firm must obtain the client’s consent before the point in the negotiations where such negotiations are reasonably likely to interfere with the lawyer’s professional judgment. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-400 (1996).
\end{itemize}
VI. THE ESSENTIAL QUESTION IS WHETHER WE ARE A PROFESSION OR MERELY A BUSINESS

A. The Monetization of the Culture and the Profession, Especially in the Large Firms

The market in a capitalist economy has a natural tendency toward the monetization of value. That is, unless tempered or checked by countervailing values offered by cultural institutions like the family, the church, and primary, secondary, and higher education, the market will define human value, human relationships, and success in terms of money. The intrinsic values of the activities of the professions for the common welfare, like contributing to justice or to the physical and spiritual health of society will, if unprotected, "meltdown into the cash nexus." Of course, these economic and cultural forces ebb and flow over the course of history, and money and personal gain have always been, and will always be, major values in a market economy—but the question is one of degree. To what degree is the monetization of value checked or tempered by other values at a particular point in our history?

Since the 1960s, the cultural and economic ethos has increasingly favored unrestricted commercialism. This is one of the great unintended and paradoxical consequences of the cultural revolution of the 1960s which held that rejection of a perceived oppressive tradition and "judgmental" moralities, and celebration of tolerance (you do your thing and I will do mine), were supposed to liberate the best in each human being. Unfortunately, the revolution undermined the institutions of culture that temper and check with other values the greed celebrated by the market.

This change in the cultural and economic ethos of society has had a substantial impact on the legal profession. Although the practice of law has always been pursued for personal gain as well as for the public good of justice, the responsible practice of the profession has required a balancing of these goals. Since the 1960s the balance has increasingly been skewed toward personal gain.

Much recent comment on the legal profession observes that over the past thirty years, money increasingly rules the profession, especially in the large firms. The incentive structure of large law firms promotes

147. See BACHMAN, supra note 133, at 102. Mr. Bachman commented that
a "tournament" of lawyers, hungry for partnership and the attendant high income generated by a pyramid of associates working on a partner's book of business.\(^{148}\) In his book, *The Betrayed Profession*, Sol Linowitz describes large firm culture where what is important is the generation of revenues. This focus on the maximization of profit is the key factor that holds the large firms together.\(^{149}\) Professor Mary Ann Glendon emphasizes in *A Nation Under Lawyers* that all segments of the legal profession have substantially lost their sense of self-restraint.\(^{150}\) The 1997 National Law Journal Partner Survey revealed that 82.7 percent of the partners polled from the nation's biggest 125 law firms believe that...
the profession has changed for the worse. 151 "Private practice has turned sour, partners say, because the law has become a fiercely dollar-driven business." 152 In other words the degree to which greed and commercial self-interest are checked by other professional values has diminished in this phase of the profession's history.

The profession increasingly sees itself as profit-centered rather than client-centered. 153 Legal ethics have gradually reflected this understanding that the practice of law is a commercial enterprise where the business interests of lawyers deserve greater weight. The jurisdictions that have embraced ethical walls for migrating private lawyers reflect this new calculus. In another area of legal ethics, the rule against restrictions on the right to practice law, the California Supreme Court, in 1993, held that, with respect to non-competition agreements: "[A] revolution in the practice of law has occurred requiring economic interests of the law firm to be protected as they are in other business enterprises." 154 The court further commented that "the contemporary changes in the legal profession... make the assertion that the practice of law is not comparable to a business unpersuasive and unreflective of reality." 155

Public perception of lawyers reflects the increasing emphasis of the profession on personal gain unrestrained by other values. A broad 1993 ABA survey of the public perception of lawyers found the following:

The only other professions in the survey that tested with less than majority favorable feelings were stockbrokers... and politicians . . . .

. . .

Public complaints about lawyers generally can be placed into four categories—perception that lawyers lack caring and compassion; a perception of poor ethical standards and enforcement; a view that lawyers are greedy; and an apparent public distaste for lawyers' advertising. 156

A 1997 Harris poll found that over the period from 1977 to 1997, "[l]awyers have seen a dramatic decline in their 'prestige,' which has

152. Id.
153. See id.
155. Id. at 159.
fallen faster than that of any other occupation.”  

In 1977, thirty-six percent of the public viewed lawyers as having “very great prestige,” but in 1997, just nineteen percent of the public held this view. In addition, “only [seven percent] of the public said they had a great deal of confidence in the people running law firms.” The Harris Poll found that “[t]his places law firms at the bottom of the institutions on the list” with “the lowest number recorded for any institution over thirty years.”

B. The Fundamental Contradictions in the Arguments for Ethical Walls

Supporters of ethical walls for migrating lawyers ask the public and clients to “trust us.” They contend that objections to ethical walls reflect a skepticism, even a cynicism, about lawyers. This argument suggests that public skepticism is unjustified, and raises a number of questions. Is public skepticism about lawyers widespread? Has the skepticism increased over the last several decades? Have money and personal gain increasingly ruled the profession, especially in the big firms, during this same period? Does this add to public skepticism? The increasing emphasis on money and greed in the profession may be a factor in explaining the psychological distress in the profession. Richard Trenk points out that the statistics are startling. . . .

1. A poll of more than 100 occupations placed attorneys first on the list in experiencing depression.
2. Various nationwide studies reveal that at least one-third of all attorneys suffer from either depression or substance abuse.
3. According to a Johns Hopkins University study, lawyers were the most depressed group among 12,000 people surveyed, and lawyers are four times more likely to suffer from clinical depression than other professionals.


161. See Trustco Bank New York v. Melino, 625 N.Y.S.2d 803 (Sup. Ct. 1995). The court commented that an impermeable “Chinese Wall” . . . amounts to . . . a total abandonment of the irrebuttable presumption rule and a substitution therefor of a “trust me” rule. This is unacceptable.

The policy considerations that gave rise to the irrebuttable presumption rule in the first place are of an order too important to be safeguarded by a “trust me” rule . . . . Id. at 808; see also Freedman, supra note 1, at 24 (discussing the effect on a client of receiving a hypothetical letter from his migrating attorney’s new firm, stating “Your lawyer . . . now works for us. But we won’t talk with him about your case. Trust us. We’re lawyers”).

157. HUMPHREY TAYLOR, LAWYERS AND LAW FIRMS PLUMB THE DEPTHS OF PUBLIC OPINION 1 (Harris Poll # 37, 1997) (on file with Authors).
158. Id.
159. Id.
160. Id. The increasing emphasis on money and greed in the profession may be a factor in explaining the psychological distress in the profession. Richard Trenk points out that

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answer to all of these questions is clearly yes.

Do law firms' aggressive stances on conflicts issues, including ethical walls, add to the skepticism? Lawrence Fox, former chair of the ABA Standing Committee on Ethics and Professional Responsibility, recently commented: "I think we've made our clients very unhappy by our aggressive attitude toward conflicts . . ." Peter Zeughauser, a past chairman of the American Corporate Counsel Association, observes: "Most clients define conflicts of interest far more broadly—and view them with much more alarm—than their outside counsel." For in-house counsel, he adds, there is nothing quite like learning that outside counsel who has been representing you is now suing you. "It is one of the greatest personal and professional embarrassments a general counsel or in-house lawyer can suffer. . . . To management, it is the ultimate betrayal of loyalty." As lawyers increasingly focus on the "technical" nature of conflicts to serve their personal interest, rather than on the basic issues of how clients and the public understand the duties of loyalty and confidentiality, they will add to public skepticism.

In light of these conditions, courts considering ethical walls for migrating lawyers face a substantial contradiction. On the one hand, the profession is in a historical period (1) where money and personal gain increasingly rule the profession, especially in the large firms; (2) where lawyers transit from one firm to another in response to competitive bidding for attractive books of business, again principally in the large firms; (3) where some commentators and judges increasingly call for the recognition that the practice of law is merely a business; and (4) where public skepticism that the practice of law is simply for money and personal gain is both growing and justified.

On the other hand, we are also in a period (1) where the profession and courts, in order to serve justice, continue to assure clients of exceptional duties of confidentiality, as well as to claim exceptional rights of confidentiality (in the form of the attorney-client privilege) greater than any other profession; (2) where some lawyers and some judges are

164. Id.
165. See Geoffrey C. Hazard, Jr., Triangular Lawyer Relationships: An Exploratory Analysis, 1 GED. J. LEGAL. ETHICS 15 (1987). Professor Hazard writes:

   In serving a client, the lawyer is largely shielded from such informal social controls because his or her work is largely done in secret. The low visibility of the lawyer's work with clients permits the lawyer to operate largely free of legal and social restraint.

   The structure of the lawyer's relationship with a client thus is legally both amorphous and secret. Subject to the client's approval and "within the limits of the law," the
asking clients and the public to “trust us,” that ethical walls will protect all confidential information no matter how large the fees at stake may be; and (3) where many in the profession and judiciary agonize over the falling public perception of lawyers.166

These contradictions are fundamental. Those worshiping most at the altar of personal gain, money, and the profession as a business are asking a skeptical public and clients to “trust us” with regard to the integrity of ethical walls. It strains credulity to argue that, even though the values of the profession are increasingly monetized, the integrity of ethical walls will not be affected.

Advocates of ethical walls argue that the legal profession, and elite lawyers at larger firms in particular, are worthy of trust. Pointing to the Code of Conduct for the Bar of England, they note that the English bar has no rule providing for imputation and secondary disqualification among members of a firm. Members of the same chamber may represent different parties in the same case.167

They ask: Are American lawyers less ethical than English lawyers? The answer is that the English bar is different in significant respects from the American bar. For example, Professor Karen Miller, comparing the two countries’ professions, notes that “the English bar is generally scornful of its American counterparts.”168 In 1988, the General Council of the Bar of England and Wales reported that the American legal profession is “a clear warning to the Government and the legal profession of the U.K.” in terms of “[the] development of mega-firms”

Lawyer operates in something of a legal vacuum in working for a client, especially compared to the working environment, for example, of a securities underwriter, an accountant, or a policeman. Similar immunity from general social norms and scrutiny is enjoyed only by undercover agents, political go-betweens, and Cayman Island bankers.

Id. at 23.


168. Id. at 7.
and "the money ethic superseding the ethic of professionalism." The English bar is much smaller and enjoys the benefit of a small community that exerts peer pressure concerning ethical conduct. Professor Miller observed that American attorneys do not for the most part exercise much influence over their peers ... whereas English barristers do exert a great deal of control over peers and younger barristers. In Britain, homogeneity of social background and geographic concentration within the Inns facilitates informal control. In contrast, the United States legal profession is heterogeneous and geographically widespread. It is only in small communities in the United States that a high degree of peer influence exists.

The common sense hypothesis has to be that as segments of the profession increasingly see the practice of law as merely a business for personal gain, unrestrained by other professional values, and as the stakes in terms of fees grow in a particular matter, the probability that peepholes will open up in an ethical wall grows. The hypothesis finds further support in the reality that it is virtually impossible to police compliance of an ethical wall. Barring the rare case where a "smoking memo" exists, outsiders will be unable to prove that peepholes did open up in the wall. For example, if lawyers within a firm understand each other, important confidential information can be gained from silence in response to questions or comments.

The risk of an inadvertent peephole in an ethical wall is also high. While some firms and courts characterize an ethical wall as a "Chinese wall," as one court has noted: "Nor is the impermeability of a Chinese Wall an attainable concept. Even the original 'impermeable' Chinese Wall was overrun by the barbarians." Harvard psychologist Daniel Schacter points out that human memory is "a delicate and malleable system, highly attuned to emotion." Schacter posits, as an example, that an engineer who leaves a sensitive job at a company to take a similar one at a competing company would be likely to reveal trade secrets

169. Id.
170. Id. at 15 (citations omitted).
171. Patrick Schiltz, based on years of practice experience, notes that "the strongest currents in the legal profession will push [an attorney] toward acting in the short-term economic interests of her clients, her firm, and herself, even if it means acting unethically." Schiltz, supra note 147, at 732.
inadvertently and in spite of a sincere promise not to do so. The engineer is honest, but "when a person has picked up thousands of pieces of information from many sources, it would be hard for him to say, 'Ah, this is something I picked up in this context.'" 174

C. We Are a Profession

Resolving the contradiction requires focusing on the essential question of whether we are a profession or merely a business. Answering that we are a profession does not mean that the business aspects of the practice of law are ignored, rather that they are balanced to a greater degree by the obligations of the profession to serve justice. The profession of law has always been pursued for personal gain, as well as for the public good of justice; the responsible practice of law requires that making money as an objective is tempered or restrained by professional values. 175

What does it mean to be a profession? What does it mean to be a member of a profession? More fundamentally, what is a profession? Professor Robert Bellah, author of Habits of the Heart, 176 posits that there is a "tripartite structure" essential to the definition of a profession. 177 A visual metaphor would be a stool with three legs, namely the professional, the person to be served by the professional, and a higher transcendental standard or purpose that informs and guides the relationship between the professional and the person to be served. 178 The transcendental standard or purpose of each profession flows from the role of that profession in contributing to the flourishing, especially the moral health, of society. The transcendental purpose of the legal profession, for example, is justice; lawyers are keepers of the sacred flame of justice. 179

Professor Bellah argues that the transcendental purposes of the

174. Id.
175. Professor William May observes that professionals work in the marketplace, trading their skills for money to pay their bills. But the professional exchange transcends the best cash nexus of other market transactions. He states that "the professional exchange assumes that the professional’s self-interest must yield to the question of the client’s well being." William F. May, The Beleaguered Rulers: The Public Obligation of the Professional, 2 KENNEDY INST. ETHICS J. 25, 37 (1992).
177. See Robert N. Bellah, Professions Under Siege: Can Ethical Autonomy Survive?, Address at William Mitchell College of Law (Feb. 20, 1997) (transcript on file with the Authors).
178. See id. at 3.
179. See id. at 4.
traditional four professions, the priesthood or ministry, the law, medicine, and university teaching,\textsuperscript{180} were in fact sacred purposes. They were duties to God to assist others in spiritual growth, justice, health, and the growth of reason.\textsuperscript{181}

Lack of understanding or rejection of the transcendental purpose or moral meaning of a profession will, Bellah posits, have severe consequences for the profession and the society. If, in a market economy, a profession does not attend to its transcendental purpose, money will sweep the field as a determiner of value.\textsuperscript{182} The tripartite structure of a profession will be reduced to an economic market exchange between a service provider and a customer for profit.\textsuperscript{183} Bellah believes we are at this point now in many professions in our society.\textsuperscript{184}

Looking to the etymology of the word "profession" also sheds light on the core meaning of the term. Professor Stephen Barker finds that the term "profession"

came into use in late medieval times. The occupations that initially came to be called professions were medicine, the law, the clergy, and university teaching—four occupations for which study in the medieval university prepared people . . . .

. . .

Why did these occupations come to be called professions? Our term 'profession' is from the Latin 'professionem,' whose core meaning is that of a public declaration, but which in medieval times had come to mean the taking of religious vows. . . . The English noun 'profession' in the thirteenth century means the declaration, promise, or vow made by one entering a religious order. Then, starting in the fourteenth century, it comes to mean any solemn declaration, promise or vow. It is only in the sixteenth century that it comes to mean an occupation in which learned knowledge is applied to the affairs of others, as especially in medicine, law, divinity, and university teaching.\textsuperscript{185}

Barker emphasizes the importance of public oaths in medieval times as a means to regulate the morality of a profession. A student seeking a degree in university teaching, law, medicine, or theology had

\textsuperscript{180} See id. at 2-4.
\textsuperscript{181} See id. at 4.
\textsuperscript{182} See id. at 5, 7-8.
\textsuperscript{183} See id. at 8.
\textsuperscript{184} See id. at 10.
\textsuperscript{185} Stephen F. Barker, What is a Profession?, 1 PROF. ETHICS 73, 84 (1992) (citations omitted).
to swear oaths, publicly and in the name of God, professing dedication to the distinctive ideal of service associated with the students' profession. In law, this meant an oath committing the law graduate to use his or her mastery of the law to promote justice. The law graduate made a promise to curb selfish interests with respect to the use of acquired special skills in order to: (1) promote high standards of performance, (2) make legal services better available to society, and (3) work to improve the institutions of justice in society.

Admission to the bar of a state still requires an oath. For example, the Minnesota Attorney Oath of Admission and the preamble to the ABA Model Rules of Professional Conduct emphasize that we are a profession committed first to clients and to the court. The Minnesota Oath of Admission provides:

I do swear that I will support the Constitution of the United States and that of the State of Minnesota, and will conduct myself as an Attorney and Counsellor at Law, in an upright and courteous manner, to the best of my learning and ability, with all good fidelity as well to the court as to the client, and that I will use no falsehood or deceit, nor delay any person's cause for lucre or malice, SO HELP ME GOD.

The swearing of a public oath on admission to the bar has both religious roots and meaning, and critical civic importance today. Essentially, the oath represents commitment through which each individual practitioner and the profession as a whole form an implicit social contract with society. The ethics rules are a further description of this implicit social contract. Professor Stephen Barker explains that

[i]f we think of professions as occupations whose ethical ideology constricts the freedom of those who work in them to pursue their own self-interest, then we may wonder why people would agree to enter such occupations. One answer is that some persons desire to serve, and therefore wish to make this type of life-commitment. Another answer, however, is that society, in order to draw recruits into professional oc-

186. See id. at 85-86. A person takes an oath "when he wants to commit himself quite exceptionally to the statement, when he wants to make an identity between the truth of it and his own virtue; he offers himself as a guarantee." ROBERT BOLT, A MAN FOR ALL SEASONS at xiii-xiv (First Vintage Int'l Edition 1990).
187. See Barker, supra note 185, at 86.
188. See id. at 89 (discussing the requirements of ethical ideology of a professional occupation).
189. See MODEL RULES, preamble, supra note 15, at 3-7; Minnesota Oath of Admission to Practice as Attorney and Counsellor at Law.
190. Minnesota Oath of Admission to Practice as Attorney and Counsellor at Law.
cupations, strikes a tacit bargain with them, allowing those in the occupation valuable privileges in recompense for what they sacrifice in committing themselves to an ideology of service. Here we might describe matters in terms of a largely unstated social contract between society and the members of the given profession, a tacit understanding that grows up over the years between society and the profession. Through this social contract the profession agrees to curb its self-interested behavior in certain respects so as to promote ideals of service, while society, in return, allows the profession to take charge of formulating and administering its own code of behavior, and perhaps even allows it a degree of monopoly control over entry into the profession. 191

The self-understanding of the legal profession represented in the oath and in the ethics rules is complex and ambivalent.

It is riddled with the conflict between entrepreneurship and professionalism, career and calling. To set themselves apart from the unvarnished entreprenuerial orientation of other occupational groups, the professions place a great deal of emphasis on their special moral commitments. They have embraced the language of ethical responsibility, and have made that language an integral part of their own cultural identity. 192

The profession sought autonomy to regulate itself through peer review. All of this generated expectations and demands in the public mind that the legal profession be held to its espoused high moral commitments. 193 The profession avowed a public identity with attendant public duties, and society granted the profession exceptional rights of self-governance on the condition that lawyers fulfill their correlative duties, both as individuals and as a profession. 194

The ABA Model Rules of Professional Conduct reflect the complexity of this implicit social compact. They begin with the statement: "A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." 195 The first seven paragraphs of the preamble emphasize each of these roles, but especially the duties of a lawyer as a representative of clients. The only reference to the practice of law as a commercial enter-

191. Barker, supra note 185, at 92-93.
193. See id.
194. See Barker, supra note 185, at 93.
prise in the preamble is in the middle of paragraph eight: “Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an upright person while earning a satisfactory living.”

The historical development of the idea that a profession was a “calling” adds to our current understanding of what is a profession and what it means to be a member of a profession. Yale Dean Anthony Kronman argues that the idea of “calling,” where a person could achieve salvation through certain kinds of work that promoted human good and human potential, appeared in the seventeenth century. The idea of a profession, Kronman believes, was an attempt to secularize the religious concept of a calling to do good. Kronman sees the ideal of the lawyer-statesman and the importance of character in the practice of law as attempts to sustain the idea of calling.

The 1996 ABA Report on Teaching and Learning Professionalism views the ideal legal profession as “a way of life in public service.” The ideal “professional lawyer is an expert in law pursuing a learned art in service to clients and in the spirit of public service; and engaging in these pursuits as part of a common calling to promote justice and public good.”

The definition is followed by “essential characteristics” of a professional lawyer, including “[e]thical conduct and integrity” and “[d]edication to justice and the public good,” and other supporting elements. This definition reflects the tension between the lawyer’s duty of zealous advocacy in service to clients and the duty to promote justice and the public good. It does not deal with the monetization of the profession except to note that supportive elements to being a professional lawyer include “[e]conomic temperance” and the “[s]ubordination of personal interests . . . to the interests of clients and the public good.”

This prescription inadequately addresses the driving force behind diminishing professionalism—the excessive worship of money unchecked by other professional values.

196. Id.
197. See Kronman, supra note 147, at 370.
198. See id. at 370-72.
200. Id. at 6.
201. Id. at 7.
202. Id.
The ABA Professionalism Report, in Cornell Professor Roger Crampton's view, falls short by leaving critical characteristics of the professional lawyer like "ethical conduct and integrity" and "dedication to justice and the public good" undefined and too abstract. Professor Crampton describes a "fully adequate conception" of lawyer professionalism as follows:

[It] rests upon a morality transcending any professional role or traditions, one resting on a religious foundation or some other foundational conceptions of objective reality. For many lawyers, religious faith provides a rich sense of calling as a lawyer.

While Professor Crampton acknowledges that the profession as a whole cannot agree on matters of fundamental truth, he believes that its professionalism can and "must be founded on the shared morality of the community as applied to the special roles of lawyers in the American democracy." This shared morality, referred to as the "central moral tradition of lawyering," asserts that

a lawyer's primary loyalty is not to the lawyer's client. The lawyer's obligation to the client is subordinate to the lawyer's primary obligation to the "procedures and institutions" of the law. . . . Moreover, the role of the lawyer within the legal system "imposes on him a trusteeship for the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends."

The profession's task today, Professor Crampton urges, is to "regenerate the ideal of the law as a public profession with large public responsibilities." Self-interest must be tempered or curbed in order to fulfill these public responsibilities.

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204. Id. at 18.
205. Id. at 18-19.
206. Id. at 20 (quoting Lon Fuller from a 1955 joint report by an AALS-ABA special committee on the professional responsibilities of lawyers).
207. Id. at 24.
VII. RESOLVING THE CONTRADICTIONS BY REJECTING ETHICAL WALLS FOR MIGRATING LAWYERS

The line of cases accepting ethical walls illustrates a major shift in focus on the part of some courts. Twenty-five years ago, both the courts and the ethics rules focused on protecting the interests of the former client of the migrating lawyer based on the cornerstone principle of client confidentiality and did not recognize ethical walls. ABA Formal Opinion 342 in 1975 created an exception validating ethical walls for the former government lawyer moving into a private firm. The primary reason was to protect the former client, the government, so that it could recruit the brightest law graduates. This benefit would offset the costs of the government’s potential loss of confidentiality. A secondary reason was to protect the lawyer choice rights of the clients of the firm into which the government lawyer migrated. Without an ethical wall, the lawyers of these clients would be subject to secondary disqualification.

Starting in 1983, what had been a secondary reason for the government attorney exception became a primary reason for some courts to recognize ethical walls for migrating private attorneys. The focus of the line of cases allowing ethical walls in these circumstances has been both the interest of the clients of the firm to which a personally disqualified lawyer has migrated to choose their lawyer, and the facilitation of lawyer mobility.

Courts permitting ethical walls should undertake a more careful analysis. First, and most importantly, courts should remember that client confidentiality is a cornerstone principle of the adversary system, and that lawyer choice rights of clients have been a secondary principle. For example, the ethics rules recognize that the client’s choice of a lawyer is limited by ability to pay, and the rules do not require a lawyer to take a particular client. Second, the government lawyer exception is based principally on a compensating benefit to the former client, the government, which allegedly should now be able to hire the brightest law graduates. The evidence available and common sense did not and do not support the conclusion that the government must risk its confidentiality to recruit excellent counsel. Indeed, the evidence indicates that the government might improve the quality of counsel by reducing, rather than facilitating, lawyer turnover. Third, those courts recognizing ethical walls for migrating private attorneys should analyze more carefully how the original government attorney exception, based principally on an alleged compensatory benefit to the former client, was extended to migrating private attorneys based on the lawyer choice right of the clients of the firm to which the lawyer has migrated. The lawyers of these cli-
ents face a potential secondary disqualification because of lawyer mobility. The problem is created and driven by the increasing movement of lawyers among firms bidding for attractive books of business. There is no compensatory benefit to the former client. The critical elements to balance are the cornerstone principle of client confidentiality against the facilitation of movement of lawyers among firms bidding for attractive books of business. The second should not trump the first.

A fourth consideration is the possibility of a remedy for the harm caused to former or current clients. The existing client whose firm is disqualified because the firm recruited a migrating lawyer who created a former client conflict has a malpractice claim to compensate for damages. The former client whose confidential information is at risk has no means to oversee the firm’s daily activities to ensure that confidential information is not available to the lawyers prosecuting a matter against the former client. The former client whose confidences are compromised has almost no chance either to discover the wrong or to prove damages.

A fifth consideration is the public’s confidence and trust in the adversary system of justice and the profession. Lawyers assure clients of absolute confidentiality. However, the former client’s inability to ensure that confidences are protected, combined with the firm’s interests both as advocate for the current client and in its own financial gain, are factors that undermine the former client’s trust, and in turn the public’s trust, in a legal system that would permit such a situation to exist without the former client’s consent.

A sixth and critical consideration to analyze is how the idea that ethical walls were necessary because of government lawyers’ self-interest required permission for them to pursue all potential private firm bidders. This idea opened the door to the same argument that ethical walls are necessary because private lawyers’ self-interest requires permission for them to pursue all potential private firm bidders. As lawyers’ commercial self-interest and the idea that law is merely a business have gained ground over the past twenty-five years, some judges are also accepting ethical walls for the migrating private lawyer. Professor Monroe Freedman calls this the “screening scam” to increase lawyers’ job opportunities.208

The major factor that has tipped the balance toward permitting ethical walls is the growing perception of the practice of law as solely a business, and that lawyer mobility is a reality of the market that must be

208. See Freedman, supra note 1, at 24.
accommodated. This is a fundamental shift away from the conception that the practice of law is also a profession shaped principally by its commitment to a transcendental purpose—justice. That commitment significantly restrains the pursuit of personal gain.

A substantial segment of the bar and the judiciary is not attending adequately to the transcendental purpose of the profession. In a market economy, when a profession does not attend adequately to its transcendental purpose, money will sweep the field as a determiner of value. The tripartite structure of a profession will be reduced to an economic exchange between a service provider and a customer for profit. To prevent this the courts and the bar must actively support the tripartite structure of the profession.

If we focus on the practice of law as a profession, then the analysis of ethical walls for migrating lawyers is not a delicate balance as described by the Schiessle decision. In analyzing the policy justification for ethical walls, a court should not consider lawyer self-interest in maximizing employment opportunities and bidding for books of business. Client confidentiality as a fundamental principle of the adversary system, public confidence in the justice system, and the discouragement of switching sides then trump the client choice problem created by the migrating lawyer.

The rejection of ethical walls for the migrating lawyer may lead to more numerous disqualification motions. Some of these motions may be simply vexatious tactics without good faith justification. The misuse of such motions without good faith justification is a matter for discipline by the courts and the profession. The lack of professionalism behind some motions to disqualify should not be a justification to further circle the drain of law practice as a business by accepting ethical walls. Vexatious bad faith tactics must be the occasion for effective peer review. Lack of professionalism in the use of vexatious motions should not be a justification to undermine professionalism ever further.

Prohibition of ethical walls for migrating lawyers may mean that bidding for lawyers with attractive books of business will be constrained by conflicts issues. This may impede the growth of large firms. At the May 1997 annual meeting of the ALI, Chief Judge Harry Edwards of the Circuit Court of Appeals for the District of Columbia urged the firms to “slow down and stop the madness” by reducing the number of hours that lawyers are required to work and by reconsidering firm growth, since smaller firms are more likely to foster collegiality and

mentoring for young lawyers.”\textsuperscript{210} At the District of Columbia convention on February 24, 1998, Judge Edwards again urged firms “to slow down and stop the madness, to reassess and recognize that the current trends—including the exponential growth in firm size, the big money dominance, and the lack of humanity that seems to drive much of law practice—breed unhappiness among practicing lawyers.”\textsuperscript{211} In particular Judge Edwards asserted that “[t]he high-expense, high-living style to which some in the private bar have become accustomed is not a necessary aspect of legal practice.”\textsuperscript{212}

VIII. CONCLUSION

During this phase of the profession’s history where personal gain is less checked by other professional values, some judges are resisting the increasing skew towards law as a business by prohibiting ethical walls for the migrating lawyer. This is a rearguard action creating and defending pockets of resistance to the general trend toward the practice of law as a business in general and acceptance of ethical walls in particular.

It will take time for the profession, the courts, and the law schools “to regenerate the ideal of the law as public profession with large public responsibilities”\textsuperscript{213} where self-interest must be curbed. Much is at stake. With each shift toward unrestrained self-interest and personal gain, the bar undermines the compact with society where society has granted exceptional rights of self-governance in return for the profession’s agreement to curb self-interested behavior to promote justice. Prohibiting ethical walls for migrating lawyers is a significant step toward preserving that social compact.

\[\text{References}\]


\textsuperscript{212} Id.

\textsuperscript{213} Crampton, supra note 203, at 24.