ETHICS: A CONFLICT OF INTEREST? WHAT CONFLICT?

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1. THE TUGS AND PULLS

The tension that exists for every lawyer is the one that exists between one's duty to the client, one's duty to the profession, and one's duties to other existing clients and former clients.[2] In any law firm of almost any size, potential conflicts of interest arise almost daily. Many law firms have had to construct elaborate electronic systems to keep track of all potential conflicts. If a potential conflict is identified, firms have created structures to leave a paper (or electronic) trail of how these are resolved.[3]

The key provisions of the Model Rules of Professional Conduct are Rules 1.6[4] on client confidentiality, Rules 1.7[5] and 1.8[6] on conflicts involving current clients, and Rule

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[2] For a discussion of the Rules of Professional Conduct and decisional law, see Lawrence J. Fox and Susan R. Martyn, "Red Flags: A Lawyers Handbook on Legal Ethics," ALI-ABA (2005). The book "Conflict of Interest in the Professions," By Michael Davis, Andrew Stark (Oxford University Press US, 2001), contains an extensive discussion of conflict issues and focuses on a risk-benefit approach. Also see Leonard E. Gross' article, "Are Differences Among the Attorney Conflict of Interest Rules Consistent with Principles of Behavioral Economics?" Georgetown Journal of Legal Ethics (Winter 2006).

[3] As early as 1993, Richard Zitrin, in his article "Risky Business . . . Representing Multiple Interests," Calif. State Bar Ethics Hotliner Vol I, No. 11 (Winter 1992-1993), wrote that the "everyday practice of most firms, large and small, is replete with potential conflicts of interest.".

[4] Model Rule 1.6 states:

Rule 1.6 Confidentiality Of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

[5] Model Rule 1.7 states:

Rule 1.7 Conflict Of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

[6] Model Rule 1.8 states:

Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

1.9[7] on duties to former clients. All of these must be read through the prism of Rule 1.10,[8] which details how the imputation-of-knowledge principle infects all lawyers in a firm, regardless of their actual knowledge of a particular matter, and regardless of their actual knowledge about the client for whom the potential conflict arises.

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(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

[7] Model Rule 1.9 states:

Rule 1.9 Duties To Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

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

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

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

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

[8] Rule 1.10 states:

Rule 1.10 Imputation Of Conflicts Of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(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.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Real estate lawyers who represent business entities must advance the interests of the company and its stakeholders while carefully threading their way through a thicket of state and federal statutes, international laws,[9] and state and local professional rules.

Much has been written about the state and federal statutory and regulatory attempts to make those who serve companies' legal needs into "whistle-blowers" or informers about corporate activities. Those issues, however, are beyond the scope of this paper.[10] In addition, there are many internet resources on ethics that may provide a source for research and links to a number of useful sites.[11]

The focus of this paper is the apparent inconsistent theories that support (a) the imputation-of-knowledge principles of Rule 1.10 for attorneys within a single firm, regardless of their actual knowledge, and (b) the rules concerning former clients and lawyers moving between firms, when actual knowledge then becomes a key factor.

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[9] For example, in addition to treaties and other matters that affect international transactions, there is the Financial Action Task Force (FATF), an inter-governmental body whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing. FATF seeks to generate legislative and regulatory changes to combat international money laundering.

[10] For more on these points, see, for example: D. DeMott, "THE DISCRETE ROLES OF GENERAL COUNSEL," 74 Fordham L. Rev. 955 (2005); Jill Barclift, "CORPORATE RESPONSIBILITY: ENSURING INDEPENDENT JUDGMENT OF THE GENERAL COUNSEL--A LOOK AT STOCK OPTIONS Z," 81 North Dakota Law Review 1 (2005); Frederick M. Gonzalez, "FOURTH ANNUAL DIRECTORS' INSTITUTE ON CORPORATE GOVERNANCE - - THE CULTURAL, ETHICAL, AND LEGAL CHALLENGES IN LAWYERING FOR A GLOBAL ORGANIZATION: THE ROLE OF THE GENERAL COUNSEL," Practising Law Institute PLI Order No. 9158 September, 2006; Lewis D. Lowenfels, Alan R. Bromberg, Michael J. Sullivan, "ATTORNEYS AS GATEKEEPERS: SEC ACTIONS AGAINST LAWYERS IN THE AGE OF SARBANES-OXLEY," 37 University of Toledo Law Review Summer 877 (2006); Jason Thompson, "THE PARADOXICAL NATURE OF THE SARBANES-OXLEY ACT AS IT RELATES TO THE PRACTITIONER REPRESENTING A MULTINATIONAL CORPORATION," 15 Journal of Transnational Law and Policy 265 (2006); Anita Indira Anand, "AN ANALYSIS OF ENABLING VS. MANDATORY CORPORATE GOVERNANCE: STRUCTURES POST-SARBANES-OXLEY," 31 Delaware Journal of Corporate Law 229 (2006).

[11] See, for example the following sites (all accessed in October, 2006): The ABA Center for Professional Responsibility, http://www.abanet.org/cpr/links.html; The Thomas Cooley Law School ethics site, http://www.cooley.edu/ethics/other_sites_of_interest.htm ; the Cornell Law School Professionalism web links page, http://ww3.lawschool.cornell.edu/faculty-pages/wendel/ethlinks.htm,; the Georgetown Law Library legal ethics link page, http://www.ll.georgetown.edu/guides/legal_ethics.cfm, and the Santa Clara University business ethics links page, http://scu.edu/ethics/links/links.cfm?cat=BUSI.

2. CONFLICTS OF INTEREST: WHAT YOU DO AND DON'T PUT IN WRITING MIGHT HURT YOU

Whether one looks at the current ABA Model Rules or the 1983 Model Rules, the basic parameters of conflicts of interest are relatively similar. Lawyers cannot represent opposite sides in the same matter. Lawyers can represent others against former clients under certain restrictions, generally related to client confidences and whether the underlying facts are similar to the previous representation. A lawyer's personal interests may result in disqualification and a lawyer's family relationship with a lawyer on the other side of the table may also result in disqualification. Various imputation-of-knowledge rules apply to law firms, and some matters "infect" the entire law firm so that no one in the firm can take on the representation, while other matters can be quarantined so that the "infected lawyer" does not prevent the rest of the firm from handling the matter. A conflict may even arise in the absence of an express lawyer-client relationship (such as when a lawyer participates in a "beauty pageant" for selection of counsel and the discussion at the selection process discloses confidences, but the lawyer is not chosen by the prospective client).

All of these areas break down into three main topics; there are (a) those conflicts that cannot be waived under any circumstance;[12] (b) those conflicts that can be waived; and (c) things that might be perceived to be conflicts but are not. On those conflicts that can be waived, the ABA Model Rule requires waivers to be "confirmed in writing"[13] (*i.e.*

[12] See, for example, the discussion in Comments 14-16 to ABA Model Rule 1.7.

[13] "Confirmed is writing" is defined by ABA Model Rule 1.0(b): " 'Confirmed in writing,' when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter."

the lawyer sends the letter explaining what has been agreed to orally), as long as the client has given "informed consent," which is defined as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risk of and reasonably available alternatives to the proposed course of conduct."[14]

There are literally hundreds of law review articles and publications on conflicts of interest. Some of the more recent ones that are worth taking a look at are set forth below in a footnote.[15] The first article one might look at, however, was written by the Reporter for the ALI Lawyer Restatement, Professor Charles W. Wolfram, "Ethics 2000 And Conflicts Of Interest: The More Things Change" 70 Tenn. L. Rev. 27 (2002), which contains a broad overview of how the ABA Model Rules continued and, in some cases, altered the conflict of interest rules.

The ABA's Center for Professional Responsibility keeps an index of all ethics opinions by the Standing Committee on Ethics and Professional Responsibility. Among the many topics on conflicts about which the Standing Committee has written are opinions on:

- The client as adverse witness in an unrelated matter (Formal Opinion 92-367);
- Conflicts involving corporate representation (Formal Opinion 95-390);

[14] ABA Model Rule 1.0(e).

[15] *See, e.g.* Shapiro, Susan P., "Bushwhacking The Ethical High Road: Conflict Of Interest In The Practice Of Law And Real Life," 28 Law & Soc. Inquiry 87 (2003); Shapiro, Susan P., "If It Ain't Broke . . . An Empirical Perspective On Ethics 2000, Screening, And The Conflict-Of-Interest Rules ," 2003 U. Ill. L. Rev. 1299; Morgan, Amanda Kay Morgan "Screening Out Conflict-Of-Interests Issues Involving Former Clients: Effectuating Client Choice And Lawyer Autonomy While Protecting Client Confidences," 28 J. Legal Prof. 197 (2004); and Jones, Alexander W., "Defenses To Disqualification: Fact Situations That Allow An Attorney To Avoid Disqualification For A Conflict Of Interest," 27 J. Legal Prof. 195 (2003).

An interesting article that examines how law firm compensation systems could affect the creation of conflicts of interest is Bernstein, Edward, A., "Structural Conflicts Of Interest: How A Law Firm's Compensation System Affects Its Ability To Serve Clients," 2003 U. Ill. L. Rev. 1261

- Conflicts relating to employment negotiations with firm representing the client's adversary (Formal Opinion 96-400);
- Conflicts when one must examine a client as an adverse witness in another matter (Formal Opinion 92-367);
- Conflicts when a former in-house lawyer is involved against the firm,(Formal Opinion 99-415);
- Waivers of future conflicts (Formal Opinion 05-436);
- Conflicts involving joint defense agreements (Formal Opinion 95-395);
- Positional Conflicts (Formal Opinion 93-377);
- Conflicts that arise when there is representation adverse to an individual member of an entity client (Formal Opinion 92-365); and
- Conflicts related to temporary lawyers (Formal Opinion 88-356).

Waivers of existing, potential, and future[16] conflicts are dealt with not only in the ABA Model Rules but also in the ALI Restatement of the Law Governing Lawyers, section 122. On consentable waiver issues involving current and former clients, the test relates to (among other considerations) whether there is a substantial relationship between the matters.[17]

One criticism of the Model Rule's conflict provisions is that, while these rules are perfectly understandable and defensible if a law firm exists in a single city with a single office, the underlying basis of the rules (particularly the imputation-of-knowledge provisions of Rule 1.10) becomes more tenuous when a law firm has multiple offices in

[16] See Comment 22 to ABA Model Rule 1.7 on consents involving future conflicts. Also see Model Rule 1.18 on duties to a prospective client.

[17] See Rule 1.9. Also *cf. Haagen-Dazs Co. v. Perche No! Gelato, Inc.*, 639 F. Supp. 282 (N.D. Cal. 1986).

multiple states. The issue may not be purely a legal one (for screening or lack of screening can occur even within a single office), but rather it may be more of a practical difference, for a criticism has been that while a client may not understand how a law firm can "screen" or protect confidential information within an office, it may well be possible to "screen" lawyers, files, and knowledge when there are far-flung offices.

When the current Model Rules were being considered, the issue of whether the "screening" can occur without each client's informed consent was discussed. The ABA House of Delegates rejected attempts to allow firms to take on direct conflicts of interest without the client's informed consent. The argument that carried the day was that clients expect unalloyed loyalty from the firm as a whole, and that any attempt to allow firms to decide on their own which potential conflicts can be handled without client consent would undermine both the confidentiality principles as well as the duty that law firms owe to each and every client.

The imputation-of-knowledge principles (under Rule 1.10), as inviolable as there are within a law firm, they revealed to have exceptions when lawyers move between firms. There are also exceptions when former government officers, public officials, and judges move to private practice (see Model Rules 1.11 and 1.12). The result is that potential conflicts with existing clients within a firm always require informed consent (under rules 1.7-1.9), but informed consent is always not required when a firm hires a lateral lawyer, a former government officials or judge. For former government officials and judges, for example, client consent is required only if the hired attorney "participated personally and substantially"[18]

[18] Rule 1.11(a)(2) and Rule 1.12(a).

In other words, there can be "screening" without the clients' consent for former government lawyers and judges if there is no personal participation, but there cannot be involuntary screening within a law firm for a lawyer in Miami who is dealing with Client A and the firm's lawyer in Seattle who is dealing with Client B. The differences between the results demonstrate that the fiction of imputation-of-knowledge under Rule 1.10 is just that — a fiction — that is readily abandoned to encourage job openings for lateral hires and for former government officials and judges. It may be that this result is entirely justified by both economics[19] and public policy, but it calls into question whether there may be other exceptions made in the future to the imputation provisions of Rule 1.10.

3. SOME EXAMPLES OF CONFLICT/SCREENING ISSUES

One way to look at the potential problems in the theoretical underpinnings of the conflict/screening rules is to consider some hypothetical situations and what the Rules allow, permit, mandate or compel.

a. Example #1

i. THE EXAMPLE

Lawyer A and Lawyer B are solo practitioners. They decide to rent space in the same building. They each maintain their own staff and own file space.

A and B often enlist the other as co-counsel in cases.

A new lawsuit arises in which A's long-standing client X will be adverse to B's longstanding client, Y.

[19] Recall that the Preamble of the Model Rules recognizes and the tension a lawyer faces between "the lawyer's own interest in remaining an ethical person while earning a satisfactory living." Preamble, Section 9, quoted in full in footnote 34, below

Lawyer B has never done work for A's client X,

and Lawyer A has never done work for B's client Y.

Are there any problems for either A or B?

ii. COMMENT ON EXAMPLE #1

Under the Model Rules, as long as A has not previously represented B's client (and vice versa), then there appears to be no restriction at all. A and B can represent adverse parties in this litigation and can engage each other as co-counsel in other matters involving other clients as long as they each maintain the confidentiality of their own client's communications and files, and as long as the personal relationship between Lawyers A and B do not prevent each from fully representing the interests of their respective clients.[20]

[20] Comments 10-12 to Rule 1.7 deal with personal interests of lawyers that may affect representation, but these do not appear to deal with the situation set forth in this example. These Comments state:

> Personal Interest Conflicts
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> [10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).
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> [11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

b. **Example #2**

i. THE EXAMPLE

As in Example #1, Lawyer A and Lawyer B are solo practitioners, except now Lawyer A owns the building in which Lawyer B rents space.

Lawyer A not only rents space to B, but Lawyer A also charges B for office facilities and employees that B uses.

Lawyer A has a receptionist who answers the phone "Law Offices," takes messages, and directs the caller to the appropriate attorney.

Lawyer A also has a file room with locking file cabinets; Lawyer B rents space in the file room and rents four locking file cabinets for her client files.

As in Example #1, A and B often enlist the other as co-counsel in cases.

A new lawsuit arises in which A's long-standing client X will be adverse to B's longstanding client Y. As in Example #1, Lawyer B has never done work for A's client X, and Lawyer A has never done work for B's client Y.

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[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

Are there any problems for either A or B?

ii. COMMENT ON EXAMPLE #2

The result appears to be same here as under Example #1. As long as A and B maintain separate practices and maintain client confidences, there appears to be no restriction. A and B can represent adverse parties in this litigation and can engage each other as co-counsel in other matters involving other clients.

c. **Example #3**

i. THE EXAMPLE

Lawyer C is purely a tax lawyer; Lawyer D is purely a real estate practitioner. Lawyers C & D form a partnership.

Although they have a partnership to share expenses, the partnership documents state that income is dependent upon the billings of each. If Lawyer C bills nothing, Lawyer C still owes the overhead expenses to the partnership out-of-pocket but gets no income from the partnership. Likewise, if Lawyer D bills a million dollars for the year, Lawyer D pays her share of overhead and keeps the rest of the million dollars, sharing none of it with Lawyer C.

Because their practices are so different, Lawyer C keeps her files in a separate file room from Lawyer D.

Lawyer's C's secretary is the only one who accesses Lawyer C's files; Lawyer D's secretary is the only one who accesses Lawyer D's files. The files are never "shared."

In fact, if Lawyer D has a client who needs tax advice, Lawyer D brings in her partner, Lawyer C, and Lawyer C opens a separate file on this matter and bills the client (on firm letterhead) separately from Lawyer D.

A new matter arises in which a tax client of Lawyer C will be adverse to a real estate client of Lawyer D. Lawyer C has never done work previously for this client of Lawyer D (and vice versa).

Can Lawyer C continue to represent her client and Lawyer D continue to represent her client in this new matter?

ii. <u>COMMENT ON EXAMPLE #3</u>

Although the situation here is practically and functionally the same as if C and D maintained separate solo practices (as in the case of Lawyers A and B under Examples #1 and #2), the Rules require a completely different result.

Because of the legal structure of the partnership, there is no possible way that either lawyer can handle the matter if the two clients are going to be directly adverse in the same matter. This is because of the imputation-of-knowledge and confidences principles of Rule 1.10(a)[21] and because the conflict of interest is non-waivable under Rule 1.7(b)(3).[22].

On the other hand, if Lawyer D's real estate client was going to be represented by Lawyer Q in this transaction or litigation, and even if Lawyer D will continue to represent the real estate client on other non-related matters, then it is possible that the firm could represent Lawyer C's tax client situation, but only if both clients give informed consent confirmed in writing. In this instance, it is feasible to get the real estate client's truly informed consent, because the real estate client now has Lawyer Q to give advice on whether to consent and the impact of such a consent. The difficult question is how "informed" the consent from Lawyer C's tax client will be, for in this situation Lawyer C seeks to continue to represent the tax client. Will Lawyer C be able to fully and impartially disclose all possible issues so that her client can give "informed consent"? Further, will Lawyer C inform the tax client that Lawyer D will be "screened off" from all of the tax client's files and will Lawyer C get the client's informed consent on this issue? Can the client become convinced that true screening will occur and that the client's confidences in all instances will be protected from Lawyer D (and Lawyer D's long-standing real estate client)?

[21] The language of Model Rule 1.10 is set forth in footnote 8 ,above.
[22] The language of Model Rule 1.7 is set forth in footnote 5, above.

d. **Example #4**

i. THE EXAMPLE

The situation is exactly the same as in Example #3, except that Lawyer C practices in one city in the state and Lawyer D practices in a different city in the same state.

Lawyers C and D have a partnership, but in this situation, it is perfectly apparent that the files are kept separately.

Lawyers C and D, although they are in a partnership, maintain entirely different computer systems and completely different bookkeeping systems; they simply "square up" their partnership books every quarter. As in the previous example, Lawyer C has never done work for D's client (and vice versa).

A new matter arises in which a long-standing tax client of Lawyer C will be adverse to a long-standing real estate client of Lawyer D. Can either Lawyer C or Lawyer D take on the representation?

ii. COMMENT ON EXAMPLE #4

As in Example #3, the Rules create an absolute bar to the lawyers representing both clients in the same transaction. This is due solely to the fact that C and D have a partnership. The combination of the imputation-of-knowledge rules[23] and the non-waivable conflict rules concerning "clients" of the firm[24] prevents the lawyers from getting effective waivers from both clients.

e. **Example #5**

i. THE EXAMPLE

The situation is exactly the same as in Example #4. Lawyers C and D are in a partnership, but each practices in a different city with different computers and different accounting systems.

Lawyer C, the tax lawyer, decides that the situation is not working out. Lawyer C leaves the partnership and joins a big law firm. Lawyer C brings all her tax clients with her.

A week after joining the big law firm, a matter comes up that will pit Lawyer C's tax client against Lawyer D's real estate client. As in the previous examples, Lawyer C had not previously done work for this particular real estate client of Lawyer D, and

[23] The language of Model Rule 1.10 is set forth in footnote 8 ,above.

[24] The language of Model Rule 1.7 is set forth in footnote 5, above.

Lawyer D had never done an work for this particular tax client of Lawyer C.

Can Lawyer C represent her client against Lawyer D's client, or can Lawyer D compel Lawyer C to withdraw?

ii. COMMENT ON EXAMPLE #5

Although functionally the ***actual*** knowledge that Lawyer C has about Lawyer D's client (and vice versa) is no different under examples #4 or #5 (in both situations, neither lawyer actually knows anything about the other's client), the Model Rules make a distinction when a lawyer moves firms.

Once Lawyer C leaves the C/D partnership taking the tax client with her, the real estate client of Lawyer D is now a "former client" of Lawyer C (and Lawyer C's current tax client is now a former client of Lawyer D). Under Model Rule 1.9(a),[25] as long as the matters are not the "the same or a substantially related matter," then not only can Lawyers C and D represent former clients who are directly adverse to one another, but no client consent is required.

f. **Example #6**

i. THE EXAMPLE

Lawyer E is a partner in a big law firm. Lawyer E's practice is limited to real estate transactions; Lawyer E never deals with litigation. Lawyer E's main client is Developer, Inc. Lawyer E is the only

[25] The language of Model Rule 1.9 is set forth in footnote 7, above.

lawyer in the firm with whom Developer, Inc. deals; no other lawyer in the big law firm works on any matters for Developer, Inc.

One of the main clients of the big law firm is Conglomerate, Inc., an insurance company that is always involved in insurance claims and subrogation suits. Lawyer E never works on any files involving Conglomerate Inc.

Lawyer E decides to leave the big law firm and to set up a partnership with Lawyer F, a litigator. Developer, Inc. follows Lawyer E to her new law firm.

A week after Lawyer E leaves the big law firm for her new partnership, a dispute arises between Developer, Inc. and Conglomerate, Inc. that will require litigation between them.

Can Lawyer E's new firm represent Developer, Inc. against Conglomerate, Inc.? Can Lawyer E assist in the litigation?

ii. COMMENT ON EXAMPLE #6

As long as Lawyer E was in the big law firm, neither she nor the firm could represent Developer, Inc. against Conglomerate, Inc.; this is an unwaivable conflict of interest under the Model Rules.

Yet, once Lawyer E leaves the big law firm, then not only is Conglomerate, Inc. a former client, but the Model Rules give Lawyer E an additional benefit. Under Model Rule 1.9(b),[26] as long as Lawyer E has not personally "acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter" — in other words, as Lawyer E knew nothing about Conglomerate, Inc. while working at the big law firm — Lawyer E can represent Developer, Inc. and no consent is required.

g. **Example #7**

i. THE EXAMPLE

Law Clerk F is one of three law clerks who works for Judge G.

Judge G divides his cases among her law clerks. A major suit has been ongoing between Landlord, Inc. and Tenant, Inc.; Law Clerk F has not worked on that case.

The Bigg Law Firm, which represents Landlord, Inc., wants to hire Law Clerk F; at the time Law Clerk F is hired, the law suit will not have come to trial.

Is there any problem with The Bigg Law Firm hiring Law Clerk F?

[26] The text of Model Rule 1.9 is set forth in full in footnote 7, above.

ii. COMMENT ON EXAMPLE #7

Model Rule 1.11[27] deals with former government employees, but Model Rule 1.12[28] is the one applicable to law clerks as well as to judges and third party neutrals. The

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[27] Model Rule 1.11 provides:

Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a 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 gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), 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 timely 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.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

[28] Mode Rule 1.11 provides:

Rule 1.12 Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer

test, however, is essentially the same as with lawyers who move between firms. There is no need to screen or notify the client if the law clerk was not personally involved in the case. In fact, under Rule 1.12, apparently the law clerk can leave the judge on day one and start work on the case on day two as long as the law clerk was not personally involved in the case. Of course, Rule 1.12 does not deal with statutes[29] or rules[30] that may require the judge to recuse herself in such instances.

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may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely 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 parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

[29] See, e.g., 28 U.S.C. Section 455 which requires that a "justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

But it appears that motions to recuse are not favored by judges in such instances.

See, for example, U.S. v. Ruff (unreported in F.Supp.2d), 2006 WL 208870 (Jan 25, 2006, N.D. Iowa), where the court refused a motion to recuse even though the prosecutor in the case was a former law clerk of the presiding judge. The court quoted with approval from *Hall v. Small Bus. Admin.*, 695 F.2d 175, 179 (5th Cir.1983):

> [A] law clerk has little incentive to influence a judge in an effort to curry favor with a former employer. Conversely, a law clerk has a financial incentive to benefit a future employer. Given this financial incentive, if ever a law clerk were of a mind to influence his judge, it would likely be for the benefit of a future rather than a former employer. Because precedent approves the isolation of a law clerk who has accepted future employment with counsel appearing before the court, it follows that isolating a law clerk should also be acceptable when the clerk's former employer appears before the court. [W]e [also] note that a law clerk has no incentive to violate a court's instruction that he isolate himself from the case and thereby subject himself to discharge. In this case, the district judge explained that, as a matter of course, he isolates law clerks from cases involving past or future employers. The obvious purpose of this procedure is to ensure that the appearance of partiality does not arise; as such, only a foolhardy law clerk would purposely circumvent the court's instruction by attempting to pass on information about a case.

Also see, for example, the opinion in *In Re Food Management Group, LLC* Case No. 04-22880, United States Bankruptcy Court, Eastern District of New York (Jan. 24, 2007, unreported, but available at http://www.nysb.uscourts.gov/opinions/mg/104370_923_opinion.pdf

The court denied a recusal motion, stating:

> "'If a clerk has a possible conflict of interest, it is the clerk, not the judge who must be disqualified.' *Hunt v. American Bank & Trust Co.*, 783 F.2d 1011, 1016 (11th Cir. 1986). Recusal of the Court has not been required where the law clerk is not working on the case. *Bartel Dental Books Co., Inc. v. Schultz*, 786 F.2d 486, 490 (2d Cir. 1986). Screening of a recused law clerk from involvement in the matter is sufficient whether the law clerk's recusal results from prior or future employment by the law clerk. *Byrne v. Nezhat*, 261 F.3d 1075, 1102 (11th Cir. 2001) ("Because precedent approves the isolation of a law clerk who has

4. IS THERE AN UNDERLYING THEORY ON THE CONFLICTS RULES?

As the examples above demonstrate, there are two mutually inconsistent theories at work on the conflict rules. One is that knowledge of any lawyer in a firm infects all the other lawyers in the firm, thereby creating an unwaivable conflict of interest if two clients become adverse to one another in the same proceeding. Thus, no matter how physically and geographically separated a law firm's offices are, the imputed knowledge rule applies uniformly. Actual knowledge is simply irrelevant.

On the other hand, when lawyers move from firm to firm, or when a judge or law clerk leave government employment, the rules completely ignore imputation-of-knowledge principles and focus instead on whether the affected lawyer was actually involved in the matter previously, possesses substantial knowledge about the situation, or had obtained client confidences.

The multiple exceptions applicable to lawyers who move from firm to firm mean that the imputation-of-knowledge rule, while it may be appropriate as a matter of policy, is a tenuous fiction when one considers the fact that many law firms operate in silos, where sections may operate as almost independent fiefdoms (after all, how many major

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> accepted future employment with counsel appearing before the court . . . it follows that isolating a law clerk should also be acceptable when the clerk's former employer appears before the court."). Any argument that my other law clerk would be influenced by the knowledge that her co-clerk worked for one of the firms involved in this proceeding would be frivolous. *Bartel Dental Books Co*., 786 F.2d at 490."

[30] Neither the black-letter rule of Canon 3 ("A Judge Shall Perform The Duties Of Judicial Office Impartially And Diligently") of the Model Code of Judicial Conduct or the comments to the Canon seem to expressly deal with law clerks in connection with recusal issue. On the other hand, the Federal Judicial Center has publications for law clerks that does deal with the topic of law clerks who seek employment outside the court system. See "Maintaining the Public Trust: Ethics for Judicial Law Clerks," Federal Judicial Center (2002), and Sylvan A. Sobel, "Law Clerk Handbook: A Handbook for Law Clerks to Federal Judges," Federal Judicial Center (2007). The National Center for State Courts also maintains a web page with links to ethics guides for court employees.

See: http://www.ncsconline.org/wc/courtopics/ResourceGuide.asp?topic=EthEmp

law firms really have lawyers who transfer between sections?), and where lawyers in different sections in geographically disbursed offices may have little if any knowledge of particular matters pending in another section of another office in another state.

The purpose of this paper is not to comment on the appropriateness of the imputation-of-knowledge policy, for the purpose is salutary — a client should be told if a law firm in which it has confided confidences is considering taking a position adverse to the client. That is why informed consent of the client, confirmed in writing, is required in waivable conflict situations.[31]

Rather, the purpose of this discussion is to note that there may come a time when the underlying theory of the imputation-of-knowledge rule may be subject to reexamination. If a client need not be notified at all when a lateral is hired from another firm — if the lateral can be "screened off" without the client's knowledge or consent as long as the lateral had no significant knowledge or participation in the matter for the adverse party prior to being hired, even if the lateral's former firm has been involved in a no-holds-barred scorched-earth litigation strategy for the adverse party — then there may come a time when the screening rules and imputation rules are re-examined to see if they might be subject to alteration in situations involving geographically disbursed offices.[32]

[31] See the discussion at page 6 of this paper and the text of Model Rule 7 at footnote 5, above.

[32] As a practical matter, in large law firms occupying multiple floors of skyscrapers in major metropolitan areas, lawyers on different floors of the same office may have as little contact with the lawyers three floors apart as do lawyers in the same firm but located in different states. Yet, as a practical matter, one may be able to more easily understand why the imputation-of-knowledge rules should be enforced among the lawyers in a single office in a single city as compared to the situation with lawyers in widely geographically disbursed offices. The issue here is analogous to those raised in the Comments to Example #3, above, involving Lawyer Q and the screening issue. While it may be difficult, as a practical matter, to ever convince a client that an effective "screen" can be erected (with the client's consent) within a single office when two existing client interests are involved whose interests are adverse (assuming a valid waiver can be obtained). Screens are nonetheless permitted in certain instances *without* the client's consent when a lateral is hired. See the discussion in Examples #5 and #6.

5. ARE THE "RULES OF ETHICS" REALLY ETHICAL?

If two different theories apply to screening for conflicts — one which applies when there are two clients of the same firm, and one which applies when there are former clients or when lawyers move among firms — one might ask whether the Model Rules are really one of "ethics" or are merely one of minimum standards that must take into account business realities (the need for lawyers to find employment) balanced against client confidences.

"Ethics" is the term that is commonly applied to lectures about the ABA's Rules of Professional Responsibility and its predecessor, the Code of Professional Conduct. These 1983 Model Rules and the 2002 Ethics Model Rules, however, do not use the word "ethics" at all, other than in two portions of the Preamble and Scope. The Scope section indicates that the rules "simply provide a framework for the ethical practice of law."[33] The Preamble admits that the "ethics" with which the rules supposedly deal must take into account a lawyer's desire to earn "a satisfactory living."[34]

The changes over the years in the ABA's approach to ethics is beyond the scope of this paper, other than to note the absence of the word "ethics" in today's Model Rules as compared to the original ABA formulation from 1908, which was expressly called the "Canon of Ethics." In fact, the 1908 ABA Canon of Ethics stated that the "future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied.

[33] ABA Model Rule, Scope Section 16, provides in part: "The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law."

[34] Model Rule Preamble, Section 9 (emphasis supplied) states, in pertinent part: "In the nature of law practice, however, conflicting responsibilities are encountered. 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 ethical person *while earning a satisfactory living.*" The full text of Section 9 is contained in footnote, 35 below.

It cannot be maintained unless the conduct and motives of the members of our profession are such as to merit the approval of all just men."[35]

Some critics use the pejorative term "amoral technicians"[36] to describe lawyers, claiming that the Model Rules provide "a highly simplified moral universe which offers easy guideposts for action that allow lawyers to sidestep wrenching ethical dilemmas, and with the luxury of acting on behalf of clients free from the risk of moral censure."[37] Another has commented that a lawyer "sees his more degrading activities as licensed by a fundamental amorality lying beneath conventional morality."[38]

It is beyond the scope of this article to deal with ethics as an abstract ideal; rather, as the previous Examples illustrate, when the Model Rules balance the desire of a lawyer

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[35] Contrast the language of the 1908 Canon, quote above, with the language of section 9 of the current Preamble to the Model Rules. Section 9 reads, in its entirety:

> "[9] In the nature of law practice, however, conflicting responsibilities are encountered. 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 ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system."

[36] *See* Richard Wasserstrom, "Lawyers as Professionals: Some Moral Issues," 5 Hum. Rts. 1, 6 (1975). 1638. Also see Allan C. Hutchinson, "Legal Ethics for a Fragmented Society: Between Professional and Personal, in The Civil Litigation Process: Cases And Materials" 157 (Janet Walker gen. ed., 6th ed. 2005), using the phrase "amoral technician" and quoted by Trevor C.W. Farrow in "The Negotiator-As-Professional: Understanding The Competing Interests Of A Representative Negotiator," 7 Pepperdine Dispute Resolution Journal 373 (2007) at footnote 64. Also cf. Stephen Pepper, "The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities," 1986 Am. B. Found. Research J. 613, 614-615 (1986).

[37] Sharon Dolovich, "Ethical Lawyering and the Possibility of Integrity," 70 Fordham L. Rev. 1629, 1638 (2002) *(citing* Deborah L. Rhode, *In The Interests Of Justice: Reforming The Legal Profession 15* (Oxford University Press 2000)).

[38] Nancy Lewis, "Lawyers' Liability To Third Parties: The Ideology Of Advocacy Reframed," 66 Oregon Law Rev Rev. 901 at 813 (1987), quoting William H. Simon, "The Ideology of Advocacy: Procedural Justice and Professional Ethics," 1978 Wisconsin Law Review 29.

to earn "a satisfactory living"[39] with other ethical considerations, one may wonder how firmly the ethical "framework"[40] of the Model Rules is constructed.

6. CONCLUSION

Part of the reason for the imputation-of-knowledge rules is to protect client confidences, for clients have no way of knowing how broadly their confidential communications are dispersed within a firm. There appears to be, however, no single unified theory that appears to applies to conflicts. There is one set of rules (imputation-of-knowledge) that applies to clients within a law firm, and there is a second set that applies to former clients, to lawyers moving between law firms, and to judges, law clerks, and government employees seeking law firm employment; this second set looks at actual knowledge.

Whether there should be a single rule or whether two sets of rules should continue to co-exist is a policy decision. What can be anticipated, however, is that law firms will continue to grow. Right now, the smallest firms that are part of the national "Top 200" lists exceed 200 lawyers, with the biggest firms numbering in the thousands.[41] Some have claimed to spot trends that seem to separate law firms that are between 200 to 500 lawyers from those that are larger than 500, with the larger ones growing ever more powerful and prosperous.[42]

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[39] Model Rule Preamble, Section 9, quoted in full in footnote, 35, above.

[40] ABA Model Rule, Scope Section 16, quoted at footnote 33, above.

[41] According to one report, there are 19 law firms with more than 1,000 partners. See: http://www.ilrg.com/nlj250/, last accessed 03/31/08.

[42] See Leigh Jones, "Starting Pay at Top Firms Falls Farther Behind Partners", The National Law Journal (Feb. 07), available at http://www.law.com/jsp/llf/PubArticleFriendlyLLF.jsp?id=1170842572765

Lawyers and law firms are well aware that major clients need to be kept satisfied, and thus major clients not only are courted by firms but also are consulted about matters for which the Model Rules may not require consultation or formal waivers. The reason is obvious, for the loss of a major client can be devastating. As law firms get larger and larger, however, the impact of a single client on a firm's bottom line may be diminished.

In this environment, we should not be surprised if, at some point, a movement arises to add a series of rules or exceptions relating to the actual nature and knowledge of client confidences within law firms that have geographically disbursed offices so as to allow firms to create internal "screens" without prior client consent or knowledge.

Such a movement would have to deal with the need to protect actual client confidences, with the desire of the Bar to avoid rules that result in the appearance of impropriety, and with concerns about whether such rules would adversely impact unsophisticated clients.

This all comes back to the basic question: should the Model Rules be merely a "framework" for ethics to be balanced by the need of a lawyer to "earn a satisfactory living," or should the Model Rules be something more? If the Model Rules are only a practical balancing test, however, then we should not be surprised if the public continues to believe that "legal ethics" is something different from "ethics" and something less than "ethical."