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## Building Chinese Walls in Virginia: Should Virginia Recognize the Chinese Wall Defense to Vicarious Disqualification?

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# BUILDING CHINESE WALLS IN VIRGINIA: SHOULD VIRGINIA RECOGNIZE THE CHINESE WALL DEFENSE TO VICARIOUS DISQUALIFICATION?

## I. A HISTORY OF THE CHINESE WALL

Consider the following situation:

[Y]our firm . . . is interested in hiring as an associate an attorney who was previously employed as an Assistant County Attorney in a county near the office where the attorney is to work. . . . [T]his attorney has significant experience acquired while employed by the county in types of matters in which your firm is engaged and . . . the attorney has been substantially involved in an ongoing lawsuit arising out of a land use matter. Your firm has been representing plaintiffs in that action and intends to continue that representation after hiring the former Assistant County Attorney.

You have [concerns about] the propriety of your firm's continued representation of your plaintiff clients after hiring this attorney, in light of the former Assistant County Attorney's prior representation of the county adverse to your clients.<sup>1</sup>

This situation is not one found only in a law school hypothetical ethics question; it is a real life professional dilemma. A firm in this position may be vicariously disqualified from representing its clients because the former government attorney cannot participate in the representation.<sup>2</sup> Under circumstances such as these, the American Bar Association (ABA)<sup>3</sup> and many jurisdictions<sup>4</sup> do not require the firm to be automatically disqualified, provided the firm erects effective procedures and safeguards to completely screen the attorney from participating in the matter.<sup>5</sup> These procedures have come to be known as a "Chinese wall." Virginia, on the other hand, has not formally recognized the Chinese wall as a defense to

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1. Virginia State Bar Standing Committee on Legal Ethics, Legal Ethics Op. 1302 (1989) (*withdrawn* after being disapproved by the Supreme Court of Virginia on September 12, 1990) [hereinafter Virginia Legal Ethics Opinion 1302].

2. *Id.* at 2; see *infra* notes 32-69 and accompanying text for discussion of individual and vicarious disqualification.

3. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11 (1989) [hereinafter MODEL RULES]. Rule 1.11 is discussed *infra* page 12.

4. See, e.g., *Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980), *vacated on other grounds*, 449 U.S. 1106 (1981); *Kesselhaut v. United States*, 555 F.2d 791 (Ct. Cl. 1977); *Kovacevic v. Fair Automotive Repair*, 641 F. Supp. 237 (N.D. Ill. 1986).

5. See MODEL RULES, *supra* note 3, Rule 1.11 (stating that the disqualified attorney must be "screened from any participation in the matter."); Virginia Legal Ethics Opinion 1302, *supra* note 1, at 4.

automatic vicarious disqualification. In its Legal Ethics Opinion 1302,<sup>6</sup> the Virginia State Bar Standing Committee on Legal Ethics, commenting on the exact situation outlined above, expressed support for the Chinese wall defense in limited circumstances.<sup>7</sup> However, the Supreme Court of Virginia, without an opinion, disapproved Legal Ethics Opinion 1302 and the opinion was withdrawn.<sup>8</sup>

A Chinese wall is essentially a screening mechanism set up within an institution to act as an "impermeable barrier to intrafirm exchange of confidential information."<sup>9</sup> To prevent inadvertent "leakage" of confidential information, a number of precautions may be taken, including the establishment of organizational and physical structures designed to separate those who possess information from those who should not have it.<sup>10</sup> Although of relatively new use in the legal profession, this type of "wall" is not new. Banks and securities firms, in an effort to protect their clients' financial confidences, routinely erect Chinese walls.<sup>11</sup>

In recent years, as law firms grow larger and attorneys frequently move both among firms and between the public and private sectors in an effort to find more interesting work or better compensation, the use of Chinese walls in law firms has become increasingly important.<sup>12</sup> As attorneys change jobs, it is possible for them to run afoul of the ethical guidelines requiring attorneys "to protect a client's confidences and secrets, to serve a client with undivided loyalty, and to avoid even the appearance of impropriety."<sup>13</sup> For example, an attorney may find that his new firm is representing a client who has interests adverse to those of a client that he or his former associates, whether in another firm or with the government, have previously represented.<sup>14</sup> A former government lawyer may move into private practice and discover that his firm is involved in a "matter in

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6. Virginia Legal Ethics Opinion 1302, *supra* note 1.

7. *Id.* The Committee expressly noted that its "opinion [was] intended to be limited to situations involving a former government lawyer accepting employment with a private firm dealing with civil matters. . . ." *Id.* at 6.

8. Telephone Interview with Susan B. Spielberg, Assistant Bar Counsel for the Virginia State Bar (Oct. 10, 1991).

9. Note, *The Chinese Wall Defense to Law-Firm Disqualification*, 128 U. PA. L. REV. 677, 678 (1980); see also M. Peter Moser, *Chinese Walls: A Means of Avoiding Law Firm Disqualification When a Personally Disqualified Lawyer Joins the Firm*, 3 GEO. J. LEGAL ETHICS 399, 400 (1990).

10. Note, *supra* note 9, at 706.

11. *Id.* at 705-06.

12. Moser, *supra* note 9, at 399; see also Note, *supra* note 9, at 678.

13. Note, *supra* note 9, at 677 (footnotes omitted); see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1980) [hereinafter MODEL CODE] ("A Lawyer should Preserve the Confidences and Secrets of a Client."); MODEL CODE Canon 5 ("A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client."); MODEL CODE Canon 9 ("A Lawyer Should Avoid Even the Appearance of Professional Impropriety.").

14. See Moser, *supra* note 9, at 399; Note, *supra* note 9, at 677.

which he had substantial responsibility while a public employee."<sup>15</sup> The *Virginia Code of Professional Responsibility* normally requires that an attorney be personally disqualified from cases that involve potential conflicts of interest or disclosure of client confidences.<sup>16</sup> In addition, an attorney's entire law firm may be disqualified because of the presumption that any client confidences possessed by the disqualified attorney will be shared with other members of the firm.<sup>17</sup>

The Chinese wall rebuts the presumption that members of a law firm will share confidences.<sup>18</sup> The ABA and many courts have expressed concern that strict application of firm disqualification rules in all circumstances will do more harm than good.<sup>19</sup> Aside from costing a law firm its clients, the automatic disqualification rules naturally result in delayed trials and a denial of the client's choice of counsel.<sup>20</sup> Ethics committees and commentators have paid particularly close attention to the situation in which a government attorney moves to a private firm.<sup>21</sup> While there are strong reasons for both individual and vicarious disqualification in these

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15. See MODEL CODE, *supra* note 13, DR 9-101(B) ("A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.").

16. See VA. CODE ANN., Rules of Supreme Court of Va., Pt. 6, § II, DR 5-105(D), 9-101(B) [hereinafter VA. CODE]; Note, *supra* note 9, at 677. DR 5-105(D) does not require disqualification of the attorney if the client whose confidences need to be protected "consents [to the representation] after disclosure." VA. CODE DR 5-105(D).

17. Note, *supra* note 9, at 677-78; see also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975), reprinted in 62 A.B.A. J. 517, 517 n.2 (1976) [hereinafter Formal Opinion 342] ("The [vicarious disqualification] rule is based on the close, informal relationship among law partners and associates and upon the incentives, financial and otherwise, for partners to exchange information freely among themselves when the information relates to existing employment."); cf. MODEL CODE, *supra* note 13, DR 5-105(D) ("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.").

18. *Manning v. Waring, Cox, James, Sklar & Allen*, 849 F.2d 222, 225 (6th Cir. 1988); see also Note, *supra* note 9, at 691.

19. In Formal Opinion 342, the ABA Committee on Ethics and Professional Responsibility endorsed the use of screening devices in situations where an "infected" government attorney moves to a private firm and is disqualified, so that a strict application of MODEL CODE DR 5-105(D) can be avoided. Formal Opinion 342, *supra* note 17, at 521. The Committee stated that "inflexible application of DR 5-105(D) would actually thwart the policy considerations" underlying the former government attorney disqualification rule, DR 9-101(B). *Id.* at 520.

20. Moser, *supra* note 9, at 404; see *Kesselhaut v. United States*, 555 F.2d 791, 793 (Cl. Ct. 1977).

21. See, e.g., Formal Opinion 342, *supra* note 17; Frances W. Hamermesh, Note, *In Defense of a Double Standard in the Rules of Ethics: A Critical Reevaluation of the Chinese Wall and Vicarious Disqualification*, 20 U. MICH. J.L. REF. 245, 249 n.17, 260 (1986) (discussing the Kutak Commission, which was appointed by the ABA to review and revise the *Model Code*, and commenting that "[f]rom the outset, the Commission intended to give special attention to the government attorney").

situations,<sup>22</sup> there is also a valid fear that an inflexible approach will serve as a strong disincentive for recent law school graduates to enter the realm of public service.<sup>23</sup>

Acting on this concern, the ABA adopted Rule 1.11 of the *Model Rules of Professional Conduct (Model Rules)*, which allows a firm to use a Chinese wall to avoid vicarious disqualification in situations where a former government attorney working for the firm is disqualified from participating in a case.<sup>24</sup> Several jurisdictions, both prior and subsequent to the adoption of Rule 1.11, also have acknowledged the Chinese wall defense in situations where former government attorneys move into the private sector.<sup>25</sup> Essentially, the Chinese wall defense rebuts the presumption that confidential information about a client will spread from the one "infected" attorney to the rest of the firm.<sup>26</sup> If a firm demonstrates that an effective Chinese wall has been placed around the "infected" attorney, it overcomes the presumption of shared confidences and thus should not be automatically disqualified.<sup>27</sup> Of course, the firm will be disqualified if confidences are in fact shared.<sup>28</sup>

Unswayed by both the ABA and other jurisdictions, Virginia has not formally recognized the Chinese wall defense as a method of avoiding vicarious disqualification.<sup>29</sup> This Note suggests that Virginia should change

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22. See, e.g., *In re Asbestos Cases*, 514 F. Supp. 914, 923-24 (E.D. Va. 1981) (emphasizing the concern that confidential information will spread from a disqualified attorney to his partners and that allowing the disqualified attorney's firm to continue with its representation will create an "unacceptable appearance of impropriety."); Formal Opinion 342, *supra* note 17, at 518 (setting out considerations underlying MODEL CODE DR 9-101(B)).

23. See, e.g., Virginia Legal Ethics Opinion 1302, *supra* note 1, at 5-6 ("Since public policy encourages competent attorneys to enter government service, the unnecessarily harsh result of vicarious disqualification of an entire firm would only serve to dissuade lawyers from entering public employment in the first place since employment possibilities following government service would be severely limited. . . ."); Formal Opinion 342, *supra* note 17, at 518 ("[T]he ability of government to recruit young professionals and competent lawyers should not be interfered with by imposition of harsh restraints upon future practice. . . .").

24. MODEL RULES, *supra* note 3, Rule 1.11.

25. See, e.g., *Bauunternehmung v. United States*, 8 Cl. Ct. 793 (1985); *Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980), *vacated on other grounds*, 449 U.S. 1106 (1981); *Kesselhaut v. United States*, 555 F.2d 791 (Ct. Cl. 1977); *Kovacevic v. Fair Automotive Repair, Inc.*, 641 F. Supp. 237 (N.D. Ill. 1986).

26. See, e.g., *Manning v. Waring, Cox, James, Sklar & Allen*, 849 F.2d 222, 225 (6th Cir. 1988); *Hamermesh*, *supra* note 21, at 256.

27. See, e.g., *Manning*, 849 F.2d at 225; Note, *supra* note 9, at 691.

28. See *Moser*, *supra* note 9, at 411; Note, *supra* note 9, at 691.

29. As discussed at the beginning of this Note, the Virginia State Bar Standing Committee on Legal Ethics has supported the use of the Chinese wall defense in those limited situations where a former government attorney moves to a private firm and is disqualified from participating in a civil matter *only* under DR 9-101(B). See Virginia Legal Ethics Opinion 1302, *supra* note 1, at 4. However, the Supreme Court of Virginia disapproved the opinion and it was subsequently withdrawn. Telephone Interview with Susan B. Spielberg, Assistant Bar Counsel for the Virginia State Bar (Oct. 10, 1991).

its position and acknowledge the defense when former government attorneys move to private practice.<sup>30</sup> A Chinese wall, when properly used, acts as an effective screening mechanism that protects former client confidences and the integrity of the judicial system, and a Chinese wall still allows the firm to continue representing its present client. This Note begins with a brief overview of the rationale behind individual and vicarious disqualification; the concerns that have arisen with regard to vicarious disqualification in the context of government attorneys moving into private firms; and the subsequent development of the Chinese wall defense. Then, the Note examines the use of the defense in several jurisdictions outside of Virginia. Finally, the Note recommends a plan for using the Chinese wall defense in Virginia.

## II. INDIVIDUAL AND VICARIOUS DISQUALIFICATION<sup>31</sup>

Disqualification due to a potential or established conflict of interest can affect both the individual attorney and his firm. If a single attorney is individually disqualified from the representation, the entire firm may be vicariously disqualified as well.

### A. *Individual Disqualification*

When an attorney leaves government employment to join a private firm, it is possible that the firm will at some point represent a client in a matter in which that client has interests adverse to those of the attorney's former government clients.<sup>32</sup> In this situation an ethical concern arises

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30. A discussion of the use of Chinese walls in situations where an attorney transfers between two firms is beyond the scope of this Note. Apparently, some jurisdictions support a less rigid application of vicarious disqualification rules in the context of the government attorney than in a private transfer situation. Nevertheless, other courts and some commentators assert that the Chinese wall defense should apply equally in these circumstances. *See, e.g., Manning v. Waring, Cox, James, Sklar & Allen*, 849 F.2d 222, 226 (6th Cir. 1988) (The court "see[s] no reason why the considerations which led the American Bar Association to approve appropriate screening for former government attorneys, should not apply in the case of private attorneys who change their association."); *Schiessle v. Stephens*, 717 F.2d 417 (7th Cir. 1983); *Moser, supra* note 9, at 400.

31. A full discussion of the principles underlying disqualification of an attorney, and the resulting vicarious disqualification of his or her firm, based on a client conflict of interest, exceeds the scope of this Note. However, a brief overview will provide a basis for looking at the usefulness and limitations of the Chinese wall as a defense to vicarious disqualification. Because this Note focuses on instances in which a government attorney enters private practice, the discussion of disqualification will be based on this perspective. Disqualification due to a potential or established conflict of interest can affect both the individual attorney and his firm. If a single attorney is individually disqualified from the representation, the entire firm may be vicariously disqualified as well.

32. There is some debate regarding whether a government agency qualifies as a "client." One commentator states that the attorney-client relationship is "an element lacking in the government context." Note, *supra* note 9, at 681 n.18. However, some courts refer to govern-

because the former government lawyer could violate the provisions of *Model Code of Professional Responsibility* ("Model Code") Canon 4,<sup>33</sup> which requires that "a lawyer should preserve the confidences and secrets of a client."<sup>34</sup> Regardless of whether the attorney actually gained or remembers "confidences and secrets" of his former client,<sup>35</sup> and regardless of whether he will "knowingly" reveal this information,<sup>36</sup> the attorney is normally disqualified as a "prophylactic" measure.<sup>37</sup> This measure "frees lawyers from the difficult task of erecting Chinese walls in their own minds between what is confidential and what is not, and forwards the public's interest in maintaining the highest standards of professional conduct and the scrupulous administration of justice."<sup>38</sup>

The former government attorney situation may also undermine the provisions of *Model Code* Canon 5: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client."<sup>39</sup> This mandate applies primarily to instances where an attorney attempts to represent two

ment agencies as "client" agencies. See, e.g., *In re Asbestos Cases*, 514 F. Supp. 914 (E.D. Va. 1981). In Virginia, a government agency is treated as a client for purposes of individual and vicarious disqualification under VIRGINIA CODE DR 5-105. Telephone Interview with Susan B. Spielberg, Assistant Bar Counsel for the Virginia State Bar (Oct. 10, 1991). Of course, the provisions of VIRGINIA CODE DR 9-101(B) do not require an attorney-client relationship.

33. Canons 4, 5 and 9 of the MODEL CODE are identical to those in the VIRGINIA CODE.

34. MODEL CODE, *supra* note 13, Canon 4; see VA.CODE, *supra* note 16, DR 4-101(B), providing that:

(B) Except as provided by DR 4-101(C) and (D), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or a third person, unless the client consents after full disclosure.

See also Virginia Legal Ethics Opinion 1302, *supra* note 1, at 2 ("Ethical Consideration 4-6 . . . indicates that the obligation of a lawyer to preserve the confidence and secrets of his client continues after the termination of his employment); Note, *supra* note 9, at 681 ("In the successive representation context, the chief ethical concern, addressed in Canon 4, is that confidential information relating to the former client will be disclosed or used to his disadvantage.").

35. See *In re Asbestos Cases*, 514 F. Supp. at 920 ("The law presumes that an attorney possesses all confidential information to which he had access in his prior representation of a client. . .").

36. Both the MODEL CODE, *supra* note 13, DR 4-101(B) and the VA. CODE, *supra* note 16, DR 4-101(B) require an attorney to not "knowingly" reveal or use a confidence. See Formal Opinion 342, *supra* note 17, at 517.

37. *In re Asbestos Cases*, 514 F. Supp. at 921 ("These considerations require application of a strict prophylactic rule to prevent any possibility, however slight, that confidential information acquired from a client during a previous relationship may subsequently be used to the client's disadvantage.").

38. *Id.* at 920 (quoting *Hull v. Celanese Corp.*, 513 F.2d 568, 569 (2d Cir. 1975)).

39. MODEL CODE, *supra* note 13, Canon 5.

or more clients with conflicting interests *concurrently*.<sup>40</sup> This circumstance obviously calls into question the ability of the attorney to "serve his or her client with undivided loyalty."<sup>41</sup> However, Canon 5 also may require disqualification of an attorney in *subsequent* representation cases when the attorney switches sides in a dispute.<sup>42</sup> *Virginia Code of Professional Responsibility* DR 5-105(D) clearly states that "[a] lawyer who has represented a client in a matter shall not thereafter represent another person in the same or substantially related matter if the interest of that person is adverse in any material respect to the interest of the former client unless the former client consents after disclosure."<sup>43</sup> While DR 5-105(D) is listed under Canon 5, it also serves to protect against the improper use of client confidences.

Finally, in DR 9-101(B), the *Model Code* specifically addresses the government lawyer who moves into private practice: "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."<sup>44</sup> The ABA Committee on Ethics and Professional Responsibility states that the numerous considerations underlying DR 9-101(B) include:

the treachery of switching sides; the safeguarding of confidential governmental information from future use against the government; the need to discourage government lawyers from handling particular assignments in such a way as to encourage their own future employment in regard to those particular matters after leaving government service; and the professional benefit derived from avoiding the appearance of evil.<sup>45</sup>

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40. Note, *supra* note 9, at 681; Formal Opinion 342, *supra* note 17, at 517-18; see *Armstrong v. McAlpin*, 625 F.2d 433, 445 (2d Cir. 1980), *vacated on other grounds*, 449 U.S. 1106 (1981).

41. Note, *supra* note 9, at 681.

42. Formal Opinion 342, *supra* note 17, at 518 ("The rules also forbid a lawyer to switch sides even in situations where the exercise of the lawyer's professional judgment on behalf of a present client will not be affected.") (footnote omitted).

43. VA. CODE, *supra* note 16, DR 5-105(D). The "consent" provision can be an important one, for "consent granted by the former government client, after full disclosure of the possible effect and conditions of such representation, [will] cure any impropriety." *Virginia Legal Ethics Opinion 1302*, *supra* note 1, at 3. In these circumstances, neither the individual attorney, nor his firm, would be disqualified. *Id.*

44. MODEL CODE, *supra* note 13, DR 9-101(B); VA. CODE, *supra* note 16, DR 9-101(B). For a full explanation of the terms embodied in DR 9-101(B), see Formal Opinion 342, *supra* note 17, at 519-20. The Virginia State Bar's Standing Committee on Legal Ethics interprets the disciplinary rule in *Virginia Legal Ethics Opinion 1302*, *supra* note 1, at 2-3.

45. Formal Opinion 342, *supra* note 17, at 518 (footnotes omitted).



## B. Vicarious Disqualification

Generally, when one attorney is disqualified from representing a client, all attorneys affiliated with that attorney are also disqualified.<sup>46</sup> In 1974, the ABA codified this generalization by amending its disciplinary rules to require vicarious disqualification of any "partner, or associate, or any other lawyer affiliated with [the disqualified lawyer] or his firm" in cases where the individual attorney is prohibited from representing a client "under a Disciplinary Rule."<sup>47</sup> Interestingly, *Virginia Code* DR 5-105(E) is not this broad, only requiring vicarious disqualification where the individual attorney is disqualified specifically under the provisions of *DR 5-105*.<sup>48</sup> Yet, the general vicarious disqualification standard applies even when DR 5-105 is not implicated.<sup>49</sup>

The basis for vicarious disqualification is straightforward. First, there is a presumption that the "tainted" attorney will share client confidences with the other attorneys in the firm<sup>50</sup> due to "the close, informal relationship among law partners and associates and . . . the incentives, financial and otherwise, for partners to exchange information freely among themselves when the information relates to existing employment."<sup>51</sup> Thus, vicarious disqualification based on this presumption is another prophylactic measure designed to protect client confidences.<sup>52</sup>

In addition, vicarious disqualification assists in preventing "even the appearance of professional impropriety."<sup>53</sup> Understandably, the public will be skeptical when an attorney switches sides, or is in a position to use his former client's confidences improperly, yet his firm continues to represent its client.<sup>54</sup> Several courts and commentators argue that disqualifying the entire firm in these circumstances avoids this appearance of im-

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46. *Id.* at 517 n.2; Note, *supra* note 9, at 682.

47. MODEL CODE, *supra* note 13, DR 5-105(D). Prior to 1974, DR 5-105(D) required vicarious disqualification only when the individual attorney was disqualified under DR 5-105. Formal Opinion 342, *supra* note 17, at 517 n.1.

48. VA. CODE, *supra* note 16, DR 5-105(E) ("If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.").

49. See Virginia Legal Ethics Opinion 1302, *supra* note 1, at 4 (supporting the use of a Chinese wall so that the firm can avoid vicarious disqualification in cases where the attorney is disqualified only under DR 9-101(B)).

50. Note, *supra* note 9, at 682; Moser, *supra* note 9, at 399 n.1.

51. *In re Asbestos Cases*, 514 F. Supp. 914, 922 (E.D. Va. 1981) (quoting Formal Opinion 342, *supra* note 17, at 517 n.2).

52. *Id.* at 922 ("[I]t is the possibility of the breach of confidence, not the fact of the breach that triggers disqualification.").

53. MODEL CODE, *supra* note 13, Canon 9.

54. See *Armstrong v. McAlpin*, 625 F.2d 433, 453-54 (2d Cir. 1980) (Newman, J., dissenting), *vacated on other grounds*, 449 U.S. 1106 (1981); *In re Asbestos Cases*, 514 F. Supp. at 924.

propriety and prevents compromising the integrity of the judicial system.<sup>55</sup>

### C. *Concerns with Vicarious Disqualification*

Strong ethical and policy considerations, notably protecting client confidences<sup>56</sup> and avoiding the appearance of impropriety,<sup>57</sup> underlie vicarious disqualification. Yet, the ABA has acknowledged that there are also "weighty policy considerations" which suggest that the vicarious disqualification rules should be applied more flexibly, particularly with respect to former government attorneys.<sup>58</sup> Justifiably, an attorney who desires to leave public service and join a private law firm may be concerned that strict application of vicarious disqualification rules will give her the "status of a Typhoid Mary."<sup>59</sup> Firms may be wary of hiring government lawyers due to the possibility of losing potential or present clients, and the employment opportunities of former government attorneys consequently may be limited.<sup>60</sup>

Realizing this dilemma, recent graduates may decide against entering government service, thereby increasing the difficulty of recruiting competent professionals for government service.<sup>61</sup> Those who are willing to enter public service should not be required to make "too great a sacrifice."<sup>62</sup>

Other policy considerations favor exceptions to the vicarious disqualification rules in instances involving government attorneys moving to private practice. While the privacy of the attorney-client relationship is "sacrosanct" and the confidences of the former client must be protected, the "prerogative of a [current] party to proceed with counsel of its

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55. See *Armstrong*, 625 F.2d at 453-54; *In re Asbestos Cases*, 514 F. Supp. at 924; Note, *supra* note 9, at 685-86.

56. See MODEL CODE, *supra* note 13, Canon 4.

57. See *id.* Canon 9.

58. Formal Opinion 342, *supra* note 17, at 518; see *Kesselhaut v. United States*, 555 F.2d 791, 793 (Ct. Cl. 1977) ("We share the view expressed in . . . Formal Opinion 342 that an 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. . .").

59. *Kesselhaut*, 555 F.2d at 793.

60. See *id.* (former government attorney may "be reduced to sole practice under the most unfavorable conditions"); *Armstrong v. McAlpin*, 625 F.2d at 443 (former government attorneys may be "shunned by prospective private employers because hiring them may result in the disqualification of an entire firm in a possibly wide range of cases"); Moser, *supra* note 9, at 403; Formal Opinion 342, *supra* note 17, at 518.

61. See, e.g., *Armstrong*, 625 F.2d at 443 ("[D]isapproval [of screening procedures] may hamper the government's efforts to hire qualified attorneys. . ."); Formal Opinion 342, *supra* note 17, at 518 ("[T]he ability of government to recruit young professionals and competent lawyers should not be interfered with by imposition of harsh restraints upon future practice. . .").

62. Formal Opinion 342, *supra* note 17, at 518.

choice" is also an important consideration.<sup>63</sup> This concept goes far beyond merely giving the client freedom of choice. The client could additionally suffer dire consequences if substitute counsel must be obtained, particularly in cases where the litigation is advanced or the firm has been representing the client for a lengthy period of time.<sup>64</sup> As one court noted, separating a client from his counsel could "perhaps altogether thwart" that client's case.<sup>65</sup> Thus, strict application of vicarious disqualification rules may result in disqualification motions becoming "mere tool[s] enabling a litigant to improve his [own] prospects by depriving his opponent of competent counsel."<sup>66</sup>

Finally, vicarious disqualification hurts the firm itself, by costing the firm clients and by making the hiring of lateral attorneys difficult.<sup>67</sup> More importantly, inflexible application of the rules may scar the entire legal profession by displaying a lack of trust in the ability of an attorney to protect confidences and carry on his practice with integrity.<sup>68</sup> These concerns prompted one court to state that vicarious disqualification "is a 'drastic measure which courts should hesitate to impose except when absolutely necessary.'"<sup>69</sup>

### III. BUILDING THE CHINESE WALL — ONE BRICK AT A TIME

#### A. *Development of the Defense*

After the 1974 amendment to *Model Code DR 5-105(D)*, requiring vicarious disqualification of the entire firm if an attorney was disqualified under *any* disciplinary rule, some jurisdictions began finding ways to avoid vicarious disqualification, particularly where former government attorneys were involved. One of the key presumptions of the disqualification process is that the attorney, either intentionally or inadvertently, will

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63. *Schiessle v. Stephens*, 717 F.2d 417, 420 (7th Cir. 1983); see Formal Opinion 342, *supra* note 17, at 518-19.

64. See *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1275 (7th Cir. 1983) (Coffey, J., dissenting) (quoting *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 720 (7th Cir. 1982)) ("[I]t may also be difficult, if not impossible for [a substitute] attorney to master "the nuances of the legal and factual matters" late in the litigation of a complex case.'").

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

66. Formal Opinion 342, *supra* note 17, at 518.

67. Moser, *supra* note 9, at 404.

68. See *Analytica, Inc.*, 708 F.2d at 1275 (Coffey, J., dissenting) ("After all, an attorney's and/or a law firm's most valuable asset is their professional reputation for competence, and above all honesty and integrity, which should not be jeopardized in a summary type of disqualification proceeding of this nature."); Moser, *supra* note 9, at 404 ("[D]isqualification motions damage the legal profession in general by challenging the integrity of lawyers.").

69. *Schiessle v. Stephens*, 717 F.2d 417, 420 (7th Cir. 1983); see also *Bauunternehmung v. United States*, 8 Cl. Ct. 793, 794 (1985) ("[D]isqualification of the firm is appropriate only where on the particular facts the conflict of interest evil cannot otherwise be mitigated.").

divulge confidential information to those around him. Some courts merely refuse to presume this sharing of knowledge, thereby avoiding the vicarious disqualification question altogether.<sup>70</sup> Other courts view the presumption as rebuttable,<sup>71</sup> allowing a firm to defeat a motion to disqualify by showing that a screening mechanism, such as a Chinese wall, has been put into place to "insulate against any flow of confidential information from the 'infected' attorney to any other member of his present firm."<sup>72</sup> For example, in a leading case on the propriety of Chinese walls, the United States Claims Court allowed a firm to continue representing its client because the disqualified attorney was effectively screened from the matter.<sup>73</sup>

In contrast, other jurisdictions refuse to acknowledge the effectiveness of a Chinese wall, holding the imputation of knowledge from the attorney to his firm to be an irrebuttable presumption.<sup>74</sup> These jurisdictions espouse several arguments for rejecting walls: the difficulty in determining their effectiveness; the possibility of inadvertent disclosures; the fact that proving a breach of confidence may lead to disclosure of the confidence itself; and the possibility that economic incentives may cause the attorney to disclose confidences.<sup>75</sup> There also is a concern that even an effective Chinese wall does not eliminate the appearance of impropriety which may exist when a government attorney "switches sides" and his firm is able to continue the representation.<sup>76</sup>

### B. *Using the Chinese Wall to Block Vicarious Disqualification*

The use of the Chinese wall as an effective device for protecting client confidences, while enabling a firm to avoid disqualification, is now widespread. The ABA and many jurisdictions have acknowledged the propriety of the Chinese wall defense in cases in which former government attorneys are individually disqualified.

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70. See Hamermesh, *supra* note 21, at 264 ("[C]ourts have differed in their willingness to impute . . . shared confidence[s] to the firm. . . .").

71. See, e.g., *Manning v. Waring, Cox, James, Sklar & Allen*, 849 F.2d 222, 225 (6th Cir. 1988); *Schiessle*, 717 F.2d at 421; Hamermesh, *supra* note 21, at 264.

72. *Schiessle*, 717 F.2d at 421.

73. *Bauunternehmung v. United States*, 8 Cl. Ct. 793 (1985).

74. See, e.g., *In re Asbestos Cases*, 514 F. Supp. 914, 922 (E.D. Va. 1981) ("[D]isqualification is required without showing that an attorney possessed explicit confidences which were . . . transmitted to . . . other members of the law firm . . . and is required whether or not the other members of the firm are actually exposed to the information."); Hamermesh, *supra* note 21, at 264.

75. Moser, *supra* note 9, at 403.

76. See, e.g., *Armstrong v. McAlpin*, 625 F.2d 433, 453-54 (2d Cir. 1980) (Newman, J., dissenting), *vacated on other grounds*, 449 U.S. 1106 (1981); Note, *supra* note 9, at 685.

## 1. The Kutak Commission and Model Rule 1.11

In 1975, the ABA's Committee on Ethics and Professional Responsibility released Formal Opinion 342,<sup>77</sup> which supports the use of screening measures in cases where former government lawyers are disqualified. Soon after, the ABA formed the Kutak Commission to review and, if necessary, revise the *Model Code*.<sup>78</sup> While the Kutak Commission "assumed the task of reformulating the [entire *Model*] *Code*,"<sup>79</sup> the issue of vicarious disqualification in the context of the former government attorney received "special attention."<sup>80</sup>

In 1983, after lengthy deliberation over the ethical and public policy considerations involved with client conflicts of interest and individual and vicarious disqualification,<sup>81</sup> the ABA formally adopted *Model Rules of Professional Conduct*, Rule 1.11. The 1989 version of Rule 1.11 (Successive Government and Private Employment) provides, in pertinent part:

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

(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.<sup>82</sup>

In Rule 1.11, the ABA expressly supports the use of screening devices, recognizing that the attorney "infected" with confidential government information can be effectively excluded from participation in the representation of the matter.

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77. Formal Opinion 342, *supra* note 17.

78. Hamermesh, *supra* note 21, at 252 n.39. The ABA's Committee on Ethics and Professional Responsibility issued Formal Opinion 342 in 1975. See *supra* note 17. The Kutak Commission was created in 1977.

79. Hamermesh, *supra* note 21, at 252 n.39.

80. *Id.* at 260 ("From the outset, the Commission intended to give special attention to the government attorney.").

81. "The ABA House of Delegates adopted the *Model Rules of Professional Conduct* on August 2, 1983, after '[s]ix years of debate and often heated controversy' that 'ended on a comparatively harmonious note.'" *Id.* at 252 n.39 (citing 52 U.S.L.W. 2077 (Aug. 9, 1983)).

82. MODEL RULES, *supra* note 3, Rule 1.11.

## 2. *Kesselhaut v. United States*

Many courts have agreed with the ABA, and their decisions provide guidance to law firms regarding the type of wall the firms should implement to avoid vicarious disqualification. One of the first decisions recognizing the Chinese wall defense was *Kesselhaut v. United States*.<sup>83</sup> In *Kesselhaut*, Prothro, who had been general counsel of the Federal Housing Administration (FHA), retired from government service and joined the firm of Krooth and Altman. Kesselhaut was a private practitioner who had represented the FHA in several tax abatement cases on foreclosed property. In this context, Kesselhaut had been in sporadic contact with Prothro. However, most of his contacts were with Prothro's subordinates.<sup>84</sup>

After Prothro joined Krooth and Altman, a dispute arose between Kesselhaut and the FHA regarding the fees owed to Kesselhaut. Kesselhaut contacted Prothro, hoping that Krooth and Altman could represent him in his action against the FHA.<sup>85</sup> Prothro stated that he could not personally participate, but Krooth and Altman could handle the case for Kesselhaut.<sup>86</sup> Prothro did not discuss the merits of the claim with Kesselhaut or with the other attorneys at Krooth and Altman, and a "Chinese wall" was built so Prothro would have no connection with the case. The attorneys at Krooth and Altman were warned not to discuss the case with Prothro, and the files were kept locked.<sup>87</sup>

Despite these precautions, the trial court disqualified Krooth and Altman.<sup>88</sup> On appeal, the United States Court of Claims<sup>89</sup> reversed. Concerned that an attorney who leaves the government to join a private firm would become a "Typhoid Mary"<sup>90</sup> if the transfer of confidences to the attorney's associates was always presumed, the court stated that "disqualification of an entire firm for the disqualification of a single member . . . is entirely too harsh and should be mitigated by appropriate screening. . . ."<sup>91</sup> Emphasizing that Prothro earned a straight salary and did not participate in the firm's earnings and acknowledging other precau-

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83. 555 F.2d 791 (Ct. Cl. 1977).

84. *Id.* at 792-93.

85. *Id.*

86. *Id.*

87. *Id.* at 793.

88. *Id.* at 792.

89. The United States Court of Claims is now designated the United States Claims Court.

90. *Id.* at 793.

91. *Id.*; see also *Schiessle v. Stephens*, 717 F.2d 417, 420 (7th Cir. 1983) ("[D]isqualification is a 'drastic measure which courts should hesitate to impose except when absolutely necessary.'"); *Bauunternehmung v. United States*, 8 Cl. Ct. 793, 794 (1985) ("Disqualification of an entire firm as a result of disqualification of a single member or associate is an exceedingly harsh remedy.").

tions taken by Krooth and Altman, the court found the screening of Prothro was "appropriate."<sup>92</sup> While recognizing the effectiveness of screening in this instance, the court noted that each case requires an individual evaluation; in some cases "no screening procedure will be adequate."<sup>93</sup>

### 3. *Bauunternehmung v. United States*

Following *Kesselhaut*, the United States Claims Court advanced the development of Chinese walls in *Bauunternehmung v. United States*.<sup>94</sup> The firm of O'Haire, Fiore and von Maur had represented the plaintiff in its case against the government for thirteen years.<sup>95</sup> Matthews, who had been counsel of record in the case while employed by the Department of Justice, joined O'Haire, Fiore, and von Maur during the pendency of the action. The United States sought to have the firm disqualified.<sup>96</sup> Following the rationale of *Kesselhaut*, the court looked closely at the screening provisions adopted by O'Haire, Fiore, and von Maur to determine if disqualification was proper.<sup>97</sup>

Stating that screening must be "explicit and inflexible,"<sup>98</sup> the *Bauunternehmung* court identified steps the firm had to take to avoid disqualification. First, Matthews could not receive any fees associated with the litigation. Second, he could not communicate with the plaintiff or its representatives. Also, he could not prepare anything or discuss matters with any of his associates with respect to the case. He was denied access to all case files, and finally, his associates were to be advised of all of these precautions.<sup>99</sup> Satisfied that the firm met these provisions, the court allowed O'Haire, Fiore and von Maur to continue its representation.

The *Bauunternehmung* decision provides guidance as to what elements are required for an effective Chinese wall. Further, it demonstrates the court's strong faith in the concept of the wall itself. Despite the presence in the case of factors that normally work to defeat the effectiveness of a screening mechanism, the court upheld the Chinese wall defense. First, O'Haire, Fiore and von Maur consisted of only four members.<sup>100</sup> Walls are much harder to erect effectively in small firms than in larger firms, where

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92. *Kesselhaut v. United States*, 555 F.2d 791, 793 (Ct. Cl. 1977).

93. *Id.*

94. 8 Cl. Ct. 793 (1985).

95. *Id.* at 794.

96. *Id.* at 793.

97. *Id.* at 794 ("Disqualification of the firm may be avoided by use of appropriate and effective screening procedures.").

98. *Id.*

99. *Id.* at 795.

100. *Id.* at 793.

there may be physical and organizational separation.<sup>101</sup> Additionally, the "infected" attorney in *Bauunternehmung* had been heavily involved with the case while with the government.<sup>102</sup> As a result, there was little doubt that he actually had been privy to confidential information. However, the *Bauunternehmung* court allowed the Chinese wall defense to stand, finding that the firm's screening mechanisms would effectively prevent the inadvertent flow of confidential information.

#### 4. *Armstrong v. McAlpin*

Other jurisdictions have supported the use of Chinese walls to avoid vicarious disqualification in situations where a former government attorney is involved.<sup>103</sup> For example, in *Armstrong v. McAlpin*<sup>104</sup> the Second Circuit examined vicarious disqualification and the validity of screening devices. Although the *Armstrong* judgment was later vacated on other grounds by the United States Supreme Court,<sup>105</sup> the Second Circuit's analysis and approval of the Chinese wall mechanism have influenced decisions in other jurisdictions.

The *Armstrong* case involved a securities fraud suit in which Armstrong was appointed as receiver for a group of investment companies and had the primary responsibility of recovering money that had been misappropriated by McAlpin and others.<sup>106</sup> Armstrong retained his own law firm to carry out the litigation, and the Securities and Exchange Commission (SEC) gave its investigatory files to that firm.<sup>107</sup> However, after it had invested a vast amount of time in preparation of the case, the firm

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101. See Moser, *supra* note 9, at 410 ("Screening is not likely to be effective, for example, in a small firm of lawyers, all of whom are located on one floor and share secretarial and litigation support personnel.").

102. *Bauunternehmung v. United States*, 8 Cl. Ct. 793, 793 (1985). Matthews had been in close contact with the client agency, discussing settlement possibilities and reviewing the agency's view of the case. Cf. *Kesselhaut v. United States*, 555 F.2d 791 (Ct. Cl. 1977) (recognizing the Chinese wall defense where former government attorney had "sporadic" exposure to the sensitive matter).

103. See, e.g., *Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980), *vacated on other grounds*, 449 U.S. 1106 (1981); *Kovacevic v. Fair Automotive Repair, Inc.*, 641 F. Supp. 237 (N.D. Ill. 1986); "Revolving Door" Case, 445 A.2d 615 (D.C. 1982).

104. 625 F.2d 433 (2d Cir. 1980), *vacated on other grounds*, 449 U.S. 1106 (1981).

105. 449 U.S. 1106 (1981). In *Armstrong*, the trial court denied the defendants' motion to disqualify plaintiff's law firm and the defense filed an interlocutory appeal. 625 F.2d at 437. A panel of the Second Circuit heard the appeal and reversed the trial court's decision. *Id.* However, an *en banc* proceeding was ordered and the court reconsidered the appeal, finding that the denial of a disqualification motion is not appealable until after entry of a final judgment. *Id.* at 437, 440. Instead of then dismissing the appeal, the court proceeded to reach the merits of the disqualification issue. *Id.* at 441-46. The United States Supreme Court vacated the judgment on the merits because the appeal itself was not proper. See generally, 449 U.S. 1106.

106. 625 F.2d at 434-35.

107. *Id.* at 435.



discovered a conflict of interest with one of its other clients.<sup>108</sup> Consequently, Armstrong had to find another firm capable of handling the litigation. He retained the Gordon Hurwitz firm,<sup>109</sup> not realizing that Altman, a former SEC attorney had recently joined the Gordon firm.<sup>110</sup> Altman had been involved with the investigation of the same investment companies while he was with the SEC.<sup>111</sup> This situation created a conflict of interest for Altman. The court determined that although Altman could not personally participate in the representation,<sup>112</sup> the Gordon firm still could do so.<sup>113</sup>

Almost two years later, the defendants filed a motion to disqualify Gordon Hurwitz.<sup>114</sup> The trial judge denied the motion.<sup>115</sup> The Second Circuit, sitting *en banc*, affirmed the trial court's decision to allow Gordon Hurwitz to continue the representation.<sup>116</sup> The appellate court's fundamental concern was maintaining the integrity of the trial process.<sup>117</sup> The court determined that there was no fear that the Gordon firm would lack "vigor" in its representation,<sup>118</sup> nor could the firm use confidential information gained through prior representation of the defendant.<sup>119</sup> Additionally, because Altman was screened from participation and the SEC had already given Armstrong its files, the firm could not use "secret" SEC information.<sup>120</sup> As a result, the "Gordon firm's representation of the receiver posed no threat to the integrity of the trial process."<sup>121</sup>

The *Armstrong* opinion supports the Chinese wall concept in two important ways. First, the court downplayed the need to invoke vicarious disqualification simply because a "possible appearance of impropriety"

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108. *Id.* One of the firm's clients was a possible defendant in the litigation brought by Armstrong.

109. *Id.* at 435-36.

110. *Id.* at 436.

111. *Id.*

112. "Altman was concededly disqualified from participating in the litigation under [Model Code] Disciplinary Rule 9-101(B). . . ." *Id.* at 442.

113. *Id.* at 436. Both Armstrong's firm and the Gordon firm concluded that Altman's disqualification should not disqualify Gordon Hurwitz. In addition, the trial judge was advised of the situation and he approved of the use of the Gordon firm.

114. *Id.* at 436-37.

115. *Id.* at 437.

116. *See supra* note 104 and accompanying text.

117. 625 F.2d at 444.

118. *Id.* at 445. This concern arises primarily where a firm is representing clients with "conflicting interests at the same time." *Id.* (emphasis added). *See* MODEL CODE, *supra* note 13, Canon 5 ("A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client."); Note, *supra* note 9, at 681 (discussing ethical concerns in concurrent representation cases).

119. 625 F.2d at 445. The Gordon firm had never represented McAlpin and the other defendants.

120. *Id.*

121. *Id.*

might exist.<sup>122</sup> Finding that separating a client from his counsel, particularly after much preparation has been done, could substantially delay or even thwart litigation, the court stated that the “‘appearance of impropriety is simply too slender a reed on which to rest a disqualification order.’”<sup>123</sup> The *Armstrong* court used a balancing test, reflecting a concern for ethical considerations, tempered by practical application of real-world needs. Second, the court indicated that its “restrained” approach to disqualification would reinforce public confidence in the efficiency and fairness of the judicial process.<sup>124</sup> Screening devices such as Chinese walls compose part of this “restrained” approach.

#### IV. THE REQUISITE BRICKS IN THE CHINESE WALL

A Chinese wall is “implemented to effectively insulate against any flow of confidential information from the ‘infected’ attorney to any other member of his present firm.”<sup>125</sup> Essentially, the disqualified attorney should be completely screened from participating in any matter in which he has a conflict, not only in terms of communications and strategies, but also with respect to financial rewards.<sup>126</sup>

A law firm must include several key elements in its wall to prohibit the flow of client confidences and to persuade the court to recognize it as a valid defense to vicarious disqualification. First, the wall must be erected as soon as the conflict of interest is discovered.<sup>127</sup> If it is not, the chance of an inadvertent disclosure of information is greatly increased and the

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122. *Id.* See MODEL CODE, *supra* note 13, Canon 9 (“A Lawyer Should Avoid Even the Appearance of Professional Impropriety.”). The court in *Armstrong* recognized that it should adopt a more restrained approach to disqualification where the only real concern is how the public will view the situation. One commentator, looking at former government cases in general, provides a good analysis of the two standards that are applied:

[T]he firm-disqualification rule . . . [serves] a dual purpose: to prevent instances of actual impropriety and also to avoid the appearance of impropriety. Only the first of these may fairly be characterized as ethical; the second is more a matter of public policy. When no risk of actual impropriety is present, and disqualification of the firm would function solely to avoid improper appearances, it makes sense to take into account other countervailing public policies.

Note, *supra* note 9, at 702 (footnotes omitted).

123. 625 F.2d at 445 (quoting *Board of Educ. v. Nyquist*, 590 F.2d 1241, 1247 (2d Cir. 1979)); accord Virginia Legal Ethics Opinion 1302, *supra* note 1, at 6.

124. *Id.* at 446.

125. *Schiessle v. Stephens*, 717 F.2d 417, 421 (7th Cir. 1983).

126. See, e.g., *Kesselhaut v. United States*, 555 F.2d 791, 793 (Ct. Cl. 1977) (the screened attorney should have no “connection” with the case); Virginia Legal Ethics Opinion 1302, *supra* note 1, at 4 (the firm must establish “measures which effectively isolate the individual lawyer.”).

127. Moser, *supra* note 9, at 410; Craig A. Peterson, *Rebuttable Presumptions and Intra-firm Screening: The New Seventh Circuit Approach to Vicarious Disqualification of Litigation Counsel*, 59 NOTRE DAME L. REV. 399, 410 (1984); Note, *supra* note 9, at 713; Virginia Legal Ethics Opinion 1302, *supra* note 1, at 4-5.

propriety of the wall defense is doubtful.<sup>128</sup> Second, the screened lawyer must not be allowed to discuss the sensitive matter with those in his new firm.<sup>129</sup> Third, the screened lawyer must be strictly denied access to the documents and files related to representation.<sup>130</sup> Fourth, if possible, the screened attorney should be physically separated from those working on the sensitive matter and should use different support personnel.<sup>131</sup> Any organizational or departmental separation is helpful as well.<sup>132</sup> All of these steps aid in preventing the disqualified attorney from coming into contact with, or inadvertently leaking information about, the sensitive matter.

Additionally, the screened lawyer should not receive any portion of the fees created by the representation.<sup>133</sup> Obviously, the temptation to breach the wall is enhanced if there is a financial incentive to do so.<sup>134</sup> Moreover, all members of the firm should be notified of the existence of the wall, and sanctions for breaching the wall should be established.<sup>135</sup> Finally, the former client (government agency) or its counsel should be notified, so that it can monitor the effectiveness of the wall.<sup>136</sup> This safeguard is important because the existence of the Chinese wall simply rebuts the presumption that confidences will be shared — if an actual breach occurs, the firm should be disqualified.<sup>137</sup>

Even if all of these precautions are strictly followed, courts are still justified in refusing to recognize the screening mechanism as an effective defense in some cases. The determination of whether the Chinese wall

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128. See *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1272 (7th Cir. 1983) (“[A] firm must demonstrate that an effective ‘Chinese Wall’ . . . was established early enough to prevent even an inadvertent intra-firm disclosure of a former client’s confidences.”); *In re Asbestos Cases*, 514 F. Supp. 914, 923 (E.D. Va. 1981) (“Because of the lapse of time . . . there exists the real possibility that improper communication did in fact pass between [the attorney] and his firm.”).

129. See, e.g., Moser, *supra* note 9, at 410; Note, *supra* note 9, at 713; Virginia Legal Ethics Opinion 1302, *supra* note 1, at 5.

130. See, e.g., *Bauunternehmung v. United States*, 8 Cl. Ct. 793, 795 (1985); Moser, *supra* note 9, at 410-11; Note, *supra* note 9, at 713; Virginia Legal Ethics Opinion 1302, *supra* note 1, at 4.

131. See Moser, *supra* note 9, at 410; Note, *supra* note 9, at 713.

132. E.g., Moser, *supra* note 9, at 410; Note, *supra* note 9, at 713.

133. E.g., *Bauunternehmung v. United States*, 8 Cl. Ct. 793, 795 (1985); Moser, *supra* note 9, at 410; Note, *supra* note 9, at 713; Virginia Legal Ethics Opinion 1302, *supra* note 1, at 5.

134. See, e.g., *In re Asbestos Cases*, 514 F. Supp. 914, 923 (E.D. Va. 1981) (“[T]here is the continuing risk that the agreement not to talk . . . will not be effective given the . . . financial incentives which exist to discuss current employment.”); Formal Opinion 342, *supra* note 17, at 517 n.2.

135. Moser, *supra* note 9, at 411; Note, *supra* note 9, at 713.

136. Moser, *supra* note 9, at 410; Virginia Legal Ethics Opinion 1302, *supra* note 1, at 5.

137. Note, *supra* note 9, at 691 (“Evidence that disclosure has in fact taken place serves, in effect, to nullify the Chinese wall defense.”).

defense rebuts the presumption that confidences are shared among associates must be made on a "case-by-case basis."<sup>138</sup> Courts must consider the size of the firm and the number of "tainted" lawyers.<sup>139</sup> Obviously, if the firm is small or if the number of screened attorneys within the firm is great, it is more likely that confidences will be accidentally leaked. The court will also consider the "magnitude of the litigation" and the financial incentives it offers the firm, for these may provide temptations to breach the wall.<sup>140</sup> In this respect, it is important to remember that any screening device is only going to prevent "inadvertent or unconscious transfers of information" — if "two people are determined to share information," a Chinese wall is useless.<sup>141</sup> As these considerations indicate, "[t]here will be instances where no screening procedure will be adequate."<sup>142</sup>

As mentioned earlier, some courts and commentators have expressed the concern that, even if a Chinese wall effectively prevents a transfer of client confidences, it will not extinguish the appearance of impropriety that might exist in the eyes of the public.<sup>143</sup> Assuming that the public is aware of the "details of a law firm's efforts to avoid disqualification,"<sup>144</sup> it is "very likely" that the public will "conclude that a voluntary screening process . . . [will] be breached."<sup>145</sup> One court argues that allowing the use of Chinese walls in these circumstances will "compromise the public's perception of the integrity of [courts] and shake the public's confidence in the administration of justice."<sup>146</sup>

Nevertheless, simply avoiding a possible "appearance of impropriety" is a weak rationale for creating the hardship that can result if a firm is disqualified.<sup>147</sup> Certainly, it is important for the public to have a positive view of the judicial process, but "the rules of law, including the rules of disqualification, cannot cater to all the often-unfounded apprehensions of

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138. *Schiessle v. Stephens*, 717 F.2d 417, 421 (7th Cir. 1983); *see also Kesselhaut v. United States*, 555 F.2d 791, 793 (Ct. Cl. 1977) ("Each case depends on its own merits.").

139. *See Moser, supra* note 9, at 410; Note, *supra* note 9, at 712.

140. *In re Asbestos Cases*, 514 F. Supp. 914, 923 (E.D. Va. 1981).

141. Donald R. McMinn, *ABA Formal Opinion 88-356: New Justification for Increased Use of Screening Devices to Avert Attorney Disqualification*, 65 N.Y.U. L. REV. 1231, 1255-56 (1990).

142. *Kesselhaut*, 555 F.2d at 793.

143. *See, e.g., Armstrong v. McAlpin*, 625 F.2d 433, 453-54 (2d Cir. 1980) (Newman, J., dissenting), *vacated on other grounds*, 449 U.S. 1106 (1981); *In re Asbestos Cases*, 514 F. Supp. at 924; Note, *supra* note 9, at 685-86.

144. Note, *supra* note 9, at 685 ("No matter how effective, Chinese walls are not likely to foster public confidence because the details of a law firm's efforts to avoid disqualification will doubtless make but a small impression upon public awareness.").

145. *In re Asbestos Cases*, 514 F. Supp. at 924.

146. *Id.*

147. *See Armstrong*, 625 F.2d at 445; Virginia Legal Ethics Opinion 1302, *supra* note 1, at 5-6.

the public."<sup>148</sup> Regardless of whether the public understands the Chinese wall concept,<sup>149</sup> "[a]pppearance must be measured by reality, which should include the particular internal screen or 'Chinese Wall' and its apparent effectiveness in avoiding improper conduct."<sup>150</sup> Where there is "no threat to the integrity of the trial process," a "possible 'appearance of impropriety is simply too slender a reed on which to rest a disqualification order.'"<sup>151</sup>

#### V. USE OF CHINESE WALLS IN VIRGINIA

In 1989, the Standing Committee on Legal Ethics of the Virginia State Bar supported the use of Chinese walls in those limited situations where a former government attorney is disqualified from a civil matter *only* under 9-101(B).<sup>152</sup> The Committee noted that the *Virginia Code* does not expressly require vicarious disqualification in these circumstances.<sup>153</sup> It further indicated that strict application of disqualification rules "would not be in the best interests of the public or of the profession."<sup>154</sup> However, the Supreme Court of Virginia disapproved Legal Ethics Opinion 1302, and it was withdrawn.<sup>155</sup> Virginia courts should acknowledge the effectiveness of Chinese walls in preventing the sharing of client confidences in successive representation situations where an attorney has moved from the government to a firm and may have privileged information about a client. As such, the Chinese wall defense should give firms a means of rebutting the presumption of shared confidences<sup>156</sup> and enable them to avoid vicarious disqualification if they can show that an effective wall has been built and is being inflexibly applied.<sup>157</sup>

Recognizing Chinese walls as a defense to disqualification does not mean accepting it under every circumstance. The propriety of Chinese walls must be examined on a "case-by-case basis."<sup>158</sup> The merits of each case, including the size of the firm,<sup>159</sup> the effectiveness of the wall itself,<sup>160</sup>

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148. *Armstrong*, 625 F.2d at 453 (Newman, J., dissenting).

149. *See supra* note 144 and accompanying text.

150. Virginia Legal Ethics Opinion 1302, *supra* note 1, at 6.

151. *Armstrong*, 625 F.2d at 445; *see also* Virginia Legal Ethics Opinion 1302, *supra* note 1, at 6 (citing *Armstrong* with approval).

152. Virginia Legal Ethics Opinion 1302, *supra* note 1; *see supra* note 44 and accompanying text.

153. *Id.* at 4; *see supra* notes 47-48 and accompanying text.

154. Virginia Legal Ethics Opinion 1302, *supra* note 1, at 5.

155. *See supra* note 8.

156. *See Manning v. Waring, Cox, James, Sklar & Allen*, 849 F.2d 222, 225 (6th Cir. 1988).

157. *See Kesselhaut v. United States*, 555 F.2d 791, 793 (Ct. Cl. 1977) ("Where screening is used it must . . . be specific and inflexible.").

158. *See supra* note 138 and accompanying text.

159. *See supra* note 139 and accompanying text.

160. *See Moser, supra* note 9, at 410-11; Note, *supra* note 9, at 713.

the ethical and policy considerations underlying disqualification rules, and the need to limit their use, should be considered.<sup>161</sup> This allows the court to weigh the factors and determine whether the firm should be disqualified, rather than requiring the "indiscriminate application of . . . firm-disqualification rules."<sup>162</sup> Further, recognizing the Chinese wall defense simply means that the presumption of shared confidences may be negated.<sup>163</sup> If the former client provides evidence that confidences have been revealed, the wall is nullified and the firm will be disqualified.<sup>164</sup>

## VI. CONCLUSION

Vicarious disqualification rules designed to prevent the revelation of former client confidences are obviously grounded upon strong ethical considerations. However, strict application of these rules can lead to dire and often unnecessary consequences for the current client, the firm itself, and the judicial process. The ABA and several jurisdictions have recognized the Chinese wall defense as a means for firms to avoid vicarious disqualification in situations where a former government attorney moves to a private firm and is disqualified from representing a particular client. Courts and commentators now are seeking to apply the defense where an attorney moves from one private firm to another.

Virginia should follow this legitimate trend and recognize the Chinese wall defense in situations where a former government attorney is personally disqualified. While not effective in all situations, a properly "built" Chinese wall can help to prevent inadvertent sharing of confidences and allow a firm to continue representing its current client. Looking at each case individually, the courts can assess whether a firm should be disqualified based on ethical and practical considerations. This process seems both more fair and more efficient than an across-the-board disqualification policy.

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161. See *Kesselhaut*, 555 F.2d at 793 ("Each case depends on its own merits.").

162. Note, *supra* note 9, at 714.

163. See, e.g., *Manning v. Waring, Cox, James, Sklar & Allen*, 849 F.2d 222, 225 (6th Cir. 1988) ("One method of rebutting the presumption is by demonstrating that specific institutional screening mechanisms have been implemented. . . ."); Note, *supra* note 9, at 691.

164. Note, *supra* note 9, at 691.

