DEFENSES TO DISQUALIFICATION: FACT SITUATIONS THAT ALLOW AN ATTORNEY TO AVOID DISQUALIFICATION FOR A CONFLICT OF INTEREST

I. INTRODUCTION

Attorney disqualification motions are increasingly becoming a litigation tool. Under the Model Rules of Professional Responsibility 1.7, 1.9 and 1.10, an attorney should be disqualified if a conflict of interest exists between the attorney and a present or former client.[1] Generally, courts will disqualify an attorney if there is even the appearance of a conflict between an attorney presently involved in the case and a former or existing client that may be the attorney's adversary in the current litigation. On account of the current law office realities, where attorneys change firms, law firms merge or are dissolved, and clients fee-shop, courts have begun to adapt the Model Rules based on equity to prevent a litigant from using the Model Rules as a litigation tactic. This Comment focuses on fact situations that give rise to disqualification defenses and situations where conflicts between attorney and client are so great the court is left with no choice but to disqualify the attorney.

II. THE CURRENT LAW REGARDING ATTORNEY DISQUALIFICATION

A. The General Rules that Govern Attorney Disqualification

Traditionally, Canon 9 of the Model Rules of Professional Conduct required that an attorney avoid even the appearance of unethical conduct.[2] As modern law firm practice began to evolve from small firms within a single city to large firms within several cities or even states, courts began to liberalize the Rules regarding conflicts of interest. The influential case of *T.C. Theater Corp. v. Warner Brothers Pictures*[3] began the trend of moving away from absolute disqualification for a conflict of interests.[4] In *Theater Corp.*, the substantial relationship test was created to determine if current representation would be adverse to a former client's interests.[5] The substan-

1. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2001); MODEL RULES OF PROF'L CONDUCT R. 1.9 (2001); MODEL RULES OF PROF'L CONDUCT R. 1.10 (2001).
2. Samuel Miller & Irwin Warren, *Conflicts of Interest and Ethical Issues for the Inside and Outside Counsel*, 40 BUS. LAW. 631, 633 (1985).
3. 113 F. Supp. 265 (S.D.N.Y 1953).
4. *See Theater Corp.*, 113 F. Supp. at 270.
5. *Id.*

tial relationship test required the party moving for disqualification to show that the prior representation and the current representation were substantially related in terms of the cause of action or the litigable issues in the suit.[6] If the matters are substantially related then disqualification is required.[7] The substantially related test emerged as the general rule that courts fashioned to determine if a law firm should be disqualified in a lawsuit.[8]

The Model Rules adopted the liberal view of disqualification. So many courts adopted the substantial relationship test that the drafters of the Model Rules adopted the test in Rules 1.9, 1.7 and 1.10. Model Rule 1.9 is to be used as a guideline in determining if past representation of a client will affect a law firm's ability to take on new clients who may seek counsel on matters similar to those the firm worked on with another client in the past.[9] Model Rule 1.9 does not attempt to create definitive guidelines for previous representation, instead focusing on the depth of the attorney's involvement with the former client.[10]

Attorney movement also gives rise to conflicts of interest situations. Under the Model Rules, once an individual attorney agrees to represent a client, the entire firm agrees to do so.[11] This was not a problem in traditional law firm practice because attorneys would stay with the same firm for the duration of their career. With the onset of freedom of movement in legal employment, courts have begun to loosen the restraints on automatic disqualification of a firm whose new lateral hire may come from a firm they currently oppose in litigation. The litany of cases giving rise to the realities of attorney movement began with *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*,[12] the first case of note dealing specifically with an attorney opposing a previous client. In *Chrysler*, the Second Circuit held that the inference that an attorney working in a firm was privy to confidential matters about the current litigant was rebuttable.[13] An attorney could represent a current client in litigation against the old client if the attorney could pass the substantial relationship test and show that the individual attorney was not privy to confidential matters as would affect the litigation at hand.[14]

Courts should disqualify an attorney only in extreme situations. Furthermore, the comments to Model Rule 1.9 indicate disqualification is only appropriate in a narrower situation involving issues where "the lawyer was so involved in the matter that the subsequent representation can be justly

6. *Id.*
7. *Id.*
8. Miller & Warren, *supra* note 2, at 635.
9. MODEL RULES OF PROF'L CONDUCT R. 1.9 (2001).
10. *See* Miller & Warren, *supra* note 2, at 641.
11. MODEL RULES OF PROF'L CONDUCT R. 1.9 (2001).
12. 518 F.2d 751 (2d Cir. 1975).
13. *Chrysler*, 518 F.2d at 753.
14. Miller & Warren, *supra* note 2, at 635-36.

regarded as a changing of sides in the matter."[15] The Seventh Circuit then created a three-part test to determine if the prior representation would violate client confidences.[16] First, the trial judge should determine the scope of the client's past legal representation.[17] Second, the trial court must decide if it is reasonable to infer that the attorney in question would have received confidential information.[18] Finally, the trial court must decide if the information the attorney in question may have received is relevant to the issues raised in the pending litigation.[19] As attorney movement becomes even more commonplace, courts continue to craft new tests to prevent attorney disqualification in order not to penalize the attorney or harm the client by forcing him to seek new representation and begin the litigation process anew.[20]

B. The Rise of Disqualification Motions as a Litigation Tactic

With attorney movement so commonplace, it is no longer unusual to see a former law partner as an adversary in a current case. Before the judicial loosening of the rules and the emergence of the Model Rules to replace the Model Code of Professional Responsibility, attorneys would use disqualification to prevent a matter from reaching trial.[21] The Model Code required automatic disqualification of an attorney who may have previously represented a client.[22] Taking advantage of these rules, an opposing attorney would wait until after the discovery process to submit a disqualification motion, which would serve only to prevent the innocent litigant's case from being resolved.[23] Seeing this unfairness, the courts began to fashion defenses to disqualification motions that can also be incorporated as affirmative defenses in pleadings.[24] Furthermore, courts have also held that a violation of the Model Rules alone does not result in an automatic disqualification, instead the current or past client must show they will suffer some harm.[25] Additionally, several affirmative defenses have been created when a motion to disqualify is brought; the four most common defenses are: standing, implied consent, waiver and estoppel.[26]

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15. MODEL RULES OF PROF'L CONDUCT R. 1.9 (2001) cmt. 2.
16. *See* LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252, 255 (7th Cir. 1983).
17. *LaSalle*, 703 F.2d at 255.
18. *Id.*
19. *Id.*
20. *See* Miller & Warren, *supra* note 2, at 641-49.
21. Douglas Richmond, *The Rude Question of Standing in Attorney Disqualification Suits*, 25 AM. J. TRIAL ADVOC. 17, 31-32 (2001) (quoting Kala v. Aluminum Smelting and Ref. Co., 688 N.E.2d 258, 263 (1989)).
22. MODEL CODE OF PROF'L RESPONSIBILITY, DR 5-105 (1980).
23. *See* Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985).
24. *See* Richmond, *supra* note 21, at 263.
25. *In re* Estate of Kirk, 686 N.E.2d 1246, 1251 (Ill. App. Ct. 1997).
26. *See generally* Miller & Warren, *supra* note 2.

C. Defenses to Disqualification Motions

1. Standing

The affirmative defense of standing can be asserted when a party seeks to disqualify counsel who never directly represented the party before. The majority approach takes a more narrow view in that only a former or current client can bring a motion to disqualify.[27] In *In re Yarn Processing*[28] a party brought a motion to disqualify the plaintiff's attorney because his firm had previously advised a co-defendant about patents the co-defendant held.[29] Because the previous client did not make the motion on its own and another co-defendant sought the attorney's disqualification, the court rejected the motion.[30] Following the general rule, the Fifth Circuit found that unless the previous client moves or supports the motion to disqualify, the inference is that the previous client does not think the current litigation and counsel's involvement in the litigation will prejudice himself.[31] Courts have interpreted the silence of the previous client as an implied consent to allow the attorneys to carry forth the current litigation.[32] The courts have found that to allow a third party to have standing to assert a disqualification motion would allow the third party to use disqualification for its own purposes.[33]

2. Implied Consent or Acquiescence

The Model Rules allow a party to consent to a current or past counsel to represent a conflicting party.[34] Judicial expansion of these Rules has allowed for the doctrine of implied consent to be imported as a defense to a disqualification motion.[35] In *Yarn*, the court found the past client's silence, when a co-defendant brings a motion to disqualify, to be consent.[36] Incorporating standing and waiver principals, a past client's silence can be construed as implied consent.[37] The theory is that if counsel representation would be adverse or prejudicial, the past client would speak.[38] Finally, if a party does not seek a motion to disqualify while the attorney both represents the party currently, and at the same time is counsel for an adverse party, then the client has given consent.

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27. *Id.*
28. 530 F.2d 83 (5th Cir. 1976).
29. *Yarn*, 530 F.2d at 86.
30. *Id.* at 90.
31. *Id* at 89.
32. *Id.* at 88-90.
33. *Id.*
34. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2001).
35. *See* Richmond, *supra* note 21.
36. *Yarn*, 530 F.2d at 88-90.
37. *See generally Theater Corp.*, 113 F. Supp. 265; *Yarn*, 530 F.2d 83; *In re* Epic Holdings, 985 S.W.2d 41 (Tex. 1998).
38. *Yarn*, 530 F.2d at 88-90.

3. Waiver

A common defense to a motion to disqualify is waiver.[39] If there is a substantial passage of time between a party's learning of an adverse attorney's conflict and that party bringing a motion to disqualify, the party may have waived their right to seek disqualification of counsel.[40] Waiver is defined as the intentional relinquishment of a known right, the right being the ability of a party to disqualify counsel and its failure to do so in a reasonable amount of time.[41]

In *Kirk*, an attorney for the estate briefly represented one of Kirk's heirs.[42] Though the current representation of the estate was a violation of the Model Rules, this violation alone was not great enough for the attorney to be disqualified.[43] Furthermore, the heirs knew of the attorney's past representation on their behalf, but waited three-and-a-half years after filing suit to bring forth the motion to disqualify the estate's attorney.[44] The lapse of time between the heirs' learning of the conflict and bringing a motion to disqualify was so great that the heirs waived the right to attempt to disqualify the estate's attorney.[45]

In *Vaughn v. Walther,*[46] a client used an attorney the defendant had previously used. The defendant waited six-and-a-half months before filing a motion to disqualify the opposing attorney, though the defendant knew of the conflict. The court held that the defendant, by waiting six and a half months, waived the right to seek disqualification by not filing the motion in a timely fashion.[47] Additionally, in *Trust Corp. of Montana v. Piper Aircraft Corp.*,[48] the Ninth Circuit found that where a defendant's firm alerted the plaintiff's firm to the potential conflict they may have in representing the defendant because of past work they had done for the deceased plaintiff, but plaintiffs counsel did not bring a motion to disqualify for over two years, the plaintiff waived its right to disqualify the defendant's counsel.[49]

Finally, the Montana Supreme Court held that a disqualification motion could be waived even if it is brought against former attorneys who now directly represent the other party.[50] Holding that the representation of the plaintiff was a violation of the Model Code, the new defense attorneys should have reported the violation to the state ethics committee and brought

39. *See, e.g.*, Tenneco Inc. v. Enterprise Products Co., 925 S.W.2d 640, 643 (Tex. 1996); Sun Exploration & Prod. Co. v. Benton, 728 S.W.2d 35, 37 (Tex. 1987).
40. *Epic Holdings*, 985 S.W.2d at 57 (Baker, J., dissenting).
41. *Tenneco*, 924 S.W.2d at 643
42. *Kirk*, 686 N.E.2d at 1251-52.
43. *Id.*
44. *Id.*
45. *Id.*
46. 875 S.W.2d 690 (Tex. 1994).
47. *Vaughn*, 875 S.W.2d at 691; *see also* Jackson v. J.C. Penney Corp., 521 F. Supp 1032 (N.D. Ga. 1981).
48. 701 F.2d 85 (9th Cir. 1983).
49. *Trust Corp.*, 701 F.2d at 85-86.
50. Schuff v. A.T. Klemens & Son, 16 P.3d 1002 (Mont. 2000).

their disqualification motion in a timely manner.[51] The court held the motion to disqualify must contain more than a mere violation of the Model Rules; the motion must show that allowing the opposing counsel to continue representing the opposing party would prejudice the party bringing the motion.[52]

4. Estoppel

In *Batchelor v. Batchelor*,[53] the wife consulted with an attorney in the firm representing the husband in a divorce matter.[54] Using the defense of estoppel, the court found that if a party could prove there was unreasonable delay, knowledge of the course of events, acquiescence, and prejudice to the party asserting the defense, the party bringing the motion to disqualify would then be estopped from bringing such a motion.[55] In *Batchelor,* the court found that the wife was estopped from seeking the disqualification of the husband's attorney based on the following facts: a three month delay in bringing the motion was unreasonable, not bringing this motion was negligence (by not doing so her husband detrimentally relied on her silence), and the waste of both money and time if his attorney was disqualified was prejudicial to Mr. Batchelor.[56]

In *Donohoe v. Consolidated Operating and Production Corp.*,[57] the plaintiff's attorney's former firm represented the defendant in the current case.[58] The court determined that the plaintiff's counsel never dealt with matters that would prejudice the defendant while working with his previous law firm, and the defendant knew of the past conflict but did not bring a motion to disqualify for over a year; thus, the defendant was estopped from bringing the motion.[59] Finding disqualification of an attorney a "drastic measure," the court examined the prejudice that the innocent plaintiff would suffer if their counsel was disqualified, and determined that it was too great in comparison to any slight confidences that the attorney may have been privy to during his work with his previous firm.[60] The year the defendant waited to bring its motion to disqualify plaintiff's counsel, and the prejudice the plaintiff would suffer if the disqualification motion were granted, served to estop the defendant from proceeding with the disqualification motion. [61]

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51. *Schuff,* 16 P.3d at 1012.
52. *Id.* at 1011.
53. 570 N.W.2d 568 (Wis. 1997).
54. *Batchelor,* 570 N.W.2d at 569.
55. *Id.* at 570-71.
56. *Id.*
57. 691 F. Supp 109 (N.D. Ill. 1988).
58. *Donohoe,* 691 F. Supp at 110.
59. *Id.* at 118.
60. *Id.*
61. *Id.*

III. CONCLUSION

Motions to disqualify have increasingly become a standard litigation tactic and should serve as a penalty for a violation of the Model Rules. However, courts have not followed this punitive construction of the Model Rules and instead have used equity as the guiding force in determining if a motion to disqualify should be granted. On account of the increased cost of litigation and the emphasis on deciding a case on its merits rather than on a technicality, courts have not used disqualification motions to punish attorneys who violate the Model Rules unless the violation is so flagrant that it would penalize the party bringing the motion. With modern law firm practice of allowing attorney movement to freely occur, courts have attempted to construe the Model Rules in a manner that reflects lateral attorney movement and realities of the marketplace.

In being more lenient, courts have attempted to balance the interests of current and former clients, similar to the substantial relationship tests and its shifting burdens. Courts have construed the Model Rules on a case-by-case basis where there is no bright line test, but instead, there is a focus on fairness, the protection of client secrets, and the judgment on the merits of the case. Therefore, in order to adhere to these principles, there are exceptions to the general rule that an attorney with any conflict should be prohibited from representing a current opposing client against the former client. Some of these exceptions include: estoppel, consent, waiver, and standing. These are fact specific tools an attorney may use to adhere to the Model Rules. The exceptions will continue to foster the desires of all parties by allowing a client to choose his attorney and by allowing an attorney to choose his place of work. In doing so, the courts best balance the interests of all parties.

Alexander W. Jones