You Can Check Out Anytime You Like, But You Can Never Leave: Attorney Conflict of Interest and Imputed Disqualification under Nebraska's New Bright Line Rule

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I. INTRODUCTION

“All bad precedents began as justifiable measures.”

-Julius Caesar

While Caesar’s words still have impact and import in 1994, the legal system he knew certainly bears little resemblance to the modern practice of law. Indeed, a time traveler from as recently as three decades ago might not recognize today’s legal profession. Legal employment is undergoing rapid changes and is witnessing several significant trends. First, a growing number of attorneys practice in large, multi-office law firms. While a law firm with 100 attorneys was considered remarkably large, the legal profession has grown tremendously, and now 100 member firms are commonplace. An accompanying change in the legal profession is the increasing mobility of attorneys, for no longer do most lawyers spend their entire careers at one firm. One reason for this increased mobility is that, the economic difficulties faced by the legal profession in the 1990’s have led many firms to down-size, forcing many attorneys to transfer to other firms or practice individually. Additionally, the practice of law today is largely regarded as a business, rather than a genteel practice.

3. Id.
4. Id. at n.1 (citing Note, Unchanging Rules in Changing Times: The Canons of Ethics and Intra-Firm Conflicts of Interest, 73 Yale L.J. 1059, 1078 (1964)(arguing for changes in the conflict of interest doctrine because of the recent development of 100-member firms).
5. See Model Rules of Professional Conduct Rule 1.9 cmt. (1989)(stating that “today... many [lawyers] move from one association to another several times in their careers”); McMinn, supra note 2, at 1231; Lateral Hiring Activity Among New York Firms, N.Y.L.J., Nov. 13, 1989, at 34 (survey showed “unprecedented [number of later moves] at both the associate and partnership levels”).
7. Steve Jordon, New Rules Enter Field of Law: Today’s Perry Masons Face Competition, Other Major Changes, OMAHA WORLD HERALD, Oct. 17, 1994, at 1 (quoting Creighton University Law Dean Lawrence Rafal as saying, “For many years, we never thought of ourselves as being in the business of law as much as we were in the service of helping others. I hear lawyers tell me, ‘This is a business now,’ and that’s very sad. You were a counselor at law. That meant you counseled people. Now we’re in the business of practicing law.”).
and reform with the same regularity as businesses in any other industry.  

While all of these changes may be in the best economic interest of the profession, they also have raised new and troubling questions about what it is to be a lawyer. Ethical rules and guidelines that were formulated to guide a stolid profession from a "counseling" perspective are inadequate to handle the realities of the mobile, competitive, fast-paced modern practice of law. One area where the failure of the law to keep up with the profession is most striking is the area of attorney conflicts of interest. The increasing size, mobility and volatility of legal employment has increased the possibility that a lawyer and his/her firm will have to address the ethical problem of a conflict of interest between two of its current clients or between a current and former client.

As the potential for conflicts and motions to disqualify have increased, the courts have struggled to formulate workable rules to deal with conflicts of interest. On the one hand, the courts must balance the protection of client confidences. On the other, the court must recognize the expectations of a subsequent client and the changed nature of legal employment. Most courts have done so by creating conflicts of interest rules that are increasingly flexible and fact-driven. The Nebraska Supreme Court, however, has chosen to deal with the problem of increasing conflicts of interest by articulating a rigid, bright-line rule that generally favors disqualification. This new rule has significant implications for the legal profession, the courts, and the public.

In Part II, this Note will first provide an overview of the doctrines underlying imputed or vicarious disqualification. Next, in Part III, it will address the facts of the Nebraska Supreme Court decisions in Nebraska ex rel. Freezer Services, Inc. v. Mullen, Nebraska ex rel. First Tier Bank, N.A. v. Buckley, and Nebraska ex rel. Creighton University v. Hickman. Part IV will provide an overview of how other jurisdictions deal with imputed disqualification, and Part V will

8. Mergers are now so common that the NATIONAL LAW JOURNAL has a regular column to help attorneys keep up with who has merged with whom.
10. See infra Part IV.
11. Id.
12. See infra Parts III and V.
13. See infra Part VI.
15. 244 Neb. 36, 503 N.W.2d 838 (1993).
examine how the Nebraska rule is unique in light of approaches from other jurisdictions. Finally, Part VI will highlight the problems created by the Nebraska rule, and Part VII will advocate steps which should be taken to remedy these flaws.

II. IMPUTED DISQUALIFICATION: AN OVERVIEW

A. Treatment Under the Model Code

The Model Code of Professional Responsibility ("Model Code")\textsuperscript{17} gives attorneys clear guidance regarding actual conflicts of interest. Canon 5 of the Model Code establishes that a lawyer owes undivided loyalty to his/her client. Model Code Disciplinary Rule (DR) 5-105 prohibits a lawyer from accepting employment or engaging in multiple employment if it will lead an attorney to represent "differing interests."\textsuperscript{18} The duty to preserve client confidences survives the termination of the attorney-client relationship.\textsuperscript{19}

The Model Code does not specifically address vicarious (or imputed) disqualification. Some courts have used Canon 4 and Canon 9

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\textbf{17.} The Model Code of Professional Responsibility and the Model Rules of Professional Conduct are standards promulgated by the American Bar Association (ABA), and one or the other has been adopted in most state and federal jurisdictions to govern the conduct of attorneys. The Model Code of Professional Responsibility, which is comprised of Canons, Ethical Considerations (EC) and Disciplinary Rules (DR), was adopted by the ABA in 1969. The Model Rules of Professional Conduct were adopted by the ABA in 1983 and were intended to supersede the Model Code of Professional Responsibility. At this time the Model Rules of Professional Conduct have been adopted in approximately thirty-five jurisdictions. Nebraska is governed by the Model Code of Professional Responsibility. Thus, this overview discusses only the Model Code of Professional Responsibility and not the newer Model Rules of Professional Conduct. For complete treatment of comparison of the Model Rules of Professional Conduct and the Model Code of Professional Responsibility see, Geoffrey C. Hazard, Jr. et al., The Law and Ethics of Lawyering (David L. Shapiro, et al. eds., 2d ed. 1994). For discussion of how the Model Code of Professional Responsibility and Model Rules of Professional Conduct differ in respect to the specific issue of attorney disqualification for conflict of interest, see, Jonathan J. Lerner, An Overview of the Law Governing Legal Conflicts of Interest, in LEGAL ETHICS 1990: WHAT EVERY LAWYER NEEDS TO KNOW (PLI Litig. & Admin. Practice Handbook Series No. H4-5099, 1990); Sheldon Raab, New Frontiers in Conflicts of Interest: The Mobile Attorney — When to Build a Chinese Wall in LEGAL ETHICS 1990: WHAT EVERY LAWYER NEEDS TO KNOW, at 180-189 (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5099, 1990); Julius Denenberg & Jeffrey R. Learned, Multiple Party Representation, Conflicts of Interest, and Disqualification: Problems and Solutions, 27 TORT & INS. L.J. 497 (1992).

\textbf{18.} MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(A) (1980). The Model Code of Professional Responsibility defines the term "differing interests" to "include every interest that will adversely affect either the judgement or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Definitions (1980).

\textbf{19.} MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-6 (1980).
\end{flushleft}
to justify vicarious disqualification. Courts taking this approach have generally relied most heavily on Canon 4, which simply states, "A lawyer should preserve the confidences and secrets of a client." Model Code DR 5-105(D) has been invoked to support vicarious disqualification once a Canon 4 violation has been found.20 Canon 9 of the Model Code provides that "a lawyer should avoid even the appearance of professional impropriety."21 Although Canon 9 does not provide specific guidelines for attorney behavior, some courts apply the following two-part test: (1) Is there some specifically identifiable appearance of improper conduct? and (2) Is there a likelihood of public suspicion that outweighs the social interest served by allowing a litigant to be represented by the attorney of his/her choice?22 Commentators criticize disqualification based on Canon 9, arguing that "the inherent lack of clarity in the term 'appearance of impropriety' makes it difficult for courts to establish any firm guidelines and leads to inconsistent and questionable rulings."23 Courts have likewise criticized the use of Canon 9, concluding that it "is simply too slender a reed upon which to rest disqualification."24 Indeed, not only have courts and commenta-


24. Board of Educ. v. Nyquist, 590 F.2d 1241, 1247 (2d Cir. 1979). See also Telectronics Proprietary, Ltd. v. Medtronic, Inc., 836 F.2d 1332, 1339 (Fed. Cir. 1988)(declining to use Canon 9 as justification for disqualification); United States v. Troutman, 814 F.2d 1428, 1442 (10th Cir. 1987)(holding that Canon 9 does not require disqualification remedy); Ah Ju Steel Co. v. Armaco, Inc., 680 F.2d 751, 754 (C.C.P.A. 1982)(stating that Canon 9 is too imprecise to justify disqualification); Chemical Bank v. Affiliated FM Ins. Co., No. 87 Civ. 0150, 1994 WL 141951, at *13-*18 (S.D.N.Y. 1994)(holding that Canon 9 is not enough to require disqualification absent some actual threat to taint trial); United States v. Martin, 824 F. Supp. 208, 211 (M.D. Ga. 1993)(finding that the appearance of impropriety will only be grounds for disqualification in the "rarest cases... The facts in this case simply do not amount to one of those rare cases where disqualification for appearance of impropriety is required."); President Lincoln Hotel Venture v. Bank One, Springfield, Nos. 1-92-2380, 1-92-2668, 1994 WL 533796, at *8 (Ill. App. Ct. 1994)(stating that "an attorney cannot be disqualified solely on the ground that there exists 'an appearance of impropriety' because Canon 9 by itself is 'simply too weak and too slender a reed' upon which to order disqualification.")(citations omitted); Schmidt v. Pine Lawn Memorial Park, Inc., 198 N.W.2d
tors questioned the wisdom of Canon 9, the American Bar Association itself has rejected this standard.25

Whether a court is operating under the Model Rules26 or the Model Code, when it reviews a litigant's motion to disqualify a law firm, it must examine three relationships. First, the court must consider whether the moving party had a previous attorney-client relationship. If the movant did not, the attorney is not disqualified.27 If there was a prior attorney-client relationship, the court must next examine the relationship between the two matters. If previous matter and the current matter are not substantially related, the attorney is not disqualified.28 Finally, the court must examine the relationship between the movant and the subsequent client. If their interests are not materially adverse, the attorney will not be disqualified.29

When the court is considering vicarious disqualification, the analysis is two-tiered.30 "The court first determines whether the individual attorney is disqualified [using the three step analysis outlined above]. . . . If the attorney is disqualified, the court must then determine whether the disqualification should be imputed to the attorney's new firm."31 This analysis is best explained in terms of two presumptions.

B. The First Presumption

The first presumption centers on the information that a challenged attorney received during his/her association with the first firm and is itself composed of two presumptions. First, the courts generally presume that a client discloses secrets to his/her attorney while the attorney is representing the client. Thus, the threshold inquiry in a motion to disqualify based on a prior representation is whether the moving party was actually a client.32 If the moving party never established an attorney-client relationship with the challenged lawyer, then there can be no basis for the claim that the client reasonably expected the information conveyed to the attorney to be, in fact, privileged. Once it

25. ABA Comm. on Professional Ethics and Grievances, Formal Op. 342, at n.17 (1975)(rejecting Canon 9 as "too vague a phrase to be useful").
26. See supra note 17.
27. Denenberg & Learned, supra note 17, at 498.
29. Denenberg & Learned, supra note 17, at 500-503.
31. Id.
is established that he/she was in fact actually a client, the movant must then show that the matters in which the attorney previously represented the former client are "substantially related" to the pending litigation. If the two matters are "substantially related," the courts presume that client confidences and secrets have been passed to the attorney and disqualify him/her. Although there is a split between the courts on this issue, the majority of courts have held this presumption to be irrebuttable. This strict standard is justified by the reasoning that "requiring the court to investigate whether confidences actually had passed would force the client to reveal the confidences, destroying the very protection that the Canons, the Model Code and the Model Rules have provided." Some circuits have mitigated this rule by adopting a "peripheral representation" exception. Under this exception, if the attorney is being vicariously disqualified, then the presumption is rebuttable.

33. See, e.g., supra note 32, infra note 34.
34. Brodeur, supra note 30, at 171. See, e.g., Smith v. Whatcott, 757 F.2d 1098, 1100 (10th Cir. 1985)(holding presumption irrebuttable and disqualifying firm); Kevlik v. Goldstein, 724 F.2d 844, 851 (1st Cir. 1984)(holding presumption irrebuttable and disqualifying firm); In re Corrugated Container Antitrust Litig., 659 F.2d 1341, 1347 (5th Cir. 1981)(refusing to allow external evidence to rebut presumption that client had shared confidences with former attorney); Trone v. Smith, 621 F.2d 994, 998-99 (9th Cir. 1980)(declaring that "it matters not whether confidences were in fact imparted to the lawyer by the client" once it has been established that an attorney-client relationship existed); Arkansas v. Dean Foods Prods. Co., 605 F.2d 380, 386 (8th Cir. 1979)(holding that policy considerations mandate that the court should not inquire into whether client actually revealed confidences), overruled on issue of appealability sub nom. In re Multi-Piece Rim Prod. Liab., 612 F.2d 377 (8th Cir. 1980); Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 608, 608 (8th Cir. 1977), cert. denied, 436 U.S. 905 (1976)(holding presumption irrebuttable and disqualifying attorney); Emile Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973)(holding presumption irrebuttable and disqualifying attorney); Nissan Motor Corp. v. Orozco, 595 So.2d 240, 242 (Fla. Dist. Ct. App. 1992)(finding presumption of shared confidences is irrebuttable). But see EZ Paint Corp. v. Padco, Inc. 746 F.2d 1459, 1461 (Fed. Cir. 1984)(holding presumption rebuttable but not rebutted in this case); Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 722-23 (7th Cir. 1982)(allowing attorney to rebut presumption of shared confidences); Cheng v. GAF Corp., 631 F.2d 1052, 1056-57 (2d Cir. 1980)(recognizing that presumption could be rebutted but holding it had not been rebutted in the case at bar); Parker v. Volkswagenwerk A.G., 781 F.2d 1099, 1105 (Kan. 1989)(remanding motion to disqualify to trial court for full evidentiary hearing as to whether confidential information was actually shared with challenged attorney while he was associated with prior firm).
35. McMinn, supra note 2, at 1247.
The second part of the first presumption operates on the realization that attorneys within a firm frequently share information with each other about their clients. Thus, even if an attorney does not personally represent a client, knowledge of all the information that the client divulges to a partner or associate of the firm is imputed to any attorney associated with the firm. This imputation applies to all attorneys affiliated with a firm, including temporary attorneys,37 of counsel, and co-counsel.38 The result is that all lawyers with any relationship to a firm, regardless of personal involvement, are deemed to have shared in client confidences and are personally disqualified. This presumption stems from various Model Code provisions, including DR 5-105(D), which extends a lawyer's disqualification to all partners and associates in the firm, and from Canon 4 and Canon 9.39

C. The Second Presumption

Once an attorney is found to have actual or imputed knowledge of a case during a prior association with the opposing law firm or attorney, the second presumption is triggered. That presumption holds that the disqualified attorney will share information with all attorneys in his/her new firm. Therefore, the new firm is disqualified en toto. This presumption also stems from DR 5-105(D). As indicated above, DR 5-105(D) of the Model Code by its terms appears to create an absolute bar to representation by any lawyers affiliated with a lawyer who is personally disqualified from that representation. At this stage, firm disqualification can only be avoided by rebutting the presumption that confidences will be shared. There are three alternatives that have been used to avoid the operation of the second presumption.

Some courts have held that a law firm that recognizes the potential for a disqualification motion obtain the former client's consent to the subsequent adverse representation.40 If, however, the court is granting disqualification because of the Canon 9 prohibition against the appearance of impropriety, a waiver may not prevent disqualification. A client can not waive the bar's interest in maintaining the trust and respect of the community.

A few courts allow a second alternative for avoiding disqualification of the entire firm due to the taint of an associated attorney. The moving party can seek a protective order from the court that would impose "a detailed court-ordered and supervised embargo on any com-

37. "Temporary attorneys, by virtue of their peripatetic nature, accumulate imputed knowledge from several firms; this may create conflicts of interest and imputed disqualifications for both the attorneys and the firms that employ them." McMinn, supra note 2, at 1269.
40. Raab, supra note 17, at 355-57.
munications between personnel of [a law firm] and [the personally disqualified lawyer now with the firm] with regard to any matter related to this litigation. The United States Supreme Court has endorsed the use of a protective order to avoid the drastic measure of disqualification.

In most cases, the only practical way to rebut this presumption is to employ the third alternative and erect an institutional screening device or “ethical wall”. A screen is a set of steps taken within a law firm to ensure that an infected attorney is isolated from the matter with which he/she has a conflict. Among the elements of an effective screening device are “the prohibition of discussion of confidential matters, limited circulation of documents and restricted access to files.”

Some courts also require the tainted attorney to receive no share of any fees generated by a client with which he/she has a conflict. The screening device is a recent innovation in the law. Until 1977, no court recognized the application of the method for private firms, despite the fact that it was routinely employed by securities firms and banks to avoid analogous conflict of interest problems. However, given the changing conditions of the profession, many courts have

41. NFC, Inc. v. General Nutrition, Inc., 562 F. Supp. 332, 334 (D. Mass. 1983). See also Amarin Plastics, Inc. v. Maryland Cup Corp., 116 F.R.D. 36 (D. Mass. 1987)(court would upon additional evidence issue protective order to prevent plaintiff’s attorneys from engaging in ex parte communications with defendant’s former office). At least one commentator advocates the use of protective orders to avoid the “drastic” “all-or-nothing nature of attorney disqualification.” Raab, supra note 17, at 357-59. The author bolsters his argument for increased use of protective orders by pointing to situations where courts have imposed such orders, mentioning Nebraska’s use of protective orders in order to limit adverse pretrial publicity. Id.


43. These screening devices are sometimes called Chinese walls. However, because of the potentially inappropriate ethnic connotations of this term, this Note will join those who have preferred to refer to these mechanisms by the more accurate term “screen” or “screening device.” See H. Low, “Chinese Wall” Adds to a Barrier of Cultural Misunderstanding, THE RECORDER, Apr. 21, 1988. One court has criticized the term “Chinese wall” because it is “suggestive of attempts in the context of a large law firm to physically cordon off attorneys possessing information from the other members of the firm[,] . . . an approach [which] tends to cast a shadow of disrepute on attorneys separated in this manner from their professional colleagues.” Nemours Found. v. Gilbane, Aetna, Fed. Ins. Co., 632 F. Supp. 418, 428 (D. Del. 1986). The court expressed its preference for the term “cone of silence” which “more appropriately describes the responsibility of the individual attorney to guard the secrets of his former client.” Id.

44. Lerner, supra note 17, at 71.

45. Id.

46. Brodeur, supra note 30, at 177-78.


48. See supra Part I and accompanying notes.
accepted and some have even actively encouraged the use of screening mechanisms to avoid conflicts of interest.49 There are some courts, however, that hold the second presumption to be irrebuttable.50 In these jurisdictions, once an individual attorney is "tainted" with knowledge about the opposition, the entire firm must be disqualified.51

When lawyers are disqualified because of the operation of one of these presumptions, they are subject to "single imputation." For example, if attorney A is personally disqualified because, even though she has no actual knowledge of a prior client's case, knowledge from prior associates is imputed to her, then there is only one presumption operating against her. Likewise, when a firm is disqualified because the court imputes the actual knowledge of an attorney to the entire firm, the only presumption operating is that the "infected" attorney will, perhaps inadvertently, share this information with his/her new affiliates. This single imputation has been the target of a great deal of academic criticism not only because of the hardship it works against attorneys and clients, but also because any danger of prejudice to the previous client could have easily been prevented.52

When both presumptions work together, however, the challenged firm is subject to "double imputation," whereby an attorney's imputed knowledge is then, in turn, imputed to his/her new firm. In this situation there is no actual conflict. The firm has no access to confidential information because the "infected" attorney has no information to im-

49. See infra Part IV and accompanying notes.
50. Id.
51. The operation of these two presumptions is particularly draconian considering the jurisdictional position that motions to disqualify occupy. The United States Supreme Court has limited the jurisdiction of federal appellate courts over appeals from disqualification motions by holding that decisions granting or denying attorney disqualification motions are interlocutory and not subject to appeal as final judgments. See Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 425 (1985)(providing that grants of disqualification motions are not subject to appeal as final judgments); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 370 (1981)(stating that denials of disqualification motions are not subject to appeal as final judgments).

Once the case has been finally disposed of, in order to overturn a judgment adverse to the current client's interest, the disqualified firm must show that it would have prevailed had it remained counsel to the client. See Armstrong v. McAlpin, 625 F.2d 433, 440-41 (2d Cir. 1980)(discussing, in dictum, the legal test governing appeal of final judgment), vacated on other grounds, 449 U.S. 1106 (1981). For an additional discussion of the procedural status and problems of a motion to disqualify, see McMinn, supra note 2, at 1265 n.255.

52. See, e.g., Steven H. Goldberg, The Former Client's Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly, 72 MINN. L. Rsv. 227 (1987)(criticizing the use of imputation to disqualify attorneys and arguing that disqualification is not a solution to conflict of interest).
This approach has been subject to nearly universal criticism. Further, it has not been accepted by any jurisdiction in which it had been argued; nevertheless, this is the approach adopted by the Nebraska Supreme Court in its consideration of this issue.

III. FACTS—NEBRASKA EX REL. FREEZER SERVICES, INC. v. MULLEN; NEBRASKA EX REL. FIRSTIER BANK, N.A. v. BUCKLEY AND NEBRASKA EX REL. CREIGHTON UNIVERSITY v. HICKMAN

In Nebraska ex rel. Freezer Services, Inc. v. Mullen, Freezer Services' attorney was originally North & Black, with John North, Jr. serving as the lead attorney in the litigation. McGrath, North, Mullen & Kratz, P.C. (McGrath, North) was opposing counsel. In 1989, Freezer Services dismissed North & Black and hired Cline, Williams, Wright, Johnson & Oldfather (Cline, Williams). North & Black assisted Cline, Williams in preparing for the pending litigation. After North & Black's involvement with Freezer Services had ended, North & Black merged with McGrath, North. In August of 1989, Cline, Williams found out about the proposed merger, and objected to the situation. McGrath, North explained that it had erected a screening device whereby all employees were instructed not to discuss the case with any former North & Black employee and all files were kept locked in an office to which North, Jr. and his associates did not have access.

53. Arkansas v. Dean Foods Prods. Co., 605 F.2d 380, 387 (8th Cir. 1979)(stating that "[D]oubling up on the imputation theory of Canon 4 in this case would be logically unjustifiable—[the tainted attorney] could not impart knowledge he did not have. It would also be ethically unjustifiable, requiring the invention of actual conflict where none exists.

54. See infra Part IV and accompanying notes.

55. See infra Part V.


57. 244 Neb. 36, 503 N.W.2d 838 (1993).

58. 245 Neb. 247, 512 N.W.2d 374 (1994).


60. Id. at 983, 458 N.W.2d at 248.

61. Id. at 984, 458 N.W.2d at 248. Shortly before the North & Black merger, the lead attorney handling the Freezer Services litigation at McGrath, North circulated a memorandum which read, in part:

With respect to this litigation or any other matter regarding [the parties], the following rules will apply:
1. You should not discuss this litigation or any matters which might relate in any way to [the parties] with any members of North & Black, P.C. who become employees of this firm. This includes any staff members of North & Black, P.C.
2. Do not request any information or documents from these new employees.
3. All files regarding this litigation will remain in my office in a locked file cabinet under my control.
Freezer Services nevertheless filed a motion to disqualify McGrath, North.\textsuperscript{62} The district court overruled the motion to disqualify, but specifically required McGrath, North to continue the office practices they had instituted to isolate the North & Black attorneys and staff.\textsuperscript{63} Freezer Services appealed. Since McGrath, North did not dispute the conclusion that North, Jr., had to be disqualified, the only question on appeal was whether to impute North, Jr.'s disqualification to McGrath, North. McGrath, North argued that it could rebut the presumption that North, Jr. would share his knowledge with his new firm by showing that it had adopted procedures to prevent information about the case from flowing through the disqualified attorney to the rest of the firm.\textsuperscript{64} Although the Nebraska Supreme Court stated in dicta that the presumption of shared confidences might be rebuttable through the use of an ethical wall, it refused to apply it here.\textsuperscript{65} The court overturned the lower court's order. In so deciding, the court specifically limited its ruling to the situation where the infected attorney was intimately involved in representing the prior client. As the court put it:

\textit{[W]hen an attorney who was intimately involved with the particular litigation \ldots has obtained confidential information pertinent to that litigation, terminates the relationship and [then] becomes associated with a firm which is representing an adverse party in the same litigation, there arises an irrebuttable presumption of shared confidences, and the entire firm must be disqualified from further representation.}\textsuperscript{66}

The court emphasized that in this case, the "infected" attorney was "deeply involved" in the litigation before moving to the second firm.\textsuperscript{67}

Following \textit{Freezer Services}, the court heard the case of \textit{Nebraska ex rel. FirsTier Bank, N.A v. Buckley}.\textsuperscript{68} In that case, FirsTier was being sued by two separate plaintiffs, both alleging self-dealing by the bank in regard to trusts held by the bank. In 1971, the time of the disputed transaction, the bank was represented by the firm of Fitzgerald, Brown, Leahy, McGill & Strom (Fitzgerald, Brown). That firm represented the bank against similar allegations by different plaintiffs regarding different trusts. In 1988, eight attorneys from Fitzgerald, Brown left and, with others, formed the firm of Lieben, Dahlk, Whit-

\begin{itemize}
\item[4.] Members of the law firm North & Black, P.C. who become employees of this firm and any of its staff will be advised of these procedures.
\item[5.] Any new employees of this firm will be advised of these procedures as well.
\end{itemize}

\textit{Id.}

\textit{Id.}

\textit{Id.} at 985, 458 N.W.2d at 248.

\textit{Id.} at 999, 458 N.W.2d at 250-51.

\textit{Id.} at 992, 458 N.W.2d at 252.

\textit{Id.} at 993, 458 N.W.2d at 253.

\textit{Id.}

\textit{Id.}

\textit{244} Neb. 36, 503 N.W.2d 838 (1993).
CONFLICT OF INTEREST

Houghton, Slowiaczek & Jahn, P.C. (Lieben, Dahlk). Lieben, Dahlk represented the plaintiffs in the current action against FirsTier. FirsTier moved to disqualify, claiming that since this case was similar to the earlier settled claim, Lieben, Dahlk should be disqualified by virtue of some of its attorneys’ former association with Fitzgerald, Brown.69 Of the attorneys who moved from Fitzgerald, Brown to Lieben, Dahlk, only one, T. Geoffrey Lieben, was associated with Fitzgerald, Brown at the time of the alleged self-dealing and the settlement of the estate dispute.70 Lieben submitted all his time sheets from the time-frame in question, which showed that on no occasion did he work on any of the files involved.71 FirsTier admitted that there was no evidence that Lieben had ever had any involvement with FirsTier in its capacity as a client of Fitzgerald, Brown.72 The Nebraska Supreme Court nevertheless disqualified Lieben and imputed that disqualification to the entire Lieben, Dahlk firm.73

In so doing, the Court announced a “bright line” rule that “an attorney must avoid the present representation of a cause against a client of a law firm with which he or she was formerly associated, and which cause involves a subject matter which is the same as or substantially related to that handled by the former firm while the present attorney was associated with that firm.”74 It does not matter if the attorney can prove that he/she personally did no work for this client. The court explained that matters are “substantially related” if counsel could have received confidential information from the former client that could subsequently be used against it.75

In adopting this rule, the court said it was acting to achieve two goals. First, the court sought to protect the first client’s right to preserve its confidences.76 Second, the court considered the public’s perception of the legal profession, invoking the Canon 9 prohibition on the appearance of impropriety.77 The court asserted that a client will be reluctant to confide in his/her attorney if there is a possibility that a member of the firm will eventually end up working for opposing counsel.78

69. Id. at 38-39, 503 N.W.2d at 840.
70. Id. at 38, 503 N.W.2d at 840. In fact, he was the only member of Fitzgerald, Brown that had moved to Lieben, Dahlk who had even been an attorney in 1971. Id.
71. Id. at 40, 503 N.W.2d at 841.
72. Id.
73. Id. at 45, 503 N.W.2d at 844.
74. Id.
75. Id. at 43, 503 N.W.2d at 843.
76. Id. at 45, 503 N.W.2d at 844.
77. Id.
78. See id.
The court further clarified this new rule in *Nebraska ex rel. Creighton University v. Hickman*. Creighton University was suing American Medical International, Inc. (AMI) and St. Joseph Hospital, Inc. (AMISUB). Creighton was represented by McGrath, North. AMI and AMISUB were represented by Bickel & Brewer, a Texas firm. Bickel & Brewer relocated several attorneys and support staff to Omaha to handle this litigation. In order to handle the quantity of information generated by discovery, Bickel & Brewer hired several temporary employees through an employment agency. One of the employees sent by the agency was Lesli Walzak, a disbarred attorney, who previously worked for McGrath, North: Walzak had logged about 40 hours on this case and had written memoranda about this litigation. In obtaining employment with Bickel & Brewer, Walzak misrepresented her former association with McGrath, North, claiming that she had worked only as a clerical and administrative employee. When directly asked if she had any contact with any matter concerning Creighton, Walzak lied by telling Bickel & Brewer that she had not. During the course of her employment with Bickel & Brewer, Walzak was recognized by members of McGrath, North who informed Bickel & Brewer of the true nature of her past association with the firm and the case. Bickel & Brewer immediately dismissed Walzak. Nevertheless, Creighton filed a motion to disqualify Bickel & Brewer. The trial court denied the motion, finding that Creighton had failed to show that Walzak was "intimately involved" with the particular litigation, as required by the holding in *Freezer Services*. Creighton petitioned for a writ of mandamus.

The Nebraska Supreme Court held that it was not necessary that the attorney (or in this case, former attorney) have had intimate involvement with the litigation as grounds for disqualification of a law firm. Instead, the court broadened its "bright line" rule of *FirsTier* by applying it to nonlegal employees who were not intimately involved with the litigation while with their former employers. Although Walzak was not an attorney at the time she was employed by Bickel & Brewer, and although she may have performed only clerical tasks for Bickel & Brewer, the court held that the rule announced in *FirsTier* was applicable and required the disqualification of Bickel & Brewer. While the court recognized that the second client had an interest in

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79. 245 Neb. 247, 512 N.W.2d 374 (1994).
80. Id. at 250, 512 N.W.2d at 376.
81. Id.
82. Id. at 250, 512 N.W.2d at 377.
83. Id. at 252, N.W.2d at 377.
84. Id. at 251, 512 N.W.2d at 377.
85. Id. at 253, 512 N.W.2d at 378.
86. Id.
being represented by the attorney of its choice, it determined that avoiding the appearance of impropriety outweighed the hardship.87

IV. CONFLICT OF INTEREST IN OTHER JURISDICTIONS

A. Federal Courts

The way the federal courts have approached imputed disqualification is relevant to a discussion of state rules of disqualification for two main reasons. First, when federal courts adopt by local rule the ethical rules of the state in which they sit, federal disqualifications are often interpretations of state rules.88 Second, many state courts look to approaches utilized by the federal courts when formulating their own position on ethical issues in general and imputed disqualification in particular.89 The federal courts are currently split on the issues of which presumptions in a motion to disqualify are rebuttable and what evidence is sufficient to overcome each presumption.90

In Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.,91, the Second Circuit cautioned against a “blanket approach” to disqualification that would employ disqualification frequently, noting the many negative consequences of using disqualification too frequently. The court stated that in order for disqualification to be appropriate, there must be a “realistic chance that confidences were disclosed” by the former client to the challenged attorney.92 In Government of India v. Cook Industries,93 the same circuit court stated that the issues in the

87. Id. at 252, 512 N.W.2d at 378. (stating that “We are not unmindful of the hardship this places upon AMI and AMISUB in the underlying action. However, this hardship is outweighed by the necessity of maintaining the confidentiality of Creighton’s communications with McGrath, North and of avoiding the appearance of impropriety.”).
90. Brodeur, supra note 30, at 179.
91. 518 F.2d 751 (2d Cir. 1975), overruled en banc on other grounds sub nom. Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980).
92. Id. at 757.
93. 569 F.2d 737, 739-40 (2d Cir. 1978). See also Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980).
second matter must be "identical" or "essentially the same." The Second Circuit had never upheld the use of a screen in a case involving a nongovernment lawyer. Thus, in the Second Circuit, the challenged attorney may be able to rebut the first presumption, that he/she shared in confidential information from the previous firm, but may not use the screening defense to rebut the second presumption, that he/she will share that information with the new firm. While Second Circuit courts seem satisfied that most attorneys would not intentionally divulge confidential information relating to the case, they are concerned with the ongoing risk of inadvertent disclosure.

The lead case regarding disqualification in the Third Circuit is INA Underwriters Insurance Co. v. Rubin. There, the Third Circuit Court of Appeals allowed the challenged firm to rebut the second presumption through the use of screening. The court also specifically noted the minimal contacts the disqualified attorney had with the adverse party, which implies that it may view the first presumption as rebuttable.

The Fifth Circuit considers both presumptions rebuttable. In In re American Airlines, Inc. the court reaffirmed its position that an attorney may rebut the first presumption that he/she actually received confidential information from the previous firm. In LeMaire v. Texaco, Inc., a district court in the Fifth Circuit did not even require a formal screen, allowing testimonial evidence to be used to rebut the presumption that a migrant attorney had shared his confidences with the members of his new firm. The court held that the presumption of shared confidences was rebuttable and that vicarious disqualification need not be automatic. If the LeMaire court was willing to accept post-facto testimonial evidence as proof that confidences had not been shared, an ethical wall would certainly rebut the presumption of shared confidences.

94. See also Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 754 (2d Cir. 1975), overruled en banc on other grounds sub nom. Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980).
95. Raab, supra note 17, at 214.
96. See e.g., Cheng v. GAF Corp., 631 F.2d 1052, 1058 (2d Cir. 1980) (upholding disqualification since the law firm involved was "relatively small" and the attorney's activities would inevitably bring him into "day-to-day contact with defense counsel"), vacated on jurisdictional grounds and remanded, 450 U.S. 903 (1981).
98. Id. The court cautioned, however, that screening may be impractical in many situations. Id. at 5.
99. Id. at 5.
100. 972 F.2d 605 (5th Cir. 1992).
102. Id.
103. Raab, supra note 17, at 221-22.
The Sixth and Seventh Circuits have likewise held that both presumptions are rebuttable. In *Schiessle v. Stephens*, the Seventh Circuit adopted a three-step test for disqualification:

First, we must determine whether a substantial relationship exists between the subject matter of the prior and present representations. If we conclude a substantial relationship does exist, we must next ascertain whether the presumption of shared confidences with respect to the prior representation has been rebutted. If we conclude this presumption has not been rebutted, we must then determine whether the presumption of shared confidences has been rebutted with respect to the present representation. Failure to rebut this presumption would also make disqualification proper.

The Seventh Circuit has not only approved screening devices, but actively advocates them. In *Panduit Corp. v. All States Plastic Manufacturing Co.*, the Federal Circuit held that the Seventh Circuit had not made screening the "sine qua non of establishing the non-existence of the presumed fact that confidences have been shared," and allowed testimonial evidence to rebut the presumption of shared confidences even absent the erection of an ethical wall. In *Maning v. Waring, Cox, James, Sklar and Allen*, the Sixth Circuit has adopted the Seventh Circuit *Schiessle* test and endorsed the use of screening procedures to rebut the second presumption of shared confidences.

The Eighth Circuit has not been so flexible regarding the first presumption. "[T]he law in the Eighth circuit . . . [is] that the attorney-client relationship raises an irrefutable presumption" that clients have disclosed confidences to their attorneys, and that the attorney

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105. 717 F.2d 417 (7th Cir. 1983).

106. The Nebraska Supreme Court, acknowledging that "[t]here is a strong trend in the federal courts holding that [the presumption that an infected attorney will share confidences with the second firm] is rebuttable," specifically considered and rejected this tripartite analysis without explanation. *Nebraska ex rel. Freezer Servs., Inc. v. Mullen*, 235 Neb. 981, 989-90, 458 N.W.2d 245, 251-52 (1990).

107. *Schiessle v. Stephens*, 717 F.2d 417, 421 (7th Cir. 1983)(stating, "When an attorney with knowledge of a prior client's confidences and secrets changes employment and joins a firm representing an adverse party, specific institutional mechanisms must be in place to ensure that information is not shared with members of the new firm, even if inadvertently.").

108. 744 F.2d 1564 (Fed. Cir. 1984)(applying 7th Circuit law).

109. Id. at 1580.


has shared those confidences with his/her associates in the firm.\textsuperscript{112} However, in \textit{Arkansas v. Dean Foods Products Co.},\textsuperscript{113} the court seemed to adopt a flexible standard regarding the second presumption, noting that "[r]igid rules can be sterile and lacking in universal application."\textsuperscript{114} \textit{Dean Foods} also explicitly refused to impute an infected attorney's imputed knowledge to co-workers, declaring, "Doubling up on the imputation theory of Canon 4 in this case would be logically unjustifiable—[an attorney] could not impart knowledge he did not have."\textsuperscript{116} The \textit{Hallmark} court also suggested that it would be open to the use of a screening device, noting that one reason for upholding disqualification in that case was that:

[The subsequent firm] did not build a 'Chinese Wall' and [the infected attorney] was not 'screened off' when he joined the new firm. . . . Because no 'Chinese Wall' was erected, and because the facts in this action give rise to the reasonable possibility of specifically identifiable improprieties, a reasonable person would see an impropriety in the continued participation of the law firm.\textsuperscript{116}

The Eleventh Circuit, in \textit{Cox v. American Cast Iron Pipe Co.},\textsuperscript{117} implied that the first presumption of confidences shared by the client to his/her attorney was rebuttable, although the standard for establishing that no confidences were shared would be very high.\textsuperscript{118} Although the court found that the challenged attorney would have to be disqualified, it declined to disqualify the entire firm, noting that the

\begin{itemize}
  \item \textsuperscript{111} Hallmark Cards, Inc. v. Hallmark Dodge, Inc., 616 F. Supp. 516, 519 n.1 (W.D. Mo. 1985). \textit{But see} EZ Paintr Corp. v. Padco, Inc., 746 F.2d 1459 (Fed. Cir. 1984), where the Federal Circuit interpreted Eighth Circuit law to support the proposition that this presumption is rebuttable:

  The precise rule on disqualification applied in the Eighth Circuit . . . is not clear but we are satisfied that that Circuit would not be less solicitous of client confidentiality than the general weight of authority which is that . . . there is a presumption (in the situation of a private lawyer's "changing sides") that confidential disclosures passed to the challenged lawyer, but that presumption is rebuttable.

  \textit{Id. at 1461} (emphasis added).

  \textsuperscript{112} 605 F.2d 380 (8th Cir. 1979), overruled on issue of appealability sub nom. In re Multi-Piece Rim Prods. Liab. Litig., 612 F.2d 377 (8th Cir. 1980).

  \textsuperscript{113} \textit{Id. at 383}.

  \textsuperscript{114} \textit{Id. at 387}.

  \textsuperscript{115} \textit{Hallmark Cards, Inc. v. Hallmark Dodge, Inc.}, 616 F. Supp. 516, 521 (W.D. Mo. 1985). \textit{See also} Blair v. Armontrout, 916 F.2d 1310, 1333 (8th Cir. 1990)(holding in a criminal prosecution, where the defendant claimed a conflict with the Attorney General, that "a screening mechanism or Chinese Wall could be implemented to avoid disqualifying the entire Attorney General's office." The court also cited with approval several academic commentaries advocating the use of screening to avoid disqualification.).

  \textsuperscript{116} 847 F.2d 725 (11th Cir. 1988).

  \textsuperscript{117} \textit{Id. at 729} (stating "[B]ecause [the attorney] actually represented [the client seeking disqualification], he is charged with the virtually unrebuttable presumption that he has received confidential information from the company.") (second emphasis added).
infected attorney had “been screened from all involvement in this litigation”\textsuperscript{119} and citing with approval the Seventh Circuit \textit{Schiessle} decision.\textsuperscript{120}

\section*{B. State Courts}

Several states have codified the rebuttability of the presumptions underlying disqualification in their ethical guidelines for the legal profession.\textsuperscript{121} Michigan allows both presumptions to be rebutted.\textsuperscript{122} Thus, in order to avoid disqualification, an infected attorney can prove that he/she did not acquire actual information adverse to the former client,\textsuperscript{123} or the firm can institute the prescribed screening procedures to rebut the presumption that the confidential information will be shared with the second firm.\textsuperscript{124} Illinois likewise allows for both presumptions to be rebutted, either by testimonial evidence regarding the challenged attorney’s lack of relevant information acquired while at

\begin{itemize}
\item \textsuperscript{119} Id. at 732.
\item \textsuperscript{120} Id. at 732 n.11.
\item \textsuperscript{121} For a general discussion of state rules regarding disqualification, see M. Peter Moser, \textit{Chinese Walls: A Means of Avoiding Law Firm Disqualification When a Personally Disqualified Lawyer Joins the Firm}, 3 GEO. J. LEGAL ETHICS 399, 410-413 and accompanying notes (1990),
\item \textsuperscript{122} Rule 1.09(b) of the MICHIGAN RULES OF PROFESSIONAL CONDUCT (1990) allows the first presumption to be rebutted:
\begin{itemize}
\item (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, whose interests are materially adverse to that person; and about whom the lawyer had acquired information protected by rule 1.6 and 1.9(c) that is material to the matter;
\end{itemize}
\item unless the former client consents after consultation.
\item If the attorney has actually acquired confidential information, Rule 1.10(b) provides:
\begin{itemize}
\item (b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter, unless:
\begin{itemize}
\item (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
\item (2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.
\end{itemize}
\end{itemize}
\item See also State Bar of Michigan, Op. R-4 (1989)(law firm may avoid disqualification when joined by lawyer who worked on opposite side of cases currently in new firm as long as institutional screening is employed in accordance with Michigan Rule 1.10(b)).
\item \textsuperscript{124} Moser, supra note 121, at 411.
the prior firm, or by the implementation of a screen to avoid the communication of that information to the subsequent firm.\textsuperscript{125}

Other states have held the second presumption rebuttable by allowing the use of screening devices. The \textit{Oregon Revised Code of Professional Responsibility} permits a law firm to accept or continue representation of a client when a lawyer entering the firm is disqualified, as long as "the personally disqualified lawyer is screened from any form of participation or representation in the matter."\textsuperscript{126} In order to assure the effectiveness of the screening, both the personally disqualified lawyer and another firm lawyer must serve affidavits of compliance on the lawyer's former firm at the outset and at the conclusion of the representation.\textsuperscript{127} The \textit{Pennsylvania Rules of Professional Con-
duct allow the firm to avoid disqualification if (1) the disqualified lawyer is screened from participation in the matter, (2) the disqualified lawyer receives no part of the fees and (3) the affected opposing party is given written notice so it can ensure compliance.128 The Tennessee Supreme Court Board of Professional Responsibility applies the three-step analysis adopted by the Seventh Circuit.129 In a formal opinion, the board stated that screening avoids disqualification of an entire firm in a case where that firm is joined by a lawyer with knowledge of confidential information of opponents of the new firm which the lawyer gained in a prior association.130

128. Rule 1.10(b) of the PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT (1994) provides:

When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the 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 client to enable it to ascertain compliance with the provisions of this rule.

The comment to the Rule omits any explanation of the measures to be applied to assure effective screening. PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT Rule 1.10(b) cmt. (1988).


Many jurisdictions that do not have ethical rules specifically allowing for one or both the presumptions to be rebutted have nevertheless allowed one or both presumptions to be rebutted. The Florida courts have held the first presumption of confidences shared with a challenged attorney at the first firm to be irrebuttable, but will not exercise the second presumption against a subsequent firm unless the tainted attorney has actual knowledge of the relevant case. The courts found support for this proposition in the Rules Regulating the Florida Bar.

The Kansas Supreme Court recently held that disqualification can be avoided if the first presumption can be rebutted through testimonial evidence to show that no sharing of material, confidential information took place while the challenged attorney was associated with the first firm. While the Kansas court has not expressly ruled on whether the second presumption is rebuttable, it has disapproved the use of screening devices unless all parties to the litigation agree that such a solution is appropriate in a given case.

The Washington Court of Appeals has recognized the propriety of screening devices to rebut the second presumption. The court set forth guidelines in establishing appropriate screening measures for law firms facing a conflict by one of its members. A firm, upon perceiving a possible disqualification of one of its attorneys, should establish and document a policy of (1) excluding the attorney from participation in the cases, (2) denying the attorney access to the files, (3) excluding the attorney from all fees earned from those cases, (4) refraining from discussing the case in the attorney's presence, and (5) precluding the attorney from disclosing any information about the opposing party or about the public agency which would not otherwise be available to the


132. Id. (interpreting Rules Regulating the Florida Bar 4-1.9 and 4-1.10). For a detailed analysis of the disqualification rules as they operate in Florida, see Adele I. Stone, Professional Ethics: 1993 Leading Cases and Significant Developments in Florida Law, 18 Nova L. Rev. 597 (1993).

133. Parker v. Volkswagenwerk A.G., 781 P.2d 1099, 1105 (Kan. 1989) (remanding motion to disqualify to trial court for full evidentiary hearing as to whether confidential information was actually shared with challenged attorney while he was associated with prior firm).

134. Id. at 1106-07. For a discussion of the series of cases dealing with motions to disqualify in Kansas and the import of the Court's decision in Parker, see Mark F. Anderson, Motions to Disqualify Opposing Counsel, 30 Washburn L.J. 298 (1991).

CONFLICT OF INTEREST

public. Other states have joined the trend in allowing the second presumption to be rebutted.

As the foregoing illustrates, the majority of states, either through promulgation of rules governing the professional conduct of the bar in their jurisdictions or through the operation of case law in which courts exercise their power to govern the behavior of the attorneys which practice before them, allow rebuttal of the first presumption, the second presumption, or both. The Nebraska rule announced in FirsTier, however, makes both presumptions irrebuttable.

V. HOW THE NEBRASKA RULE IS UNIQUE

The Nebraska Supreme Court in FirsTier declared the "bright line rule" that:

An attorney must avoid the present representation of a cause against a client of a law firm with which he or she was formerly associated, and which cause involves a subject matter which is the same as or substantially related to that handled by the former firm while the present attorney was associated with that firm.

The court adopted this rule even though the challenged attorney had proven that he had no actual knowledge of the matter currently at issue. Thus, the court held the first presumption irrebuttable. An attorney can do nothing to prevent being tainted by information given by a client to one of his/her associates.

The court did not stop at imputing knowledge to the challenged attorney. It then disqualified the challenged attorney's entire firm, even though none of the other members of the firm were personally tainted by the prior matter. The court had laid the foundation for this approach in Freezer Services, where it declared in dicta that "[i]n some factual situations the second firm might be disqualified by reason of a double presumption of shared confidences which works to im-

136. Id. at 1322. For a complete discussion of this holding and its applicability in the Washington courts, see Bryce E. Brown & Christopher M. Herriges, Comment, Dovetailing the "Chinese Wall" Defense with the Rules of Professional Conduct—Washington Should Finish What It Has Started, 26 GONZ. L. REV. 569 (1991) (advocating a change in the Washington Rules of Professional Conduct to codify and formalize the use of screens to rebut the presumption of shared confidences).

137. See, e.g., Ex parte Taylor Coal Co., Inc., 401 So.2d 1 (Ala. 1981) (finding no automatic disqualification of lawyer or his firm, even when "substantial relationship" to prior matter is found); Jenson v. Touche Ross & Co., 335 N.W.2d 720 (Minn. 1983) (holding that law firm not disqualified when the presumption of sharing of confidences by the tainted lawyer had been rebutted).


139. Id. at 39-40, 503 N.W.2d at 841.

140. Id. at 45, 503 N.W.2d at 844.

141. Id. at 39-40, 503 N.W.2d at 841.

142. Id. at 46, 503 N.W.2d at 845.
pute disqualification to that firm." Immediately after that declaration the court included the following citation sentence: "But see Panduit Corp., . . . (under certain facts, the double imputation theory would invent conflicts where none exist)." The court's use of "but see" as an introductory signal gives particular insight to the court's position, since the Bluebook explains that "But see" is to be used when "cited authority clearly supports a proposition contrary to the main proposition." If Panduit Corp., which expressly rejects double imputation, is an authority that "clearly supports a proposition contrary to the stated proposition," the court's position must be that double imputation is appropriate. The court, therefore, endorsed double imputation in Freezer Services, and then gave force to that dicta in FirsTier. When read together, Freezer Services and FirsTier clearly establish that, in Nebraska, neither presumption is rebuttable.

No other court has endorsed this double imputation. The Second Circuit was one of the first courts to consider the issue in Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp. There the court refused to disqualify a firm when one of its attorneys had been an associate with opposing counsel's eighty member firm, since there was no basis for assuming that all client confidences revealed to members of the firm had in actuality been revealed to the tainted attorney. The court held that “[t]o apply the remedy when there is no realistic chance that confidences were disclosed would go far beyond the purpose of those decisions” granting disqualification. Since Silver Chrysler, double imputation has been rejected virtually out of hand by the courts that have considered it, with opinions declaring that, “[s]uch a rule would be unsound logically and indefensible practically,” and that “resort to so drastic a measure would not only be

146. The Bluebook: a Uniform System of Citation Rule 1.2(c)(15th rev. ed. 6th prtg. 1992)(emphasis in original).
147. See supra Part IV. See also H. Liebman, The Changing Law of Disqualification: The Role of Presumption and Policy, 73 Nw. U. L. Rev. 996, 1000 n.18 (1979)(noting that “[t]he courts have not gone so far as to adopt a ‘double imputation’ theory”); Moser, supra note 121, at 405 (stating that no court has adopted double imputation); Developments in the Law: Conflicts of Interest in the Legal Profession, 94 Harv. L. Rev. 1244, 1357 (1981).
148. 518 F.2d 751 (2d Cir. 1975).
149. Id.
150. Id. at 757.
unwise, but would also set disturbing precedent.” Every other jurisdiction allows some flexibility in the operation of one or both of the presumptions. The Nebraska Supreme Court can draw support for holding either one of the presumptions alone as irrebuttable, but it stands alone in the proposition that there is no escape from both presumptions working together.

The breadth of this rule can best be understood by considering a factual situation in which it would operate. Suppose attorney Cornelius Husker begins his career in Bugeater & Associates law firm. Bugeater & Associates represents Free Shoes University (FSU), a large corporate defendant, in a claim asserted by Nebraska Collegiate Apparel Association (NCAA). While at Bugeater & Associates, Cornelius will have knowledge regarding FSU's case, in addition to potentially thousands of other clients and matters, imputed to him. This imputation is irrebuttable, even though it is not possible that Cornelius worked on or even knew about all of these matters. After a few years, Cornelius decides he wants to strike out on his own. He joins forces with two other attorneys, Jay Hawk and Ralph E. Buffalo, who are themselves leaving large firms. All three attorneys form Big Eight, P.C. All members of Big Eight will now be prohibited from representing NCAA, or any client with a claim against FSU that may be

152. Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1578 (1984). See also Blair v. Armontrout, 916 F.2d 1310, 1333 (5th Cir. 1990)(refusing to disqualify entire Attorney General's Office by reimputing imputed knowledge of tainted lawyer); Arkansas v. Dean Foods Prods. Co., 605 F.2d 380, 387 (8th Cir. 1979), overruled on issue of appealability sub nom. In re Multi-Piece Rim Prod. Liab. Litig., 612 F.2d 377 (8th Cir. 1980)(stating that “[d]oubling up on the imputation theory . . . would be logically unjustifiable—[the challenged attorney] could not impart knowledge he did not have. It would also be ethically unjustifiable, requiring the invention of actual conflict where none exists.”); Donohoe v. Consolidated Operating & Prod. Corp., 691 F. Supp. 109, 119-20 (N.D. Ill. 1988)(refusing to disqualify entire law firm, even though one of its members was subject to disqualification on the basis of imputed knowledge from prior association with opposing counsel's firm); U.S. Lord Elec. Co. v. Titan Pac. Const. Corp., 637 F. Supp. 1556, 1566 (W.D. Wash. 1988)(refusing to disqualify firm based on imputed knowledge of an associated attorney when the tainted attorney was “not likely to have retained more than a distant recollection of [the] former client's affairs”); In re Farmers Co-Op of Ark. and Okla., Inc., 53 B.R. 600, 604 (Bankr. W.D. Ark. 1985)(finding attorney's disqualification on the basis of imputed knowledge not imputed to entire firm); Richers v. Marsh & McLennan Group Assoc., 459 N.W.2d 478, 482 (Iowa 1990)(finding no appearance of impropriety problem with allowing associate of tainted attorney to continue representation when the tainted attorney is charged only with imputed knowledge); Carlson v. Langdon, 751 P.2d 344, 349 (Wyo. 1988)(stating “[W]e chose not to carry the irrebuttable presumption any further than necessary, and . . . we would not adopt a second-stage irrebuttable presumption in cases involving imputed knowledge.”); Chambers v. Superior Court of Shasta County, 121 Cal. App. 3d 893 (Cal. Ct. App. 1981)(refusing to reimpute knowledge of a former government attorney to her private firm).

153. See supra Part IV.
substantially similar to the case of FSU v. NCAA. All of the attorneys at Big Eight will have knowledge of all of the clients of Bugeater & Associates (as well as Jay and Ralph’s prior firms) imputed to them.

Suppose further that Big Eight flourishes and decides to hire a fourth attorney, Tex S. Longhorn. Tex represents NCAA. FSU will then be able to bring a disqualification motion against Tex on the grounds that Cornelius’ imputed knowledge of FSU’s case has been passed to Tex by virtue of their association.

Let us now assume that instead of hiring Tex at Big Eight, Ralph wishes to leave Big Eight to form a third law firm (Dirty Dozen, P.C.) with Tex. The Nebraska rule would imply that Tex would still be vulnerable to a motion to disqualify because Ralph’s imputed knowledge (acquired from Cornelius, who acquired the imputed knowledge from Bugeater & Associates) would now be imputed to Tex. The problems created by such a rule are obviously myriad.

VI. WHY THE NEBRASKA RULE IS UNWISE

A. Harm to the Legal Profession

The impact of this new “bright line rule” on attorneys practicing in Nebraska is hard to overstate. An attorney now must take care, not only to avoid conflicts that he/she knows of, but conflicts about which he/she is unaware. These hidden conflicts can arise from matters that a former associate in a previous firm handled, from matters a current associate dealt with during a prior association with another firm, or from matters imputed to a current associate from a former associate. Thus, it is no longer enough to examine a firm’s client list before accepting employment. An attorney must now also examine the client lists of all firms any member of the current firm was associated with in the past. Given the fact that a client’s identity can, in some situations, be considered confidential, and an attorney’s general reluctance to reveal the identity of their clients as a matter of principle, this task, Herculean to begin with, becomes impossible. The only way for a firm to protect itself from a motion to disqualify is to refrain from associating with any attorney with any past relationship with another practice in Nebraska. This severely circumscribes the mobility of attorneys. What firm will consider a new hire when it will open the

155. See, e.g., 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2291, at 545 (McNaughton rev. 1961)(stating, “In order to promote freedom of consultation of legal advisors by clients, the apprehension of compelled disclosure by the legal advisors must be removed; hence the law must prohibit such disclosure except on the client’s consent.”).
156. Recall, however, that the Nebraska rule operated against a non-Nebraska firm in Nebraska ex rel. Creighton Univ. v. Hickman, 245 Neb. 247, 512 N.W.2d 374 (1994).
firm up to challenges that are unforeseeable and unpreventable? It will also inhibit the dissemination of new innovations in the law since attorneys with new areas of expertise or experience cannot join a firm. "[A] per se disqualification rule inhibits . . . an attorney's ability to move between firms, and a law firm's ability to hire qualified attorneys while retaining its client base."157

Those most severely impacted by this new and unprecedented approach to conflict of interest will not, however, be senior partners comfortably established in a specific practice area in a particular firm.158 This rule is most pernicious because it falls most harshly on those with the least power to prevent its effects—young associates, law clerks and secretarial and clerical staff.

The competition to secure legal employment has never been so fierce.159 Recent law school graduates and young associates find themselves in a competitive “buyer’s market,” in which employment opportunities are limited.160 A harsh rule allowing double imputation to operate against a firm that hires an attorney from a competing firm restricts a young attorney’s opportunities even more severely. As the Silver Chrysler court put it, “[T]he courts must be cautious not to . . . unnecessarily circumscribe the career of a young professional. The Canons may not be used to engross legal talent or to obtain the advantages of an implied restrictive covenant that would be of doubtful validity in any other employment situation.”161 The Supreme Court of New Jersey has noted that irrebuttable presumptions harm “the mobility of young attorneys and what they sometimes look upon as their serf-like status.”162 A rigid rule of total disqualification forces graduates to become overcommitted to their initial employer because it prevents them from leaving the firm with which they are first employed and being retained by clients seeking their specialized services.163 Ac-

158. The application of the rule to law firm mergers, however, as was done in Nebraska ex rel. Firstier Bank, N.A. v. Buckley, 244 Neb. 36, 503 N.W.2d 838 (1993), does have the potential to circumscribe the career of the most established practitioner.
159. See Jordan, supra note 7, at 1. See also Janie MaGruder, New Competitive Era Awaits State's Law School Graduates, ARIZ. BUS. GAZ., June 9, 1994, at 23 (finding too many law school graduates chasing too few jobs); Jacqelyn J. Burt, How Law Schools Should Cope with a Changing Market, N.J.L.J., September 12, 1994, at 10 (stating law school graduates facing a "tighter economic market").
160. Susan C. Thomson, Bar Wars: Law Graduates Facing Trials in Job Market, St. LOUIS POST-DISPATCH, July 17, 1994, at 8A.
According to Geoffrey C. Hazard, this bright line rule "could cause firms not to hire anyone having previously worked at another firm." The net effect is that young attorneys have one chance to secure satisfying employment within the state of Nebraska. Once they have been associated with a firm, they are forever burdened with an irrebuttable presumption of knowledge, the extent of which is impossible for an associate to determine, and the reach of which extends not only to the individual, but also against any attorney with whom they associate for the rest of their careers. This choice is forced upon young attorneys when they are most vulnerable and lacking any bargaining power or negotiating experience—when they seek their first job.

This rule has all the effects of disfavored restrictive covenants not to compete with one's former employer: it reduces the economic mobility of employees and thus reduces their personal freedom to follow their own interests. It also serves to diminish competition by intimidating associates of a firm from striking out on their own to compete with the prior firm. Any associate who leaves his/her initial employer will be forever vulnerable to retaliation from that firm in the form of a motion to disqualify.

Moreover, a rigid rule of imputed disqualification is particularly inappropriate in a state like Nebraska, where, because of a small population, a small number of law firms handle much of the area's substantial commercial practice. An attorney seeking to leave one of these firms will find himself/herself effectively prohibited from practicing in his/her area of expertise since most potential clients will have had some dealings in opposition with the former firm. The Nebraska rule serves to severely circumscribe the employment opportunities of lawyers, with the burden falling most heavily on those least able to bear it—young attorneys just starting their careers.

Law school graduates are not the only ones who will have their legal careers severely circumscribed because of Nebraska's overly rigid approach to conflict of interest. Law students have already been affected by the rule. In Advisory Opinion 94-4, the Advisory Committee appointed by the Nebraska Supreme Court for the Nebraska State Bar Association concluded, "It is the opinion of the Committee that the 'bright line' rule is intended by the Court to apply not only to lawyers or former lawyers, but also to law clerks, paralegals, secretaries or other ancillary staff members who change law firms." The reaction

164. Professor of Law at University of Pennsylvania, Professor Emeritus at Yale Law School, and a reporter for the Kutak Commission (authors of the ABA Model Rules of Professional Conduct).
166. See Jordon, supra note 7, at 1 (discussing competition among law graduates).
of the state bar has been swift. When the Creighton case was published in the early summer of 1994, one Lincoln law firm immediately suspended two second-year summer clerks who had clerked for other Lincoln law firms.\footnote{Letter from Lawrence Raful, Dean of the Creighton University School of Law, Harvey S. Perlman, Dean of the University of Nebraska College of Law, and Steven Kalish, Margaret Larson Professor of Legal Ethics at the UNL College of Law to the Honorable William Hastings, Chief Justice, Nebraska Supreme Court (May 27, 1994)(on file with author)[hereinafter Letter to Chief Justice Hastings].} One Nebraska law firm has terminated its clerking program altogether because of the potential for conflicts.\footnote{Deborah Lewis, Conflict of Interest Bright Line is Limit on Students' Horizons, 29 NEBRASKA TRANSCRIPT (Univ. of Neb. C. of L.)(Spring, 1995)(manuscript on file with author).}

The harm worked by this rule on law students is immediately apparent. One of the most effective, and in some cases the only, way for an aspiring attorney to gain experience in serving the needs of clients, confidence in the application of legal principles and an understanding of the day-to-day operation of the practice of law is through a summer associate or law clerk program. A law clerk gains the benefits of a legal apprenticeship that provides him/her with a ready source of professional mentorship and valuable contacts that serve the student long after graduation. It is through these summer clerkships that permanent associate positions are normally acquired.\footnote{NEB. ST. B. Ass'n News, supra note 165, at 2.} If a permanent position is not secured at the firm where the student is employed, this type of practical educational experience has become almost \textit{de rigueur} in building a resumé to secure permanent employment elsewhere. Additionally, because of the demands of attending law school, these positions are one of the few forms of well-paid employment a law student can secure. Denying students this kind of work not only increases the financial burden of attending law school, a burden that falls heavily on students of poor or moderate means, but also increases the social and economic elitism of the profession, a criticism to which the bar is already subject.\footnote{HAZARD ET AL., supra note 17, at 855-84.}

The folly of such an approach was recognized in Silver Chrysler, one of the earliest decisions regarding imputed disqualification:

\begin{quote}
[\textit{I}t has now become the practice to hire for summer work (usually between their second and third years at law school) a substantial number of law students. These "summer associates" most frequently perform tasks assigned to them by supervising associates or partners. Many of the summer students do not return to the same firms with which they have been associated. . . . [I]t would be absurd to conclude that immediately upon their entry on duty they become the recipients of knowledge as to the name of all the firm's clients, the contents of all files relating to such clients, and all confidential disclosures by client officers or employees to any lawyer in the firm. Obviously such legal osmosis does not occur. The mere recital of such a proposition should be self-refuting. And a rational interpretation of the Code of Professional Responsi-
\end{quote}
bility does not call for disqualification on the basis of such an unrealistic per-
ception of the practice of law in large firms.\textsuperscript{172}

Additionally, there is less danger that a law clerk's knowledge of
client matters will pose a danger to that client's cause. Student law
clers will rarely be privy to the same kind of confidential information
as attorneys are, and because of their inexperience, clerks will be less
able to apprehend the significance of any information they do
acquire.\textsuperscript{173}

Additionally, applying the bright line rule to law clerks will con-
tribute to a continuing source of concern to the Nebraska bar: the
problem of "brain drain." The most talented Nebraska law school
graduates will likely accept employment as law clerks while they are
students and then flee the state upon graduation for a jurisdiction
where clerking experience is an attribute, rather than a liability. In
fact, this is the intention currently announced by many students at
the University of Nebraska College of Law.\textsuperscript{174} It is certainly in the
best interest of the profession as well as the courts and the public to
courage legal talent to remain in the state—particularly when the
state has invested in students' education by funding a College of Law
at the state institution. This rule creates incentives that will deprive
Nebraska taxpayers of a significant return on that investment.

The Nebraska rule is even more harsh as applied to non-lawyer
personnel. Even in jurisdictions that hold one of the two presump-
tions to be irrebuttable, the knowledge of confidential information by
the nonlawyer does not and will not generally "disqualify the employ-
ing law firm from representation so long as adequate screening meas-
ures are undertaken which prevent such knowledge from "tainting"
the rest of the firm."\textsuperscript{175} However, in \textit{Creighton}, the court extended the
duel irrebuttable presumptions to a non-attorney, declaring "[W]e re-
 fuse to entertain the notion that exchanges of confidences were not
made by this nonlawyer."\textsuperscript{176} However, other courts that have consid-
ered the issue of disqualification based on tainted ancillary staff have
emphasized that law firms rely on experienced legal assistance. One
court concluded that if a rule of imputed disqualification were applied
to paralegal staff it would be impossible to maintain and staff law firm
offices.\textsuperscript{177} The American Bar Association has recommended that non-

\textsuperscript{172}. Silver Chrysler Plymouth v. Chrysler Motors Corp., 518 F.2d 751, 753-54 (2d Cir.
1975).

\textsuperscript{173}. Letter to Chief Justice Hastings, \textit{supra} note 168, at 3.

\textsuperscript{174}. Lewis, \textit{supra} note 169.

\textsuperscript{175}. McLaughlin et al., \textit{supra} note 32, at 833 (discussing this proposition in general
and citing rulings from California, Maryland, and ABA Informal Opinions).

\textsuperscript{176}. Nebraska ex rel. Creighton Univ. v. Hickman, 245 Neb. 247, 253, 512 N.W.2d

\textsuperscript{177}. Herron v. Jones, 637 S.W.2d 569, 571 (Ark. 1982).
lawyer personnel be exempted from stringent conflict of interest rules, explaining that:

It is important that nonlawyer employees have as much mobility in employment opportunity as possible consistent with the protection of clients' interests. To so limit employment opportunities that some nonlawyers trained to work with law firms might be required to leave the careers for which they are trained would diserve clients as well as the legal profession. Accordingly, any restrictions on the nonlawyer's employment should be held to the minimum necessary to protect confidentiality of client information.\textsuperscript{178}

One commentator has noted that this treatment of paralegal staff smacks of elitism, concluding that "court[s] are unwilling to jeopardize the availability of [experienced staff] by disqualifying a firm that hired a mere secretary."\textsuperscript{179} However, the harm worked on ancillary staff by treating them like attorneys for the purpose of disqualification is unduly harsh. If an attorney's choices for employment are limited by this overly rigid rule, staff members are affected even more severely. The governance system of most law firms is such that attorneys are the ones who make significant employment decisions. Staff members have significantly less value to and consequently less bargaining power with their employers than do attorneys. This position of weakness is made much more severe by the fact that, with the advent of double imputation for staff persons, a clerical employee can no longer go out and offer his/her services to another employer. The skills that make an experienced, competent legal secretary employable are the very abilities that prevent him/her from finding a position with another employer law firm who will value those skills. Many firms will doubtless feel freer to pursue an unpopular policy within the firm, because, with the advent of double imputation as applied to staff members, secretaries and paralegals won't be likely to quit over the matter. Depriving nonlawyers of the choice of moving to another firm if they are unhappy with their current employers is too great a price to de-

\textsuperscript{178} ABA Comm. on Ethics and Professional Responsibility, Informal Op. 88-1526 (1988). \textit{See also} Kapco Mfg. Co. v. C & O Enter., Inc., 637 F. Supp. 1231 (N.D. Ill. 1985)(refusing to disqualify law firm representing defendant because a secretary hired from the firm representing the plaintiff was properly shielded from any involvement in the case); Herron v. Jones, 637 S.W.2d 569 (Ark. 1982)(denying disqualification where no disclosure of confidential information by secretary occurred); Virginia State Bar Comm. on Legal Ethics Op. No. 754 (1986)(stating that a lawyer may continue in case so long as his/her secretary is required to maintain confidences acquired during former employment with opposing counsel); Philadelphia Bar Ass'n Ops. 80-77, 80-119 (1980)(allowing screening procedures to prevent disclosure of confidences to secretary). \textit{But see} New Jersey Op. 546 (1984)(stating the presumption that confidences have been exchanged is irrefutable, and disqualification automatic when staff member has actual knowledge of confidences).

mand in pursuit of a rule that is not evoked to protect the actual needs of the public.  

The fact that this rule provides attorneys with a source of captive labor, however, does not mean it is a boon for attorneys as applied to secretarial and clerical staff. The potential for conflicts of interest in small towns could limit a firm's ability to recruit qualified personnel. There will be a limited pool of qualified applicants for support positions in smaller communities. That pool will be even more severely circumscribed when all applicants with prior experience in legal work cannot be considered. This approach, however, will be the only safe alternative because a secretary, even less often than an attorney, will have no way of knowing about all matters the firm handled. There has been bitter complaint by attorneys in states that require disqualification when the challenged staff member has actual knowledge and is not allowed to be screened. The Nebraska rule however, is even more unforgiving. Staff members with a prior association with opposing counsel's firm will leave their new firms vulnerable to a motion to disqualify, regardless of the staff member's actual knowledge of client confidences. This rule threatens to deprive the bar of qualified support staff, an invaluable resource to both practitioners and their clients.

Perhaps the greatest harm worked on the legal profession by the Nebraska Supreme Court's interpretation of the two presumptions as irrebuttable is the damage it does to the public's perception of the profession. This is the primary interest that motivated the court in laying down this inflexible rule. In FirsTier, the court declared,

[A] very real and critical consideration is the perception that the public has of the legal profession generally. It is difficult to explain to an individual client how an attorney who was once associated with a firm can leave that firm and now bring suit against that client involving the same or substantially similar subject matter formerly handled by his or her prior firm. Resort to affidavits stating that "I didn't look at the file" or asserting the existence of Chinese walls are of little consolation to that client and do little or nothing to erase the appearance of impropriety.

The court then went on to pronounce its "bright line rule," rationalizing it as necessary "to properly preserve not only the actual existence, but also the appearance, of propriety, and to eliminate as nearly as possible unnecessary and unwarranted criticism of the legal profession." As noted above, the “appearance of impropriety” standard,

180. See infra Part VI.C.
181. Aaron M. Grossman, Lawyer Disqualified; Secretary Used to Work for Other Side, LAWYERS WEEKLY USA, May 23, 1994, at 1, 12.
182. Id.
184. Id.
CONFLICT OF INTEREST

When used to justify disqualification of a firm tainted by an imputed conflict of interest has been roundly criticized by commentators, the ABA, and the courts themselves.\footnote{185} Indeed one commentator has observed:

> If the adversary system’s image is relevant, courts arguably should never hear successive conflict disqualification motions. These often visible motions, charging unethical conduct, bring matters to public attention that would otherwise escape notice. Further, the motions ask courts to help clients keep secrets, something that in most contexts the public considers distasteful.\footnote{186}

While few would agree with the proposition that the courts should not work to enforce ethical behavior among attorneys, disqualification motions themselves can create the appearance of impropriety. Many courts agree that granting disqualification motions where no actual conflict exists leads to the public perception that the challenged attorney has done something wrong, furthering a perception of attorneys as unethical creatures who are constantly working to undermine the system.\footnote{187} In most instances, such as the facts presented in \textit{FirsTier} and \textit{Freezer Services}, nothing could be further from the truth. No actual unethical conduct was charged in either case,\footnote{188} but the court’s disqualification is likely to lead to the public perception that someone did something wrong. The capricious nature of this rule is compounded by the fact that courts have allowed for screening mechanisms in banks and securities firms, even though those professionals, like attorneys, owe their clients the utmost fiduciary duty.\footnote{189} By allowing the presumptions to be rebutted in one situation and not the other, the court implies that lawyers are less trustworthy than members of the banking and investment banking communities.\footnote{190} The Eleventh Circuit noted an additional problem with using the appearance of impropriety

\footnote{185. \textit{See supra} Part II and accompanying notes.}
\footnote{186. Goldberg, \textit{supra} note 52, at 270.}
\footnote{187. \textit{See, e.g.}, Black v. Missouri, 492 F. Supp. 848, 873 (W.D. Mo. 1980)(stating, “[T]he publicity surrounding this case to date suggests that the public’s confidence in the integrity of our judicial system would be eroded and emasculated by the disqualification of challenged counsel, because such an action would likely be viewed as a triumph of regimented rule over reason.”); Arkansas v. Dean Foods Prods. Co., 605 F.2d 380, 383 (8th Cir. 1979), overruled on appealability sub nom In re Multi-Piece Rim Prod. Liab. Litig., 612 F.2d 377 (8th Cir. 1980)(stating, “Disqualification in spasm reaction to every situation capable of appearing improper to the jaundiced cynic is as goal-defeating as failure to disqualify in blind disregard of flagrant conflicts of interest.”).}
\footnote{188. Nebraska \textit{ex rel. FirsTier Bank}, N.A. v. Buckley, 244 Neb. 36, 503 N.W.2d 838 (1993); Nebraska \textit{ex rel. Freezer Servs.}, Inc. v. Mullen, 235 Neb. 981, 458 N.W.2d 245 (1990).}
\footnote{189. Varn, \textit{supra} note 47, at 211-16.}
\footnote{190. Lerner, \textit{supra} note 17, at 67 (stating, “Lawyers are no less trustworthy than members of the banking and investment banking communities, and there would not seem to be a principled reason not to permit the more widespread use of Screening Devices in the legal community to resolve potential conflicts.”).}
standard to disqualify attorneys absent an actual ethical violation stating it endangers the profession by exposing the tactical nature of many disqualification motions and thereby increases cynicism about both the bar and the judiciary.\textsuperscript{191} The Federal Circuit in \textit{Panduit} agreed, cautioning that "judges must exercise caution not to paint with a broad brush under the misguided belief that coming down on the side of disqualification raises the standard of legal ethics and the public's respect. The opposite effects are just as likely—encouragement of vexatious tactics and increased cynicism by the public."\textsuperscript{192} The Fifth Circuit explicitly rejected the very argument employed by the Nebraska court, concluding, "Carriage of this imputation-on-an-imputation to its logical terminus could lead to extreme results in no way required to maintain public confidence in the bar."\textsuperscript{193} When the disqualification is covered in the media, the public only hears that a law firm committed an ethical impropriety.\textsuperscript{194} What is lost is that the advantage gained by the disqualified law firm is imputed, rather than actual, and inadvertent rather than intentional. The public will likely see motions to disqualify brought under this rule as petty squabbles between attorneys that do nothing to further their interests as clients, while delaying final resolution of a dispute and inflating the attorney's final bill. They will be right.

\subsection*{B. Harm to the Courts}

The new "bright line" rule as articulated by the Nebraska Supreme Court will do more than harm the perceptions and practical realities of the bar, however. This rule will also significantly hinder the courts of Nebraska by subjecting them to increased use of the motion to disqualify as a litigation weapon, requiring acrimonious and time-consuming hearings about the validity of those motions, and raising new and troubling questions about the conflicts of judges themselves, along with their clerks and their staff.\textsuperscript{195}

In 1984 the Court of Appeals for the District of Columbia deplored "[t]he tactical use of motions to disqualify counsel in order to delay proceedings, deprive the opposing party of counsel of its choice, and harass and embarrass the opponent."\textsuperscript{196} The United States Supreme Court agreed with the court of appeals, characterizing motions to dis-

\begin{thebibliography}{10}
\bibitem{191} Cox v. American Cast Iron Pipe Co., 847 F.2d 725, 732 (11th Cir. 1988).
\bibitem{192} Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1576-77 (Fed. Cir. 1984)(applying 7th Cir. law).
\bibitem{193} American Can Co. v. Citrus Feed Co., 436 F.2d 1125, 1129 (5th Cir. 1971).
\bibitem{194} Black v. Missouri, 492 F. Supp. 848, 873 (W.D. Mo. 1980). \textit{See also} Goldberg, \textit{supra} note 52, at 262.
\end{thebibliography}
CONFLICT OF INTEREST

qualify as a "dangerous game." One author described the increasing use of motions to disqualify as a "fifteen-year journey from ethical equanimity to procedural pandemonium." The use of motions to disqualify is devolving from a drastic measure resorted to only when one's opponent has committed an egregious ethical violation into just another weapon in an arsenal of litigation "hard ball." One observer reports that "[l]awyers have discovered that disqualifying opposing counsel is a successful trial strategy, capable of creating delay, harassment, additional expense, and perhaps even resulting in the withdrawal of a dangerously competent counsel."

Nebraska's bright line rule does not simply "aid the bar in its coping with situations [where a potential conflict exists]" by examining their own backgrounds for potential conflicts. It encourages Nebraska practitioners to scrupulously examine the background of their opponents for an area where they might be vulnerable to a motion to disqualify. Litigators are likely to accept this invitation, because the motion to disqualify is a powerful weapon. If the disqualification gambit is successful, the opposing party is deprived of the counsel of its choice and frequently is denied use of any work product generated by that counsel, since the work cannot be cleaned of a presumptive taint. This places the opposition back at "square one" of a matter, while the successful movant continues the relationship established

198. Goldberg, supra note 52, at 228.
199. Developments in the Law: Conflicts of Interest in the Legal Profession, 94 Harv. L. Rev. 1244, 1285 (1981). See also Freeman v. Chicago Musical Instrum. Co., 689 F.2d 715, 722 (7th Cir. 1982)(providing that motions to disqualify "should be viewed with extreme caution for they can be misused as techniques of harassment"); Ellsworth A. Von Graefeland, Lawyers Conflict of Interest—A Judge's View, 50 N.Y. St. B. J. 101, 140-41 (1978)(stating motions to disqualify are "common tools of the litigation process, being used . . . for purely strategic purposes").
201. Courts routinely have held that once a firm is disqualified, no work product from the tainted firm can pass to the substitute attorney. See, e.g., EZ Paintnr Corp. v. Padco, Inc., 746 F.2d 1459, 1463 (Fed. Cir. 1984)(prohibiting turnover of work product prepared by disqualified attorneys because there was danger that work product contained confidences obtained from plaintiff); Realco Servs. v. Holt, 479 F. Supp. 867, 880 (E.D. Pa. 1979)(denying motion for access, substitute counsel not permitted access to work product of disqualified attorney because disqualified attorney many have acquired and used confidential information in work product). But see First Wis. Mortgage Trust v. First Wis. Corp., 554 F.2d 201, 205 (7th Cir. 1977)(en banc)(rejecting rule that prohibited substitute counsel access to work product because penalty would be against blameless client); Black v. Missouri, 492 F. Supp. 848, 871 (W.D. Mo. 1980)(allowing turnover of disqualified attorney's work product to soften impact of client's loss of experienced counsel). See generally Comment, The Availability of the Work Product of a Disqualified Attorney: What Standard?, 127 U. Pa. L. Rev. 1607 (1979).
with its counsel. Motions to disqualify are also extremely expensive. One author notes that $130,000 spent by both parties in litigating such a motion is not uncommon.202

If there is strong incentive for litigants to bring motions to disqualify, the motivation for vigorously defending them is even stronger. The challenged firm has a strong interest in avoiding a motion to disqualify. First, the challenged firm is obligated to oppose the motion on the grounds that disqualification is not in the best interests of its client. Secondly, a firm will want to protect its ethical reputation, particularly if the firm has not actually done anything improper. Further, some courts have ordered the disqualified firm to pay the attorney's fees to cover the cost of the disqualification motion's prosecution.203 All these factors combine to insure that motions to disqualify will be hard fought, time consuming and expensive exercises, diverting the resources of the courts, counsel and clients from the substantive issues in a lawsuit.

The court's pronouncement of a per se rule does nothing to lessen the intensity of a motion to disqualify. It will, however, increase the number of such motions. It is safe to say that a significant number of the attorneys currently practicing in Nebraska, if not the vast majority, have had some prior experience with another firm, or are associated with an attorney who has had experience at another firm, or employ a non-lawyer with a former relationship with another firm. Since the extent or nature of the conflicts is virtually impossible to predict, and since an opponent has every incentive to search for a conflict with the advantage of knowing what the source of the conflict is, this rule seems virtually to assure that the Nebraska courts will be forced to deal with an increase in both the number and acrimony of motions to disqualify.

The prediction that this rule will increase the number of disqualification motions is borne out by the fact that one firm, McGrath, North, is involved in two of the three cases considered herein.204 It would be reasonable to conclude that, subjected to disqualification in the Freezer Services case, McGrath, North decided to turn the weapon that had wounded it onto an opponent in another matter. This interpretation of McGrath, North's actions is even more reasonable when considered in light of the fact that motions to disqualify "promote intense professional and personal bitterness."205 Being called dishonest is never pleasant, but it is even more insulting when the allegation

202. Goldberg, supra note 52, at 263.
205. Goldberg, supra note 52, at 262.
comes from a professional peer. Still smarting from the sting of a motion to disqualify, it is understandable how a firm would want to ensure that the entire profession felt the bite of such a rule. This rule will further erode the amicability currently enjoyed by members of the Nebraska bar, and consequently for the Nebraska courts.206

The cost of motions to disqualify in terms of judicial resources is significant. The United States Supreme Court has noted the significant amount of judicial time and energy required by a motion to disqualify.207 Judges and commentators routinely condemn the quantity of time spent on these type of collateral issues that divert the courts and the parties from the substantive dispute.208 The Nebraska bright line rule, in engendering a wider use of the motion to disqualify, will have a significant impact on how the Nebraska courts spend their most precious resource—time.

C. Harm to the Public

The strongest criticism that can be leveled against the Nebraska rule is the harm it does to clients, and through them, the public. As one observer astutely observed:

[In a country which values individual liberty and where the freedom of association and the freedom to contract are constitutionally protected, more deference should be given to a client's right to keep his [sic] lawyer of choice, certainly to keep the law firm of his [sic] choice. This should be true particularly when that client has invested much time and money with those lawyers.209

A rule which disqualifies entire firms based only on knowledge imputed to a single attorney does nothing to protect a client's reasonable expectation of confidentiality. It does, however, force irreparable hardship on the second client. The second client is deprived of the counsel of his/her choice and all of the work that the attorney has provided for the client, frequently at the client's considerable expense.210

206. Jordon, supra note 7, at 1 (observing that "some see a decline in civility [in the Nebraska bar, with] lawyers allowing combativeness to turn into improper conduct rather than treating one another with professionalism.").

207. Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 434-36 (1985). See also Board of Educ. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979) (stating that courts should hesitate to disqualify counsel and must carefully weigh needs of efficient judicial administration against effect of attorney's conduct).

208. See, e.g., Von Graafeiland, supra note 199, at 140-41 (noting strategic use of disqualification motions and concluding higher quality of representation attainable with less expenditure of judicial time than currently consumed by motions to disqualify); Goldberg, supra note 52, at 262.


210. The Nebraska Supreme Court has not relented when it comes to the cost of disqualification to clients. In Nebraska ex rel. First Tier Bank v. Mullen, 248 Neb. 384, 534 N.W.2d 575 (1995), the court held that work product is not privileged when supplied by a disqualified firm to subsequent counsel. It is also of more than passing interest to note that the court expressly disapproved of any fee
Other commentators have identified additional costs to the second client by disqualification: “The client [loses not just a law firm but] an individual lawyer in whom the client has confidence. Moreover, most clients find selecting counsel and preparing for litigation sufficiently harrowing experiences that they will do almost anything to avoid them once. The system exacts a high price when clients have to suffer twice.”

Even if a client is lucky enough to have not chosen a firm or an individual attorney that is vulnerable to a motion to disqualify, he/she will still be apportioned a cost of the new Nebraska rule. First, since Nebraska firms, leery of the applicability of imputed disqualification, are reducing or in some cases ending their utilization of law clerks, many routine drafting matters and much time-consuming research will now have to be completed by attorneys. While this is not a difference the client will see when presented with the final work product, it certainly is a difference they will see when presented the final bill. Firms routinely bill law clerks’ time at a fraction of the charge for an attorney’s time. Thus, one result of the Nebraska rule is to increase the cost of legal services, a cost which is already prohibitive for too many.

A second harm worked on clients is more subtle, but in the end eminently more destructive. As Dennis Carlson, the Nebraska Bar Association’s Counsel for Discipline observed, clients are becoming more demanding and knowledgeable about the law. While discussing this trio of cases at the 1994 Survey of Nebraska Law, Mr. Carlson advised that attorneys refuse to discuss the facts of a matter with any client at the initial consultation, suggesting that an informed client might intentionally seek the services of opposing counsel in order to facilitate the bringing of a motion to disqualify. While Mr. Carlson

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agreement between the two firms which would allow the disqualified firm to recover fees earned or expenses incurred before disqualification. Id. at 391, 534 N.W.2d at 580 (“[S]uccessor legal counsel’s argument that Lieben Dahlk [,the disqualified firm,] is entitled to quantum meruit fees in representing the plaintiffs also lacks merit. We do not accept the contention that an attorney can receive fees for representation which from the outset gives the appearance of impropriety and is violative of established rules of professional conduct.”). Notice that the attorneys most likely affected by this additional stricture are those that work for clients unable to pay by the hour and who are thus likely to have a large receivable at the time of disqualification. Once again, those ultimately hurt most by this rule are clients of low to moderate means.

211. Goldberg, supra note 52, at 263-64.
212. Interview with Sue Kirkland, Assistant Dean, Career Services Director, University of Nebraska College of Law, in Lincoln, Neb. (October 27, 1994).
213. See HAZARD ET AL., supra note 17, at 1035-63.
may be providing attorneys with sound advice, this view suggests that the Nebraska rule promotes suspicion, not only of the public toward attorneys, but of attorneys toward clients in general. This approach signals the beginning of an era of mutual suspicion, in which attorneys are skeptical of the motivations of clients, viewing them, not as people with problems to be resolved, but as potential infiltrators, seeking to deny the firm of its existing clients and to besmirch its hard earned reputation. The reaction of the public when confronted with the suspicion, will justifiably be more hostility and distrust of the legal profession.

VII. SOLUTION

At its 1994 annual meeting, the Nebraska State Bar Association held an open meeting to discuss the impact of this new rule. Representatives from Nebraska law schools, the Nebraska Legal Assistant's Association, as well as members of the practicing bar attended the meeting. After this meeting, the Nebraska State Bar Association passed a resolution asking the Court to adopt Model Rule 1.9.

Model Rule 1.9 adopts the holding in Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., which limited disqualification to circumstances in which the challenged attorney had acquired actual client confidences. The rule provides in relevant part:

(b) A lawyer shall not knowingly represent a person in the same or 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 [protected] information . . . that is material to the matter;
unless the former client consents after consultation.

The comment to Rule 1.9 recognizes that "competing considerations" require some flexibility regarding conflict of interest questions. The comment then explains that:

215. Telephone Interview with Dennis Carlson, Counsel for Discipline, Nebraska State Bar Association (October 28, 1994).
216. Id.
217. 518 F.2d 751 (2d Cir. 1975).
218. See supra notes 91-92 and accompanying text.
220. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 cmt. (1989). The comment explains that:

When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming
Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of [protected] information. . . . Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or related matter even though the interests of the two clients conflict.221

Thus, Rule 1.9 makes the first presumption rebuttable, "depend[ing] on a situation's particular facts."222 This rule sensibly recognizes that a migratory attorney poses no danger to client confidences unless he/she has actual knowledge of those confidences. Under this approach an attorney (or law clerk or legal secretary) can inform a potential employer of his/her actual conflicts, and the two parties can together assess the risk of a motion to disqualify if they join forces. This alleviates much of the uncertainty that now discourages employee mobility. It will also decrease the danger of a burgeoning number of these motions reaching the courts, since presumably, an employer will be unlikely to hire attorneys or staff who have actual conflicts. This is the approach adopted by the state courts of Florida, among others.223 It should be noted that under this rule, Freezer Services224 and Creighton225 would remain intact—in those cases the challenged employee did possess actual knowledge. The only precedent that would be displaced by adoption of Model Rule 1.9 is FirsTier226 where the challenged attorney only possessed imputed knowledge.

The best solution in terms of preserving mobility, of course, would be for the Nebraska court to adopt a rule allowing both presumptions to be rebutted. This is the approach adopted by Michigan227 and Illi-

new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

Id. The comment then goes on to criticize per se approaches to disqualification, as well as disqualification based on Canon 9 of the Model Code of Professional Responsibility, concluding, "A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification." Id.

221. Id.
222. Id.
223. See supra notes 131-32 and accompanying text.
227. See supra notes 122-24 and accompanying text.
nois, among others, as well as the Sixth and Seventh Circuits. The court could then act to preserve actual client confidences through stringent application of the requirements of an effective screening device as, for example, the Seventh Circuit has done or by including rigorous requirements in the rule allowing the screen as Oregon and Pennsylvania have done. This approach does the most to protect all of the competing interests involved in imputed disqualification: attorneys and legal staff are assured a maximum of employment mobility, the prior client's secrets are protected when they are actually at risk, and the subsequent client's choice of counsel is protected in all but the factual circumstances where prior client confidences are actually threatened.

At a minimum, the Nebraska Supreme Court should overrule the bright line rule announced in FirsTier and limit Freezer Services and Creighton to their facts. The Nebraska Supreme Court has previously shown its willingness to overrule precedent because it has proven unworkable or undesirable. The court should exhibit simi-

228. See supra note 125 and accompanying text.
229. See supra notes 104-11 and accompanying text.
230. The approach in these jurisdictions is to allow for the presumptions to be rebutted, but to strictly adhere to stringent requirements in actually rebutting the second presumption. See, e.g., Schiessle v. Stephens, 717 F.2d 417 (7th Cir. 1983)(outlining three part analysis to determine whether challenged firm should be disqualified that includes rebutting the second presumption through the use of ethical wall, but concluding that the challenged firm in the instant case must be disqualified because the firm "at the time of [the tainted attorney]'s transfer did not have specific institutional mechanisms . . . to insure that [the tainted attorney] would have no contact with the [case in litigation]"); Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263 (7th Cir. 1983)(holding that presumption that confidences gained during previous employment rebuttable, but not rebutted when challenged firm failed to prove that the "individuals [representing the client] had not received any relevant confidential information about [that client's adverse party] from [the tainted attorney]"); LaSalle Nat. Bank v. County of Lake, 703 F.2d 252 (7th Cir. 1983)(disqualifying challenged firm because screening mechanism not instituted early enough). See also Moser, supra note 121, at 410, for a discussion of factual situations wherein ethical walls would not be appropriate.
231. See supra notes 126-27 and accompanying text.
232. See supra notes 128 and accompanying text.
236. See, e.g., Kerrey Constr. Co. v. Hunt, 213 Neb. 776, 781, 331 N.W.2d 519, 522 (1983)(overruling previous rule disallowing damages for loss of a prospective sale of land arising out of a breach of contract action on the grounds that allowing such claims would be "reasonable"); Brezina v. Hill, 195 Neb. 481, 484-85, 238 N.W.2d 903, 906 (1976)(overruling prior decision allowing broker to sign a sales agreement for the owner without express authorization on policy grounds); Yellow Cab Co. v. Nebraska State Ry. Comm'n, 176 Neb. 711, 714-15, 127 N.W.2d

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lar prudence in this case and retreat from taking an inflexible stance regarding imputed disqualification. In so doing, the court would signal that Nebraska, like other American jurisdictions, is grappling with the conflict problems created by an increasing firm size and attorney mobility. The *FirsTier* decision did not create the conflict of interest problem and overruling the bright line rule will not end all attorney conflicts of interest. However, overruling *FirsTier*'s bright line rule will allow Nebraska courts and practitioners to focus on how to protect actual client confidences, rather than diverting attention to invented conflicts. To do anything less would be a disservice to the constituency the court is diligently working to protect: the public.

The Nebraska Supreme Court should act to make the rules regarding vicarious disqualification more flexible. Ideally, it should do so by allowing both presumptions to be rebutted. In the alternative, it could heed the Nebraska State Bar Association's recommendation and adopt Model Rule 1.9. Regardless of other measures taken, the Court should confine *Freezer Services* and *Creighton* to their facts, and overrule *FirsTier*'s bright line rule.

VIII. CONCLUSION

Julius Caesar may not recognize today's legal system, but his words still have weight. Disqualification of the challenged firms may have been appropriate measures in *Nebraska ex rel. Freezer Services, Inc. v. Mullen*, *Nebraska ex rel. FirsTier Bank, N.A. v. Buckley*, and *Nebraska ex rel. Creighton University v. Hickman*, but the rigid rule laid down in these cases make bad precedent. The Nebraska court is alone in holding that both presumptions regarding communication of client confidences are irrebuttable and subsequently in allowing double imputation to operate. The mischief done by such a rule has already disrupted the legal profession, the courts, and will soon impact the public. A rigid approach to imputed disqualifi-
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...fication robs attorneys and legal staff of their economic and professional freedom. It will clog the Nebraska courts with increasingly bitter and tactical motions to disqualify. The rule will not increase the public's esteem for the bar, it will encourage clients to view the legal profession with contempt as they are forced to witness (not to mention to pay for) often petty meaningless squabbles between lawyers that do nothing to protect client confidences and serve only to increase the time and expense of our adversarial system. The Nebraska Supreme Court should not turn blindly away from the realities of the modern practice of law by pursuing a standard of propriety that, while initially appealing, is unattainable and ultimately undesirable.

The most sensible approach for the court to take would be to limit *Nebraska ex rel. Freezer Services, Inc. v. Mullen*, 245 *Nebraska ex rel. FirstTier Bank, N.A. v. Buckley*, 246 and *Nebraska ex rel. Creighton University v. Hickman* 247 to their facts, and to allow legal professionals to present evidence to rebut either presumption when challenged with a motion to disqualify. In the alternative, the Court should allow the second presumption to be rebutted when the challenged firm can prove that effective prophylactic measures have been taken to prevent the taint from a disqualified attorney from seeping throughout the rest of the firm. At a minimum, the court should exempt ancillary staff from this unyielding standard. 248 To fail to take some action would be to endanger the future of the legal profession in Nebraska and its unique societal role in serving the interests of clients, the courts, and ultimately justice itself.

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246. 244 Neb. 36, 503 N.W.2d 838 (1993).
248. See supra section VI.A.