NOTES

EXPLANATIONS, SUGGESTIONS, AND SOLUTIONS TO CONFLICT TRACKING AND PREVENTION IN RESPONSE TO THE GROWTH AND EXPANSION OF THE LARGER LAW FIRM

I. INTRODUCTION

The growth and expansion of the large law firm represents a potentially major obstacle to both the firm and the attorney alike.\(^1\) As firms grow, many find themselves in the precarious position of enjoying the benefits of increased resources and revenues, while simultaneously exposing themselves to a greater number of client conflicts and ethics concerns.\(^2\) While the Model Rules of Professional Conduct (Model Rules) mandate the standard of conduct a lawyer must consistently maintain, the parameters of the Model Rules are increasingly incapable of addressing current problems facing many of today's larger law firms.\(^3\)

This marked increase in law firm size is mainly attributable to several factors related to today's business climate.\(^4\) Notwithstanding these business-related characteristics, other factors have considerably influenced this trend as well. One such factor is the complexity of matters attorneys handle and the shift towards greater firm diversification.\(^5\) Another factor is the growing number of lateral moves made by attorneys either from government practice...

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\(^1\)See Jonathan J. Lerner, An Overview Of The Law Governing Legal Conflicts of Interest, in LEGAL ETHICS 1990, at 9, 13 (PLI Litig. & Admin. Practice Course Handbook Series No. 403, 1990) (discussing generally this growth trend as it leads to more client conflicts). "The exponential growth of law firms, particularly during the last decade, has spawned an increasing number of conflict of interest issues. As firms expand and their client rosters increase, so does the potential that new engagements will create conflicts with the interests of present or former clients." Id.

\(^2\)Id.; see also Susan R. Martyn, Visions of the Eternal Law Firm: The Future of Law Firm Screens, 45 S.C.L. REV. 937, 940 (1994) (stating that "[i]ncreased size brings opportunities for increased wealth, but it also multiplies the potential for problems").

\(^3\)Less than 50 years ago, there were a mere 38 law firms in the country with more than 50 lawyers; in 1985, by contrast, over 500 firms had over 50 lawyers. Marc Galanter & Thomas M. Palay, Why the Big Get Bigger: The Promotion-to-Partner Tournament and the Growth of Large Law Firms, 76 VA. L. REV. 747, 749 (1990).

\(^4\)James W. Jones, The Challenge of Change: The Practice of Law in the Year 2000, 41 Vand. L. REV. 683, 684-86 (1988). These factors include the growing complexity of legal matters, an increase in the amount of nationwide entrepreneurial activity, a dramatic rise in the "instability of corporate America," and "growing consumer consciousness in the United States." Id.

\(^5\)Id. at 684.
into the private arena or from one private firm to another. Yet another factor is the decreasing loyalty that attorneys tend to exhibit toward employers. These factors, coupled with the increasing difficulty and length of the partnership track, make switching jobs more attractive to any attorney with aspirations greater than his or her current employer can accommodate.

As firms seek to bring the benefits of specialization and experience to a fledgling department, it is common to see both partners and associates relocate. The interplay between these factors has caused new and unique ethical considerations for firms attempting to handle client conflicts, address professional malpractice issues, and uphold the tenets of professional responsibility.

The larger firms involved in this exponential expansion are not ignorant of the ethical implications that accompany their growth. In fact, firms are seeking innovative methods to ensure that they are doing all in their power to prevent potential conflicts, as well as imputed or vicarious disqualifications. Notwithstanding these efforts, no panacea has been found. Though there are now several preventive and insulating devices in use, none fully safeguard firms from the inherent risks that larger practices are encountering.

One controversial method of insulating firms from malpractice and disqualification is a construct known as the "Chinese Wall," which has also

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7Joan Wagner Zinober, The Loyalty Crisis — Today's Employee is Quite a Different Breed from Yesterday's, LAW PRAC. MGMT., Apr. 1992, at 27, 29 (discussing how "younger lawyers want an increasingly larger share of the pie," as background for an explanation for the growing lack of commitment attorneys exhibit to their firms).
8Id. at 29 (stating that "young workers are more likely to prioritize family over work").
9Id. (stating that "[w]ith low levels of loyalty, both lawyers and employees feel no pressing need to remain with the firm. As a result, they will be more receptive to offers that come along").
10See Charlotte M. Fischman, Client Conflicts: The Large Firm Experience and the Use of the Chinese Wall, in CONFLICTS OF INTEREST IN LEGAL REPRESENTATION 69, 73 (PLI Litig. & Admin. Practice Course Handbook Series No. 365, 1988) (stating how "[m]ajor law firms are devoting substantial resources and attorney time to avoid conflict of interest problems and resolve them short of disqualification motions or other forms of public scrutiny").
11Id.
12See infra Part IV (discussing existing devices and their shortcomings).
13Id.
14Sheldon 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 173, 202 (PLI Litig. & Admin. Practice Course Handbook Series No. 403, 1990) (stating that the Chinese Wall "is an intrafirm barrier to the dissemination of confidential information"). See also Julius Denenberg & Jeffrey R. Learned, Multiple Party Representation, Conflicts of Interest, and Disqualification: Problems and Solutions, 27 TORT & INS. L.J. 497, 519 (1992) (stating that the "Chinese Wall is a screening procedure that completely insulates an attorney . . . from the rest of a
been referred to as the "Cone of Silence." The "Chinese Wall" is barely recognized by the Model Rules and it has not been warmly received by the various United States Circuit Courts. It is hoped, however, that as the problem becomes more widespread and the number of actual client conflicts escalates, these jurisdictions will recognize the "Chinese Wall" defense as a valid protection against the vicarious disqualification of firms.

This note will address the reasons why law firms are growing and the ethical ramifications that accompany such rapid expansion. It will examine this issue in the context of the Model Rules and will further explore how firms are protecting themselves from conflicts today. Finally, it will examine what, if any, impact newly developed conflict-tracking software and other technological advances will have on the practice of law in the next millennium.

Part II will address the genesis of the larger law firm and some prominent factors behind this growth including insight from the corporate arena, as well as other types of behavior and conduct esoteric to the practice of law. Part III will address the Model Rules and discuss their shortcomings with respect to specific sections, as well as their antiquated prohibition of the use of the "Chinese Wall" in the private firm context. Part IV will discuss the various screening devices used and address the current, but inadequate, measures law firms have taken to prevent conflicts of interests from arising. Finally, Part V will offer suggestions and solutions for curbing the ethical dilemmas attorneys face through a discussion of conflict-tracking software.
and other technology-based alternatives, as well as a commentary on the utility of those devices.

II. CAUSAL FACTORS BEHIND LAW FIRM GROWTH

The practice of law is experiencing a remarkable degree of change. While many areas of law are undergoing a transformation, the increase in the size of law firms may pose the greatest impact on the ethical and professional responsibilities inherent to lawyering. This increase in firm size is primarily due to the increasing complexity of legal matters. While the following discussion does not purport to address every reason for firm expansion, it does discuss several factors most germane to attorney responsibility and various ethical consequences of firm growth.

A. Complexity and Diversification

Today law firms are handling a broader range of client issues that may, in the past, have been referred out. Firms now provide more services to their clients and, in many instances, offer something akin to "one-stop shopping." They are adopting a more problem-solving and goal-oriented approach to client concerns with less apprehension about delving into an area a lack of expertise might normally forbid. As previously mentioned, this shift from a highly specialized practice to one more widely diversified brings with it ethical implications. For example, the Canons of Professional Ethics illustrate the relatively bright lines that have always separated

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18 Jones, supra note 4, at 683. "The past two decades have witnessed extraordinary changes that will have a lasting impact on the structure of the legal profession and the ways in which lawyers approach their practices." Id. See also David Bradlow, The Changing Legal Environment: The 1980s and Beyond, 74 A.B.A. J. 72 (1988) (stating that "[t]he legal profession is experiencing significant — and accelerating — changes"); see generally Galanter & Palay, supra note 3, at 747 (discussing the development of the legal profession accompanied by detailed statistical analysis).

19 Martyn, supra note 2, at 939.

20 Jones, supra note 4, at 684. The traditional role of the lawyer is more nebulous today, and "the distinction between what is a 'strictly legal' issue and what is not is often quite blurred." Id.

21 Id. at 684.

22 James F. Fitzpatrick, Legal Future Shock: The Role of Large Law Firms by the End of the Century, 64 IND. L.J. 461, 465 (1989) (stating firms achieve this end by developing teams of experts comprised of both attorneys, and non-legal professionals to help meet the demands of the client).

23 Id. See also id. at 467 (discussing some of the new and original endeavors that have been undertaken by some large law firms).
different professions. 24 However, such traditional borders within the profession are rapidly giving way to a more modern trend. 25

The multidisciplinary nature of law firms makes the lawyer's role less narrowly defined. 26 The increasing complexity of the world, in general, has forced lawyers to address non-traditional issues, as well as legal ones. 27 Many firms now possess nonlegal departments. The presence of these additional professional services in-house can enable one firm to gain a competitive advantage. 28 In fact, several firms have diversified even further by creating subsidiary entities aimed at providing greater service to their clientele. 29 Often these firms hire nonlegal professionals to serve clients, provide nonlegal services to clients through separate partnerships or corporations, and market the services of new ventures to existing clients or clients of nonlegal ventures. 30

As firms grow, they are increasingly able to draw upon internal experience and resources to handle more complex matters; whereas, in an earlier era, firms were typically focused on a smaller, more narrowly defined, area of practice. Today's firms are increasingly apt to hire specialists and nonlegal professionals whose knowledge enables the firm to handle more abstract areas of both law and business. 31 As our culture continues to undergo great change in its social, economic, and political norms, so, too will the legal profession. 32 The typical firm will soon incorporate attributes of multiple disciplines to provide a diversified service within a single institution. 33

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24 Id. at 465.
25 Id.
26 Id. at 685.
27 Id. at 684-85 (stating that "[t]oday's lawyer is almost as likely to be focusing on economic, scientific, financial, or political questions as on strictly legal issues").
28 Fitzpatrick, supra note 22, at 466.
29 Id. at 467 (discussing nonlegal activities undertaken including law firms in Atlanta and Memphis starting an investment banking venture, an Atlanta firm operating energy and environmental consulting services, an Arizona law firm creating an advertising agency, a Philadelphia labor law firm engaging in consulting work and a Los Angeles law firm entering the real estate business. See also Jones, supra note 4, at 688-89 (elaborating on the diversification of law firms into nonlegal activities).
31 Bradlow, supra note 18, at 72 (stating the multifaceted attorney of today handles a wide array of matters, and as one source astutely explained, "there are no corporate lawyers anymore: instead there are specialists in areas such as securities, takeovers and regulations").
32 Id. at 74.
33 Fitzpatrick, supra note 22, at 465.
In addition to the increasing complexity of legal issues, competition among firms has increased, thereby forcing firms to change or fall behind.\textsuperscript{34} Diversification, commercial aggressiveness,\textsuperscript{35} and a multidisciplinary approach to problem solving are essential elements of these changes and to the evolving legal profession a whole.\textsuperscript{36}

This highly competitive nature encourages the growth of large firms creating the ethical implications endemic to the modern practice of law.\textsuperscript{37} As these firms continue to diversify, grow, and ally with other entities, issues of confidentiality and professional responsibility must be addressed.\textsuperscript{38} Moreover, mergers, acquisitions, and the continuing flux of corporate America exert a profound effect on today's legal practice.\textsuperscript{39}

B. Mergers & Acquisitions

Consolidations and mergers have also changed the face of the traditional law firm.\textsuperscript{40} Historically, it was common for firms to expand their departments to accommodate a wider array of legal issues and client concerns.\textsuperscript{41} Such small scale expansion, however, was typically accomplished through hiring and recruiting.\textsuperscript{42} Today's firms go well beyond the hiring process to achieve this; actual defections of entire departments, even entire firms, are not uncommon.\textsuperscript{43} Small and mid-sized law firms are

\textsuperscript{34}Bradlow, supra note 18, at 74. "To prosper and survive, a law firm must have the flexibility to grasp new opportunities as they appear, and the foresight and agility to develop new practice areas [as well] as existing ones." \textit{Id.; see also} Haserot, supra note 30, at 16 (discussing the rapidly changing environment of the modern law firm). "The reason for this internal diversity is once again the search for a competitive edge in order to provide needed expertise that lawyers cannot fulfill, [and] to compete with companies in other fields that are moving into functions that only lawyers used to perform." \textit{Id.}

\textsuperscript{35}Fitzpatrick, supra note 22, at 465.

\textsuperscript{36}Jones, supra note 4, at 685 (citing Haserot, supra note 30, at 18).

\textsuperscript{37}Galanter & Palay, supra note 3, at 750 (stating that "[s]ize multiplies the possibility of conflicts of interest, and the resulting tension between partners who tend old clients and those who propose new ones can often lead to a breakaway").

\textsuperscript{38}Haserot, supra note 30, at 18.

\textsuperscript{39}Jones, supra note 4, at 685.

\textsuperscript{40}Galanter & Palay, supra note 3, at 750 (describing how a perusal of legal newspapers and periodicals revealed a total of 71 mergers involving over 80 different large firms). "As mergers increase, creating more 'megafirms,' the possibilities for conflicts of interest can increase exponentially." Denenberg & Learned, supra note 14, at 509.

\textsuperscript{41}Fitzpatrick, supra note 22, at 466 (noting that historically firms would hire individuals whose services were once "separate and independent" from the firm).

\textsuperscript{42}Id.

\textsuperscript{43}Zinobe, supra note 7, at 27 (commenting that mass defections of several attorneys from one firm to another are more frequently occurring as large firms hope to expand their resource base).
being acquired with increasing frequency because small firms do not have the resources to specialize in narrower fields of law.\footnote{Fitzpatrick, supra note 22, at 464.}

As law firms shift focus toward greater diversification, a corresponding change occurs in the make-up of the average large law firm. When a firm has several departments well-staffed with experts, more work can be completed in-house, allowing the firm to earn more revenues.\footnote{Bradlow, supra note 18, at 72. "The trend toward specialization will speed up the merger movement already in progress . . . [and] m]edium-and-large sized firms, anxious to capitalize on rapidly growing practice areas, will continue to present merger offers . . . ." Id.}

Consequently, mergers and formal affiliations are gaining popularity because they allow a firm to achieve many of its long term growth goals almost immediately. The potential benefits of such relationships are immeasurable. A recent survey indicates that many more firms are amalgamating or, at the very least, contemplating more of these alliances than would be expected.\footnote{Haserot, supra note 30, at 18 (discussing a recent survey in which 20% of the firms that responded said they had such affiliations or had considered forming them, 50% had affiliations in other geographic locations, and half had affiliations with firms of other expertise).} In short, "the multiprofessional firm is in its infancy, but the concept shows definite signs of catching on as firms seek to develop new marketing niches and perspectives."\footnote{Id.}

In addition to alliances between law firms, corporate business mergers and acquisitions now comprise much of the corporate lawyer's practice. Consequently, as America's larger companies continue to make hostile takeover bids and engage in more complex joint ventures, the effects of such growth inevitably trickle down to the legal profession.\footnote{Jones, supra note 4, at 685.} For example, when "corporate upheavals"\footnote{Id. When author Jones uses the term corporate upheaval, he is likely referring to an event such as a corporate acquisition, dissolution, takeover or merger which may put a corporation and its affiliates or subsidiaries in a state of disarray.} occur, the relationships between a firm and its clients may be adversely affected.\footnote{Id. at 685-86.}

Problems associated with this type of unstable corporate activity are readily apparent.\footnote{Raab, supra note 14, at 179. "The movement of attorneys between private law firms or between government agencies and law firms raises ethical dilemmas separate and distinct from those presented in a strictly intrafirm context. These dilemmas are compounded when law firms merge or establish affiliations or joint ventures." Id. See also Bruce A. Green, Conflicts of Interest in Litigation: The Judicial Role, 65 Fordham L. Rev. 71, 124 n.193 (1996) (discussing problems associated with the instability of corporate activity) (citing Gould, Inc., v. Mitsui Mining & Smelting Co., 738 F. Supp. 1121, 1127 (N.D. Ohio 1990) (noting a decision which "explain[ed] that disqualification is appropriate when a conflict of interest arises from a merger between law firms").} For instance, when two companies merge and sever their relationship with their respective counsel, should the law firm be forever
barred from representing competitors of its former client, when a majority of the litigation in that area will undoubtedly involve the former client? This note will attempt to answer this question by first elucidating the need for change in the context of the Model Rules, then discussing consequences of its shortcomings, and finally, presenting potential solutions to these issues. In addition to the role the American business climate generally has on law firm expansion, the effects of attorney loyalty and mobility also enter this analysis, as well.

C. Lateral Movements, Waning Loyalty, and Increased Attorney Mobility

No longer does the typical attorney begin and end his career at the same firm.52 Related to the growth and expansion of law firms is the increase in lateral moves, as well as a diminished sense of attorney loyalty.53 Today, it is common for an attorney to leave his or her current practice for the "greener pastures"54 of another firm. Similarly, because headhunting activity for lawyers has drastically increased in recent years, the corresponding decrease in loyalty makes the market for a good attorney much more competitive.55 Moreover, to meet the desired end of greater diversification within a law firm, the modern trend is to hire laterally.56 Lateral hiring is an excellent way for a firm to meet the demands and pressures inherent in the profession today, and, beside merging or creating a formal alliance with another firm, there are few options as feasible as

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52Fitzpatrick, supra note 22, at 463. See also Jones, supra note 4, at 688 (discussing the impact increased lawyer mobility has had on firm recruitment).
53Jones, supra note 4, at 688.
54Diane E. Ambler, Lateral Hiring Conflicts, INSIGHTS, June 1991, at 7. See also Zinober, supra note 7, at 30 (discussing what often occurs after associates at a firm become profitable and look for other places to take their newly-acquired talents). "[A]pproximately 40 percent of partners come to firms as lateral hires . . . [and] the lateral hiring of partners has become a primary marketing strategy." Phyllis Weiss Haserot, Successfully Integrating Your Lateral Practice, LAW FIRM PARTNERSHIP & BENEFITS REPORT, June 1996 at 8.
55Jones, supra note 4, at 688 (citing Julia Alexander, Charting a Course of Change: Firms in Transition, NAT'L L.J., Jan. 18, 1988, at 34 (stating that over 150 professional recruiting firms currently engage in activity that could be considered headhunting)). See also Haserot, supra note 54, at 8 (observing that, in the past, "[t]he legal headhunting community was considerably smaller and much less prosperous than it is today").
56Fitzpatrick, supra note 22, at 464 (citing a magazine survey which states that, of the 500 largest firms, 25% reported that 50% or more of the firm's new partners were acquired from outside sources, and were not the result of promotion). See also Jones, supra note 4, at 687 (stating that "lateral acquisitions rapidly are becoming the rule rather than the exception," and discussing a survey which determined that very few of the largest firms did not engage in lateral hiring).
acquiring laterals when seeking to either construct or expand a particular area of practice.\textsuperscript{57}

Although lateral hiring offers several potential benefits to firms, it is not without risk. In addition to the obvious risks associated with all hiring, firms hiring laterally must also concentrate heavily on the fundamental need to prevent client conflicts and mitigate confidentiality concerns associated with such hiring.\textsuperscript{58} It is important, however, to understand the effect lateral hiring can have on a firm insofar as it can create instantaneous conflicts between current and former clients.\textsuperscript{59}

The inherent risks of client conflicts and issues of confidentiality when hiring laterally are problematic for those firms attempting to expand their resource base and provide better services to their clients in this manner.\textsuperscript{60} All businesses, be they a large law firm, a publicly held corporation or a small, family-run business, hope to achieve higher profits by offering better service. In this regard, law firms are like their business counterparts in that many of the strategic moves made by businesses are mimicked by the large law firms.\textsuperscript{61} In a law firm context, however, the danger of violating specific ethical rules distinguishes the legal landscape from that of the business world.

The lateral attorneys that a firm hires typically come from another private firm. As discussed earlier, a function of the greater willingness to hire attorneys laterally is the accompanying decrease in loyalty lawyers

\textsuperscript{57}Hamberg, supra note 6, at 44–45. See also Galanter & Palay, supra note 3, at 750. "[S]tarting in the 1970's, lateral movement became more frequent, soon developing into a systematic means of enlarging the specialties and localities a firm could service and acquiring rainmakers who might bring with them or attract new clients." Id. Rainmakers are those attorneys that are able to win exorbitantly large cases and secure a windfall for either their firm, or themselves. Black's Law Dictionary 520 (new pocket ed. 1996).

\textsuperscript{58}See Martyn, supra note 2, at 942. "Conflicts ... between former and current clients arise when either a client or a lawyer changes law firms. A lawyer joining a new firm can taint the new firm by bringing information about former clients from her past practices." Id.

\textsuperscript{59}Model Rules of Professional Conduct Rule 1.10 cmt. (1983). "[I]f a lawyer has been a partner in one law firm and then becomes a partner in another firm, there is a presumption that all confidences known by a partner in the first firm are known to all partners in the second firm." Id.

\textsuperscript{60}Ambler, supra note 54, at 7. "Competing interests presented by lawyers making lateral moves must be detected in the early planning stages so that actual conflict may be avoided." Id.

\textsuperscript{61}Jones, supra note 4, at 685. In addition to firm mergers and alliances, yet another "factor that has significantly affected the practice of law in recent years has been the growth of a new spirit of entrepreneurship, which has literally swept the country in the past decade." Id. The source then goes on to discuss some statistics regarding the formation of new business and stated that in 1950, only 90,000 new business were formed, but in 1985, some 1.4 million new businesses were created. Id. While law firm creation has not kept pace with the speed at which new business are formed, their impact is nonetheless substantial. Id. See also Galanter & Palay, supra note 3, at 752 (describing how "[i]n the practice of law has become more openly commercial and profit-oriented, more like a business").
exhibit to their respective firms. In the past, it was expected that once a lawyer made a career decision and chose his place of practice, there was little chance that lawyer would leave the firm prematurely. As law firms have struggled to compete in the chaotic market and business climate, this sense of loyalty and "family" within the legal profession has inevitably broken down.7

Younger lawyers are perceived to have less devotion to their careers and their firms. This is due, in part, to attorneys' increasing desire to have lives beyond the four walls of their offices and a better balance between work and family. This tension often leads to a less happy employee and, in turn, may affect an attorney's work product and cause his productivity to diminish. This lack of loyalty has another implication: "Job search follows dissatisfaction."6

Other explanations for an attorney's inclination to leave his current practice are the increasing length of the partnership track, and the growing reluctance on the part of firms to extend partnership offers to associates. The current length of the partnership track is typically at least eight years, and in some cases, ten years. Additionally, because the ratio of associates to partners has increased in recent years, younger attorneys commonly perceive attaining partner status as a remote possibility. Further, firms are more likely to "dismiss" associates who do not measure up to firm standards, and these promotion-related concerns inevitably detract from an attorney's tendency to remain at a particular firm.7

While a generalized decrease in attorney loyalty is not alone alarming, the consequences of such a phenomenon are troubling. The attenuated result of this decrease in loyalty is, of course, a rise in the number of possible conflicts of interest. As the profession undergoes these stark changes, it is

6Fitzpatrick, supra note 22, at 463. While in an earlier era, "[m]oving from one law firm to another reflected badly on the lawyer's professional judgment, and the probity of his advice," such movement today has little or none of the negative connotation it once did. Id.

7Id. (commenting that firms no longer represent the bastion of stability and reliability they once did, and lawyers are no longer loath to move on when the firm fails to meet their continuing expectations).

6Nelson, supra note 7, at 29. "Older lawyers who built the firms are dismayed at having to contend with younger lawyers whom they perceive to have less loyalty, less commitment, and less willingness to work long hours." Id.

6Id. (noting that many younger lawyers "are more likely to prioritize family over work," and seek a different lifestyle from the often restrictive one their parents led).

6Id. at 30.

6See Galanter & Palay, supra note 3, at 752.


6Galanter & Palay, supra note 3, at 753.

7Nelson, supra note 68, at 737.
difficult to foresee what ethical ramifications will develop. The profession as a whole, however, must stand ready to adapt to the modern trend.

These causal factors behind law firm growth are not conceptually difficult, and many of the changes and trends discussed above are indicative of general developments occurring in businesses across America. Though many other professions and entities undergoing great change face similar risks and possible rewards, none face the tremendous ethical issues the attorney and the law firm must ultimately confront. The next section of this note will discuss those portions of the Model Rules which are most relevant to the growth of the large law firm: those that deal specifically with client conflict and confidentiality issues.

III. THE MODEL RULES OF PROFESSIONAL CONDUCT AND RELEVANT CASE LAW

"Conflicts of interest in the practice of law have presented the legal profession with some of the most serious problems of professional responsibility." Courts have struggled with various readings and interpretations of the Model Rules since their creation. Regardless of the breakdown of the individual circuit's approach, the Model Rules' inability to adequately address current problems in this troublesome area requires both in-depth analysis and the recommendation of a viable remedy likely to be adopted by the courts.

A. Model Rules of Professional Conduct

The relevant sections of the Model Rules of Professional Conduct that will be addressed by this note are 1.6, 1.7, 1.9, and 1.10. These rules most specifically address the conflict of interest dilemmas and are the most germane to the discussion of the expansion and growth of large law firms.

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71Zinober, supra note 7, at 27.
72Martyn, supra note 2, at 938. The author contends that external factors, such as market forces and both national and international economies are responsible for much of the growth all businesses, including law firms, and the law firm have been experiencing.
75The circuits split on standards, and individual judges differ on how the same standards should be applied to the same fact situation. In fact, some courts have recognized and taken into account the realities of the modern legal practice, while others have adopted a strict approach that ignores these considerations.
76Green, supra note 51, at 109.
1. Rule 1.6

Rule 1.6 addresses the duty of confidentiality which all attorneys owe their clients.\textsuperscript{26} This rule needs only a cursory discussion as its relevance to the issue addressed herein is limited. Rule 1.6 is, in essence, the underlying fiduciary obligation that all attorneys have to protect the confidences of his or her clients.\textsuperscript{27} It has been referred to as a "fundamental principle" to the practice of law, and its origin stems from the lawyer's role as an officer of the court, who, like judges and various other members of the judicial system, are responsible for upholding the law.\textsuperscript{28} The duty of confidentiality is pertinent because when a lawyer or firm seeks to take on a new client, or a tainted lawyer, it is the duty of confidentiality that courts fear will be breached. The gravamen of all conflict concerns is the worry that clients will speak to their attorneys with less candor if they feel that what they say could later be used to their detriment.\textsuperscript{29}

2. Rule 1.7

Rule 1.7 addresses consequences resulting either from the representation of concurrent clients with "directly adverse" interests, or a situation where an attorney believes the representation of one client will be materially limited by the representation of another.\textsuperscript{30} As deduced from the language of the Model Rules, it is apparent that Rule 1.7 will not punish or preclude an attorney from representing a client whose interests are merely inconsistent, or in some way conflicts with, those of another client.\textsuperscript{31} While the definition of a "directly adverse" interest is subject to judicial interpretation, the reality is that unless courts adopt a more liberal approach to its application, Rule 1.7 might become an insurmountable stumbling block to the practice of law in coming decades.\textsuperscript{32} As the Rule reads now, violations can only be avoided where "the lawyer reasonably believes the representation will not be adversely affected," and consent from each client is obtained after consultation.\textsuperscript{33} While the Model Rules do provide for concurrent

\textsuperscript{26}Model Rules of Professional Conduct Rule 1.6 (1983).
\textsuperscript{27}See id. (A "lawyer shall not reveal information relating to representation of a client . . . .").
\textsuperscript{28}Id.
\textsuperscript{29}Id.
\textsuperscript{30}Model Rules of Professional Conduct Rule 1.7 (1983).
\textsuperscript{31}Id.
\textsuperscript{32}In fact, courts are moving in this direction as evidenced by the language of Rule 1.7 which implies that concurrent representation would be allowed at times, provided the client interests are not adverse. Lerner, supra note 1, at 21.
\textsuperscript{33}Model Rules of Professional Conduct Rule 1.7(1) (1983).
representation of possibly conflicting client interests, the broad language of Rule 1.7 also precludes representations that pose none of the fears that the rule is geared to protect against.\textsuperscript{84} This is the problem presented by the Model Rules, and while the protection of clients is integral to the practice of law, it should not go so far as to retard the development of the legal profession.

While representations that would lead to the incongruous result of an attorney or firm losing in court, yet still winning because the firm is somehow associated with both sides, are offensive and clearly impermissible, not every conflict situation that arises justifies disqualification. For example, if a large law firm with several branch offices represents a corporate client, that law firm may be precluded from undertaking the representation if a branch office represents an opposing party in a suit or ancillary matter. This is because, technically, the law firm represents a client with adverse interests. General relaxation of the Model Rules is not necessarily the best solution; nevertheless, a more liberal view is necessary if the Model Rules are to adapt and keep pace with the changes in the legal profession.

While it is argued that a more liberal interpretation of the Model Rules might compromise the integrity of the practice of law, it seems clear that not only are the ethical difficulties of the practice of law increasing today, but the Model Rules charged with governing such practice are becoming increasingly deficient.\textsuperscript{85} Crafting a solution for this problem from the Model Rules themselves would be a formidable task because their language results in such a wide array of disparate interpretation. Though the Model Rules offer guidelines for what types of representations are impermissible, as demonstrated in the examples above, a literal interpretation can lead to a violation of a rule notwithstanding the improbability of confidences being leaked.\textsuperscript{86} Therefore, in light of these concerns regarding Rule 1.7 and its application, it is apparent that an alternate solution is required to combat the conflict problems associated with the growth of the law firm.

\textsuperscript{84}Id.

\textsuperscript{85}This is especially true as operation of this rule has resulted — and continues to result — in ethical overkill as it is applied to large corporate firms with far flung offices and representing corporate clients." Lerner, supra note 1, at 27.

\textsuperscript{86}Factors used to determine whether interests are directly adverse are: "(a) duration and intimacy of the lawyer's relationship with the client or clients involved; (b) the functions being performed by the lawyer; (c) the likelihood that actual conflict will arise; and (d) the likely prejudice to the client." Id. at 16.
3. Rule 1.9

Rule 1.9 is commonly referred to as the substantial relationship test and deals primarily with the problems that arise when a lawyer has a possible conflict of interest with a former client. The rule states, in relevant part, that "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation." The rationale behind the rule, as with Rule 1.7, is simply that greater client candor will likely be generated when clients know that the confidences they disclose to their attorney will not somehow hurt them later. Though Rule 1.9 is careful not to actually define what is considered "substantially related," it does comment that the findings of the court should be predicated on such considerations as the facts inherent to the particular situation or transaction, and the degree to which the lawyer is involved.

Many jurisdictions disagree on the definition of the term "substantially related." Accordingly, three approaches have developed to determine whether a substantial relationship exists between a former and current representation. In one case, the Second Circuit stated that the issues must be "identical," or "essentially the same" to be substantially related. In contrast, the Seventh Circuit put forth a different, three-pronged test to determine substantiality. The Ninth Circuit has adopted a test of its own that hinges on whether or not "the factual contexts of the two representations are similar or related." Finally, the Third Circuit has stated that the substantial relationship test requires a three-pronged analysis: courts are to consider the nature and scope of the prior representation, the nature of the present case against the former client, and the possibility that any confidences of the former client could be used to his detriment in the present

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88Id.
91Lemer, supra note 1, at 30.
92Id. at 31 (citing Government of India v. Cook Indus., 569 F.2d 737, 739-40 (2d. Cir. 1978)).
93Id. at 32 (citing Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 225 (7th Cir. 1978) (discussing the requirements of a substantial relationship determination)).
94Id. at 33 (citing Trone v. Smith, 621 F.2d 994, 998 (9th Cir. 1980)).
litigation.\textsuperscript{95} Notwithstanding the disconcert among the Circuits, the result of the various substantial relationship tests is equivalent: lawyers who switch firms, or lawyers who move from government practice into the private arena, and the firms that merge or expand, are all at risk from the imposition of these rules upon their practices.\textsuperscript{96} As Judge Posner explained in a decision regarding the application of Rule 1.9, it does not matter if actual client confidences were exchanged, if the attorney was in a position where confidences could have been exchanged, then the rule is invoked.\textsuperscript{97}

Therefore, once a substantial relationship has been found, an irrebuttable presumption arises that the attorney acquired confidential information in the course of the former representation.\textsuperscript{98} This presumption necessarily implies that the attorney is assumed to have all the confidences of his or her former clients. The problem arises, however, when that attorney moves between firms or corporations, and those client confidences go with him or her to the new place of employment. This transition could have harsh consequences for both the attorney and the employer. While the policy behind this rule certainly warrants its existence and justifies both its purpose and function, (client confidences must be secure),\textsuperscript{99} in today's chaotic climate of change and growth, its practicality has become somewhat suspect.

While in earlier times, migrating attorneys and formal affiliations between firms were a rare occurrence, now such is the norm.\textsuperscript{100} Furthermore, while regulation is a necessary evil to every field and industry, is the type that precludes progress necessary? In addition to Rule 1.9, which


\textsuperscript{96}MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 cmt. (1983). "When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited." \textit{Id.}

\textsuperscript{97}Lerner, supra note 1, at 30 (citing Posner in Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1266 (7th Cir. 1983)).

\textsuperscript{98}Id. at 34 (citing T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265, 268 (S.D.N.Y. 1953)).

\textsuperscript{99}"Loyalty is an essential element in the lawyer's relationship to a client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. (1983).

\textsuperscript{100}Miller et al., supra note 74, at 155. See also Fitzpatrick, supra note 22, at 462-63 ("Firms are not only becoming bigger in terms of numbers of lawyers and gross revenues, but they are increasingly broadening their geographic reach .... This trend toward a regional or even nationwide network of branches will not simply continue, it will accelerate."); Jones, supra note 4, at 687 (stating that many firms have now expanded geographically as well, and that "[t]oday, more than one-third of all the lawyers in the nation's 100 largest firms work in branch offices—both domestic and foreign").
addresses, specifically, the substantial relationship between former and current representation, an even more potentially inhibiting rule often invoked in conjunction with Rule 1.9, is Rule 1.10. Rule 1.10 allows for the imputed or vicarious disqualification of entire firms, and represents another grave concern to those firms and attorneys participating in the current trends and patterns of growth and change.\textsuperscript{101}

4. Rule 1.10

Rule 1.10 is the general rule regarding imputed disqualification and is especially applicable to this discussion on firm growth and expansion, and the correlated increase in ethics and responsibility concerns.\textsuperscript{102} The relevant language in Rule 1.10(b) states that "[w]hen a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or substantially related matter in which the lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person."\textsuperscript{103} In essence, Rule 1.10 takes those conditions in Rule 1.9 that apply to individual attorney disqualification, and applies them generally to the firm as a whole.\textsuperscript{104} Though the presumption that the attorney has received confidential information is not rebuttable under Rule 1.9,\textsuperscript{105} the presumption that the attorney has communicated these confidences to his new firm is rebuttable, but requires a strong argument to convince the court.\textsuperscript{106} The reason behind this exception is the drafter's prescience regarding the potential problems that would arise when attorneys move from government positions into private firms.\textsuperscript{107}

The drafters' intent was not to deter attorneys from beginning their careers in a government or public service position, and in theory, this rule.

\textsuperscript{101}\textit{Model Rules of Professional Conduct} Rule 1.10 (1983).

\textsuperscript{102}\textit{Id}.

\textsuperscript{103}\textit{Id}.


\textsuperscript{105}See Lerner, supra note 1, at 34 (citing T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265, 268 (S.D.N.Y. 1953)).

\textsuperscript{106}\textit{Id} at 37-38. The author notes that "absent some mechanism to prevent the sharing of information . . . some courts have presumed that new partners of a recipient of confidential information will also be privy to that information." \textit{Id}. at 38. See also Nemours Found., 632 F. Supp. at 427 (noting courts which have taken this approach) (citing, \textit{inter alia}, Ez Paintr Corp. v. Padco, Inc., 746 F.2d 1439, 1462 (Fed. Cir. 1984); Analytica, Inc., v. NPD Research Inc., 708 F.2d 1263, 1267-68 (7th Cir. 1983)).

\textsuperscript{107}Nemours Found., 632 F. Supp. at 425 (discussing comment to \textit{Model Rules of Professional Conduct} Rule 1.10 (1983)). The Rule calls for a "functional analysis' . . . which balances the expectations of confidentiality of a former client against the importance of allowing a client the representation of his choice and promoting the mobility of attorneys, particularly associates from one private law firm to another." \textit{Id}.
purports to address the issue of the mobile attorney.\textsuperscript{108} Despite the existence of the exception, many courts have been reluctant to enforce its provisions, and one approach is of per se disqualification.\textsuperscript{109} While this approach has not been widely adopted, it demonstrates the fact that some courts are unwilling to tolerate even \textit{de minimus} infringements that appear to even slightly offend the ethical canons upon which the legal profession rests.\textsuperscript{110} Nor should they be; the Model Rules are necessary to govern the practice of law. They must, however, be able to strike a balance between the need to preserve client confidences, and the right of today's attorney to be mobile.\textsuperscript{111}

Rule 1.10 by itself is not inimical to the progress and evolution of the practice of law that has been addressed herein. The diverse and varied interpretations of it, however, represent precisely that potential hindrance. The greatest flaw of Rule 1.10 is its patent failure to endorse the screening provision that constitutes one of the key methods for avoiding client conflicts and possible disqualification. The next section of this note will discuss relevant jurisprudence on this subject, the screen provision of Rule 1.11, as well as, address both the shortcomings of the Model Rules and other judicial recalcitrance in accepting feasible solutions to the increasing conflict problems facing the legal profession.\textsuperscript{112}

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\textsuperscript{108}Lerner, supra note 1, at 40. \textit{See also} Mark Brodeur, \textit{Building Chinese Walls: Current Implementation and a Proposal for Reforming Law Firm Disqualification}, 7 REV. LITIG. 167, 185-86 (1988) (citing Kesselhaut \textit{v.} United States, 555 F.2d 791, 793 (Cl. Ct. 1977) (discussing the public policy rationale that strict literal adherence to Rule 1.10 "would act as a strong deterrent to the acceptance of Government employment by the most promising class of young lawyers"); Geoffrey C. Hazard, Jr., \textit{Erecting a Wall to Prevent Conflicts of Interest}, NAT'L L.J., July 21, 1997, at A19, A19 (explaining that the rule was designed "to facilitate the 'revolving door' between government service, and private practice, thus improving lawyers' incentive to enter government service in the first place").

\textsuperscript{109}This approach is the more stringent of two possible approaches in the analysis of the imputed disqualification question. The other deals with the antiquated concept of the "appearance of impropriety" as found in the Model Code. \textit{Nemours Found.}, 632 F. Supp. at 425.

\textsuperscript{110}See McLaughlin et al., supra note 15, at 828-29 (citing Cheng \textit{v.} GAF Corp., 631 F.2d 1052, 1058 (2d. Cir. 1980) (rejecting the "Chinese Wall" defense)); \textit{but see} Laskey Bros. of W. Va. Inc. \textit{v.} Warner Bros. Pictures, Inc., 224 F.2d 824, 827 (2d Cir. 1955). \textit{See also} Lerner, supra note 1, at 41 (citing Laskey Bros., 224 F.2d at 827). "[T]he presumption did not preclude subsequent representation by his new law firm after the previous firm dissolved. The court emphasized that the presumption of shared confidences must not be 'unattainably high' lest young lawyers 'seriously jeopardize their careers by temporary affiliation with large law firms.'" \textit{Id.}

\textsuperscript{111}Miller et al., supra note 74, at 162 (stating that Model Rules 1.9 and 1.10 "attempt to balance lawyers' duties to their clients with the need to accommodate the increasing mobility of members of the profession").

\textsuperscript{112}MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11 (1983).
B. Case Law

Rule 1.11 is a device that enables the mobile attorney who moves from government practice into the private sector to dodge vicarious disqualification of his or her entire firm through artful maneuvering and the completion of several insulating measures. As mentioned before, the origin of the rebuttable presumption of shared confidences was the drafter's intent to not discourage young attorneys from beginning their careers in the government. Nowhere in the language of the rule, however, is reference made to those attorneys who move from firm to firm strictly within the private arena. Because a literal reading of the language of the rule implies that it is inapplicable to the privately mobile attorney, the risks and consequences attached to such movement may act as a strong deterrent. This inference, however, has been altered slightly as the acceptance of ethical screens, though not universal, has taken the evolution of the Model Rules a step closer to comporting with the growth and changes of the practice of law.

One Third Circuit case integral to the general acceptance of the ethical screen in that jurisdiction was INA Underwriters Insurance Co. v. Nalibotsky. In that case, a partner in a firm received confidences from a client, but later opted not to represent that client based on a possible conflict. There was no dispute that the attorney who had received the sensitive information was to be disqualified under Rule 1.9; the issue was whether the entire firm should be disqualified under Rule 1.10. The court determined "that there [was] not a 'substantial relationship' between the prior representation and the present litigation warranting disqualification," and then went on to discuss the screen known as the "Chinese Wall." The

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113 Id.
114 See supra text accompanying note 108. "[C]ourts have been sensitive to the need of government lawyers to be able to enter the private sector. Law firms that have hired government lawyers, therefore, have been allowed to rebut the presumption of shared confidences ..." Lerner, supra note 1, at 40. See also Miller et al., supra note 74, at 164 (stating that justification for preferential treatment of attorneys moving from the public sector into the private sector was warranted as a means of encouragement to work for the government).
116 Id.
118 Id.
119 Id. at 1201-02.
120 Id. at 1203.
122 Id. at 1210-11 n.8.
court concluded that because such a prophylactic device would preclude the tainted attorney from disclosing confidential information, the "Chinese Wall" would be effective and, therefore, rendered the imputed disqualification of the entire firm unnecessary. In Ina Underwriters Insurance Co. was relied on heavily in the next case to be discussed which helped to solidify the Third Circuit's willingness to accept the ethical screen in appropriate circumstances.

In Nemours Foundation v. Gilbane, an associate attorney worked on a case as an assistant to a partner, and his primary responsibility was the preparation of a "mini-trial" that would be conducted in an effort to induce a settlement among the parties. The scope and degree of the attorney's representation were minimal. Subsequently, the attorney moved to another law firm who, unbeknownst to any of the parties involved, represented a party with whom a conflict existed. A motion to disqualify the attorney's new firm was made, and the two questions before the court were: (1) whether the attorney's prior representation warranted his individual disqualification, and (2) whether the entire firm should be disqualified pursuant to Rule 1.10. In light of his prior involvement with the litigant, the attorney had formed the attorney-client relationship with his former client, and was disqualified under Rule 1.9. In sharp contrast to typical Model Rules analysis for similar factual scenarios, Chief Judge Farnan refused to disqualify the entire firm stating that "[t]here is no substantial reason against extending the exception to vicarious disqualification from the case of a former government attorney to private attorneys generally."

In conducting his analysis, Chief Judge Farnan examined the comment following Rule 1.10 and reasoned that the framers did, in fact, intend for a pragmatic approach to be taken when deciding these types of disqualification cases. The Chief Judge concluded that the exception to imputed or vicarious liability should not only apply to attorneys migrating from government positions and furthermore, that "an appropriate screening
mechanism, in the proper circumstances, may rebut the presumption of shared confidences that arises under Rule 1.10.\textsuperscript{133} The adoption of the screening mechanism in the Third Circuit represents the Court's awareness of both the disqualification and ethical questions that are so prevalent today. While this trend is a step in the right direction, screening mechanisms have not met with universal acceptance.\textsuperscript{134} Ethical screens such as the "Chinese Wall" are not dispositive of the conflict of interest dilemma because the best means to combat the problem are not yet known, or have not been widely implemented.\textsuperscript{135}

Because of the incredible difficulties surrounding the differing applications of these rules in various jurisdictions, much controversy is generated.\textsuperscript{136} Ironically, these rules pose serious threats to the way in which law is more commonly practiced.\textsuperscript{137} These one-time guardians of the profession are rapidly becoming its most ardent opponents, notwithstanding some judicial attempts at a more liberal construction.\textsuperscript{138} Although this is a disheartening analysis, by concluding that the growth and expansion of the law firm and the practice of law, in general, is beneficial to the profession, there is no alternative but to view with disdain the Model Rules for their role in hindering the progress of the profession. That is not to say that the Model Rules by which all attorneys are ethically bound should be discarded. Alternative devices, however, should be adopted to enable the evolution of the practice of law to continue, without causing lawyers in their daily practice to inevitably run afoul of the Model Rules that, by their nature, stifle that natural progression.

\textsuperscript{133}Id. at 428.

\textsuperscript{134}See Cheng v. GAF Corp., 631 F.2d 1052, 1058 (2d. Cir. 1980) (rejecting "Chinese Wall" defense). \textit{See also} Lemer, \textit{supra} note 1, at 18 (discussing how in situations where the presumption of shared confidences was, in fact, rebuttable, "many courts have applied this prima facie rule as if it established a per se rule of attorney disqualification").

\textsuperscript{135}As later discussed, this note proposes that firms take a more proactive role in the prevention of client conflicts and attack the problem through the use of technology-based approaches.

\textsuperscript{136}The United States Circuit Courts have not taken a unified position regarding the efficacy of the ethical screen. \textit{See supra} note 17.

\textsuperscript{137}Miller et al., \textit{supra} note 74, at 162. "The ability of screening procedures to temper [disqualification] is uncertain. Model Rules 1.9 and 1.10 do not contain any provision for screening at the new firm of a private lawyer who fails to rebut the presumption of knowledge acquired in the former employment." \textit{Id.} at 164.

\textsuperscript{138}See \textit{id.} at 162. "[I]t should be recognized that today many lawyers . . . 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 [make such a] move . . . ." \textit{Id.} Though per se disqualification is no longer endorsed by the Model Rules, not all courts are willing to bend towards a more liberal construction of them. \textit{Id.}
IV. DEVICES USED TO INSULATE FIRMS AND ATTORNEYS FROM CLIENT CONFLICTS

The "Chinese Wall" and other devices have been accepted in those situations deemed "proper," although they are not in widespread use nationally, and remain shunned by the Model Rules.139 These conflict minimizing alternatives, as well as other technologically based ones, will prove to be invaluable constructs whose implementation can be used to prevent conflicts of interest.140

A. "Chinese Wall"

The origin of the "Chinese Wall" can be traced to the Court of Claims decision in Kesselhaut v. United States.141 The adoption of the "Chinese Wall" was intended to afford former government employees an easier transition into the realm of private practice.142 While the Kesselhaut case represented the Wall's debut in its intended form, the Seventh Circuit was the first to explicitly sanction the use of "Chinese Walls."143 Since then, circuit courts have split on the issue, and several still refuse to accept the "Chinese Wall" as a viable means of avoiding disqualification pursuant to Rule 1.10.144

An effective "Chinese Wall" "is designed to screen attorneys who have potential conflicts of interest with potential adversaries from the other attorneys in a law firm."145 In a conflict context, "the Wall is the primary way to rebut the presumption of imputed knowledge."146 The screen's

140 Id. Other common screening devices include consent, waiver, and the related "Cone of Silence." See generally supra note 15 and accompanying text (discussing the difference between the "Cone of Silence" and the "Chinese Wall").
141 555 F.2d 791 (Cl. Ct. 1977). Brodeur, supra note 108, at 178 (citing Kesselhaut, 555 F.2d at 793) (explaining that this case put the screening measure to use in its intended situation: one where a former government employee goes to work for a private practice as contemplated by Rule 1.11 of the Model Rules of Professional Conduct).
142 Brodeur, supra note 108, at 178-79.
143 Raab, supra note 14, at 204 (citing Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Lab., Inc., 607 F.2d 186 (7th Cir. 1979) (en banc)).
144 See id. at 204-27. The Sixth Circuit has approved "Chinese Walls" in an exclusively private context in Manning v. Waring, Cox, James, Sklar & Allen, 849 F.2d 222 (6th Cir. 1988). The Second Circuit has denied the application of the "Chinese Wall" in Cheng v. GAF Corp., 631 F.2d 1052, 1057-58 (2d Cir. 1980); the Fourth Circuit has not yet spoken definitively on the "Chinese Wall" defense; see also Brodeur, supra note 108, at 179 n.40 (discussing court decisions regarding the "Chinese Wall" defense).
145 Denenberg & Learned, supra note 14, at 519.
146 Id. at 520.
effectiveness depends on several factors which vary among those jurisdictions that recognize its existence.\textsuperscript{147} One commentator's discussion regarding the adequacy of a conflict screen analyzed several key factors required to determine the Wall's quality and practicability.\textsuperscript{148} These factors included the substantiality of the relationship, the lapse of time involved, the firm size, the number of disqualified attorneys, the nature of those attorneys' involvement in the litigation, the timing of the Wall, and the Wall's features.\textsuperscript{149} After weighing some or all of these factors, the court will then look to the actions of the firm, as well as the tainted attorney, and consider whether or not the erected screen is "unimpeachable in two respects: its components and its implementation."

To ensure that the "Chinese Wall" is "impenetrable," it must include several specific institutional mechanisms.\textsuperscript{151} The necessary components include: complete and unequivocal adherence to it by all members of the firm; restricted access to sensitive files and information; the absence of fee sharing among the tainted and "clean" attorneys; a comprehensive ban on any conversation regarding the litigation or sensitive matters; possible geographic isolation to a satellite office if feasible; and, most importantly, a written affidavit of oath to obey and perform all the conditions by which the Wall maintains its effectiveness.\textsuperscript{152}

The other fundamental element of the inviolable "Chinese Wall" is the timeliness of its implementation.\textsuperscript{153} It is essential to put any conflict-avoidance mechanism in place as near to the creation of the conflict as possible.\textsuperscript{154} Because it is difficult to get courts to accept the "Chinese Wall" defense as valid, "[t]he sooner the conflict is detected and a Wall is created, the more likely that Wall will provide an effective defense to a disqualification motion."\textsuperscript{155} Because the ABA and the judiciary are reluctant to embrace the "Chinese Wall", it is unlikely that it will ever be deemed

\begin{footnotesize}
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  \item[\textsuperscript{147}]\textit{Id.} at 521-22.
  \item[\textsuperscript{148}]Lerner, supra note 1, at 64.
  \item[\textsuperscript{149}]\textit{Id.} (citing Note, \textit{The Chinese Wall Defense to Law-Firm Disqualification}, 128 U. PA. L. REV. 677, 712-13 (1980)).
  \item[\textsuperscript{150}]Brodeur, supra note 108, at 182.
  \item[\textsuperscript{151}]\textit{Id.}
  \item[\textsuperscript{152}]\textit{Id.} at 182-83.
  \item[\textsuperscript{153}]\textit{Id.} at 183.
  \item[\textsuperscript{154}]Brodeur, supra note 108, at 183 (noting that courts are generally reluctant to allow the "Chinese Wall" defense to be applied, and in those situations where the Wall was an ad-hoc response, the Wall will never be recognized as valid); see also Denenberg & Learned, supra note 14, at 521 (noting "[t]he sooner the conflict is detected and a Wall is created, the more likely that Wall will provide an effective defense to a disqualification motion").
  \item[\textsuperscript{155}]Denenberg & Learned, supra note 14, at 521.
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satisfactory when applied too late or in an ad-hoc manner.\textsuperscript{156} This is partly due to the fact that the rebuttable presumption of shared confidences cannot be rebutted where tainting of the firm by the "dirty" attorney was not initially precluded by preventive measures.\textsuperscript{157} Though the "Chinese Wall" can be a viable method of preventing the disqualification of an entire firm, in the proper circumstances, it is not accepted in all jurisdictions or in all situations.\textsuperscript{158}

A major problem with the "Chinese Wall" is that it contradicts the language in the Model Code which requires prevention of an "appearance of impropriety."\textsuperscript{159} The Model Code's use of this standard has been characterized as "too slender a reed on which to rest a disqualification order except in the rarest cases."\textsuperscript{160} Nonetheless, those jurisdictions that have not adopted the Model Rules must apply the Code's appearance of impropriety standard, and show that the screen itself is properly in place.\textsuperscript{161}

Because of this hesitance in accepting and implementing the "Chinese Wall," other devices and techniques must be developed and more widely accepted. These future developments will enable client conflicts to be contained in this era of change.

B. Consent, Waivers, and Protective Orders

Another device offering limited relief from the perils of conflicts is client consent.\textsuperscript{162} Pursuant to the provisions set forth in Rule 1.9, "a former client can consent to a prior counsel's adverse representation of a new client."\textsuperscript{163} In such cases, obtaining consent of a client who may be detrimentally affected by adverse representation might completely remedy

\textsuperscript{156}Id. "Walls erected in response to a disqualification motion will almost never be considered effective." \textit{Id. See also} Lerner, supra note 1, at 72-73 (discussing the necessity to timely create the Wall in order to avoid disqualification).

\textsuperscript{157}See Denenberg & Learned, supra note 14, at 521. \textit{See also} Lerner, supra note 1, at 72 (discussing LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252, 258-59 (7th Cir. 1983)).

\textsuperscript{158}See Raab, supra note 14, at 211-14.

\textsuperscript{159}Brodeur, supra note 108, at 187.

\textsuperscript{160}Miller et al., supra note 74, at 154 (quoting Board of Educ. of N.Y. v. Nyquist, 590 F.2d 1241, 1247 (2d Cir. 1979)).

\textsuperscript{161}Brodeur, supra note 108, at 187; \textit{see also} Denenberg & Learned, supra note 14, at 521 (explaining that the court's rationale for imposing such strict requirements on the aspects of the Wall are the highly sensitive and possibly prejudicial confidences that may be disclosed by transgression of the Model Rules).

\textsuperscript{162}Miller et al., supra note 74, at 152 (discussing how former clients can consent to a former lawyer's adverse representation in certain instances where the representation would not be damaging to the consenting client, and full disclosure and understanding of the risks are present).

\textsuperscript{163}\textit{Id.} (citing MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1983)).
the conflict dilemma.\textsuperscript{164} Despite this potential solution, and the Model Rules' seemingly forgiving language, certain situations will occur where even client consent will not prevent a motion for disqualification from being granted.\textsuperscript{165}

Both the Code and the Model Rules impose two requirements on client consent: it must be obtained after the client has been made aware of all material facts and such consent will be effective only if the attorney is able to adequately represent the interests of each client.\textsuperscript{166} In addition to these requirements, the attorney must also fully inform the interested parties of the risks and disadvantages of such representation, explain the nature of the conflict of interest, and satisfy his burden of disclosure for all relevant facts.\textsuperscript{167}

Once client consent has been shown, the attorney may be permitted to maintain representation, provided the conflict of interest at hand is not "serious and pervasive."\textsuperscript{168} Though consent can be a valid means of avoiding disqualification, its limited applicability prevents it from being the most viable solution to combat increasing ethics problems stemming from the continued growth and expansion of law firms.\textsuperscript{169} One reason for its limited application is the burden implicit in the language of the second prong, which states that "the attorney [must] reasonably believe the representation will not adversely affect the relationship with the other client."\textsuperscript{170} This difficult burden often precludes consent from being the client conflict cure-all.\textsuperscript{171} Furthermore, according to one source, this standard acts "to vitiate consent in certain cases."\textsuperscript{172}

The waiver is akin to consent.\textsuperscript{173} Because a waiver is similarly hindered by limited applicability in only proper circumstances, it, too, fails

\textsuperscript{164}Denenberg & Learned, supra note 14, at 518.
\textsuperscript{165}Id. "If a conflict of interest cannot be avoided, the consent of those clients affected by the conflict is necessary, but not always sufficient, to avoid disqualification." Id.
\textsuperscript{166}Id. at 518-19.
\textsuperscript{168}See Cox v. American Cast Iron Pipe Co., 847 F.2d 725, 730 (11th Cir. 1988) (discussing whether a client may waive a "serious and pervasive" violation of Model Code Canon 4); see also Miller et al., supra note 74, at 153 (noting, that in some instances, even "serious and pervasive" conflicts will not preclude representation where client consent has been obtained).
\textsuperscript{169}Denenberg & Learned, supra note 14, at 519.
\textsuperscript{170}Id.
\textsuperscript{171}Id.
\textsuperscript{172}Id. The courts, however, may look more favorably on a consent issue where the consenting clients are businessmen, who are more aware of the risks that are associated with granting consent. Lerner, supra note 167, at 311.
\textsuperscript{173}Miller et al., supra note 74, at 153.
as the ultimate solution to the conflicts quandary. 

When a client with a legitimate conflict concern fails to promptly bring a motion for disqualification, that client's right to relief may be considered waived by the court; "a client should be estopped from objecting to an asserted conflict where the client fails to take action to remedy the conflict." 175

When determining whether or not a party has effectively waived its right to obtain relief on a conflict of interest claim, a court will analyze several factors: "when the movant learned of the conflict; whether the movant was represented by counsel during the delay; why the delay occurred; whether the motion was delayed for tactical reasons; and whether disqualification would result in prejudice to the non-moving party." 176 After considering these factors, a court will decide whether the delay was so egregious as to warrant a complete denial of the adversely affected party's right to relief. 177 While waivers have been granted in some circumstances involving lengthy delays, such action by the courts is not frequent enough to stem the tide of the growing conflicts law firms and attorneys face today. 178

Another alternative, albeit used rather infrequently, is the protective order. 179 The protective order offers a middle ground between "[t]he all-or-nothing nature of attorney disqualification," 180 by calling for an "embargo [on] the flow of confidential information between the tainted attorney and other members of the firm trying to avoid disqualification." 181 In NFC, Inc. v. General Nutrition, Inc., 182 the court entered a protective order which enabled a firm to maintain its representation without being subject to disqualification, provided it strictly heeded the court's admonition. 183

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174 Id.
175 Id.
176 Id. (citing Employer's Ins. of Wausaw v. Albert D. Sceno Constr. Co., 692 F. Supp. 1150, 1165 (N.D. Cal. 1988)). The fourth factor regarding the question of whether or not the delay was made for tactical purposes is reflective of the court's awareness in "[r]ecognizing that motions to disqualify may be used to delay proceedings and harass opposing parties." Id.
177 Miller et al., supra note 74, at 153.
178 Id. (citing Trust Corp. v. Piper Aircraft Corp., 701 F.2d 85, 87 (9th Cir. 1983)) (discussing how the court allowed "de facto consent" to adverse representation when a party knew of a conflict for years, and brought it to the court's attention just before trial was scheduled).
179 Lerner, supra note 167, at 343.
180 Raab, supra note 14, at 357.
181 Lerner, supra note 167, at 343. See also Raab, supra note 14, at 358 (discussing the consequences of protective orders).
These court-imposed warnings make the protective order a somewhat attractive alternative to the "Chinese Wall" and other insulating devices.\textsuperscript{184} Attached to protective orders are strict sanctions that the court will impose should any of the conditions of the order be breached by the parties.\textsuperscript{185} The benefit of the protective order is that it enables the attorneys to skip the actual preparation of disqualification motions.\textsuperscript{186} In addition, "the contempt sanctions which back such orders may provide a credible deterrent to breaches of confidentiality and thus dispel any possible appearance of ethical impropriety."\textsuperscript{187} The protective order is potentially a partial solution to the problems that have been discussed herein. While considered relatively effective, the protective order requires constant judicial intervention to ensure compliance and therefore, is not a panacea to the problems of law firm growth.

\textbf{C. Various Other Methods to Avoid Disqualification}

In addition to the several screening devices discussed herein, there are other, more simplistic ways to avoid client conflicts. Many of these methods involve efforts on the part of attorneys and their respective firms to police themselves against creating conflicts. These methods will ultimately prove to be most effective. One easy solution to a conflict of interest is to simply terminate the relationship with the client; this, however, is not always permitted under Canon 5 of the Model Code.\textsuperscript{188} While merely firing a client to secure the fees of a more lucrative client may seem attractive, "[a] firm may not drop a client like a hot potato."\textsuperscript{189} But if clients cannot be released at will, what viable alternatives are left? Once it has already taken on the client and the conflict exists, there is likely little that can be done to prevent the motion to disqualify from being granted.\textsuperscript{190} Before this situation occurs, however, a firm must shield itself by taking steps to screen its clients.\textsuperscript{191}

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\textsuperscript{184}Raab, supra note 14, at 357-59.
\textsuperscript{185}Id. at 359.
\textsuperscript{186}Id. at 358-59.
\textsuperscript{187}Id. at 359.
\textsuperscript{188}Lerner, supra note 167, at 312 (quoting Estates Theatres, Inc., v. Columbia Pictures Indus., Inc., 345 F. Supp. 93, 100 (S.D.N.Y. 1972) ("The Rule itself does not vest the choice of withdrawal in the lawyer.").
\textsuperscript{189}Id. (citing Picker Int'l, Inc. v. Varian Assocs., Inc., 670 F. Supp. 1363, 1365 (N.D. Ohio 1987)). The actual facts of the situation will determine whether or not a relationship can be terminated. Id.
\textsuperscript{190}Id. However, "[p]ermissive withdrawal is always possible where the client 'knowingly and freely assents to termination of the employment.'" Fischman, supra note 10, at 78 (citing DR 2-110(C)(5)).
\textsuperscript{191}Fischman, supra note 10, at 73.
This screening will give the firm the option of turning down a potential client, thus avoiding the conflict.\textsuperscript{192}

The first step a firm must take requires it to create a plan that will enable the firm to detect and track conflicts before they develop into serious problems.\textsuperscript{193} To that end, obtaining adequate information during the initial interview with the client has proven effective.\textsuperscript{194} In this preliminary meeting, the firm or attorney should go to great lengths to ensure that the representation about to be undertaken is not one that is prohibited by the ethical provisions of the Model Rules.\textsuperscript{195}

Therefore, although releasing a client, declining representation, and initially obtaining sufficient information are all possible methods of dodging conflict of interest liability, they are not solely capable of taking the legal profession into the twenty-first century. The next section of this note will discuss what needs to be done in the near future regarding ethics and the expansion of the law firm. It will analyze what both the government and the private attorney can do to allow the modern practice of law to flourish, without compromising the ideals that are fundamental to its existence. Finally, this note will address what may be the only true way to successfully combat the conflict problems that are plaguing the growth of the law firm: widespread use of databases, advanced computer technology, and newly invented conflict-tracking software.

V. SUGGESTIONS AND SOLUTIONS TO CONFLICT TRACKING AND PREVENTION IN RESPONSE TO THE GROWTH AND EXPANSION OF THE LARGER LAW FIRM

Several measures, taken collectively, can effectuate changes necessary to allow the legal profession to continue unabated on its current course of progress. These measures can be broadly categorized into public-based and private-based. Although these public measures are not, by themselves, capable of rectifying the current situation,\textsuperscript{196} they, nonetheless, must be

\textsuperscript{192}Id.
\textsuperscript{193}Miller et al., supra note 74, at 200 (stating that "identify[ing] potential problems at the earliest possible moment" is the best way to prevent conflict situations from occurring).
\textsuperscript{194}Fischman, supra note 10, at 73.
\textsuperscript{195}Id. It is interesting to note however, that even the slight contact created from the preliminary interview may be sufficient to establish the privileged attorney-client relationship. Id.
\textsuperscript{196}As will be discussed later in this part, regardless of the public-based efforts, no remedy will be complete without the cooperation of the private sector. Because law firms and attorneys must make the initial determination of the presence of a potential conflict, no liberal statutory or court-made doctrine could alone sufficiently safeguard the large law firm from potential conflicts of interests.
addressed. The bodies that comprise the public-based approach consist of the state legislatures and their respective judicial counterparts.197

With respect to state legislatures' initiatives, one action that might help mitigate many of the current ethical disputes is revising the Model Rules to make them better suited to today's legal practice.198 Because state legislatures are the primary drafters of the ethics codes governing professional responsibility in a given state, it is at this level that broad-scale change should originate.199 Simply rewriting the Model Rules, however, is not entirely feasible.

A significant problem encountered by seeking a set of rules more aligned with today's legal trend is fear of an overly liberal construction which could jeopardize the interests of the client.200 A valid question related to this analysis is whether the negative aspects of law firm growth act as a detriment which would further undermine the credibility of the profession as a whole? The answer to that query is an emphatic no; and presumably, no attorney would advocate a system in which clients' interests are subordinate to the hollow ends of growth and profit. To the contrary, ethical considerations are paramount to the practice of law. Notwithstanding this position, however, the simultaneous growth and the maintenance of client confidentiality are not mutually exclusive. A balance can be struck. Therefore, though I am both critical of the Model Rules for their deficiency in this respect, and mindful of their importance as the watchdog of the law, restructuring them with both

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197My failure to mention Congress does not intimate that it has no function or role in a potential solution to the problems highlighted by this note. To the contrary, congressional action, in the form of a unified system of Model Rules more sympathetic to the current practice of law, would be an invaluable means to the end of maintaining progress. Unfortunately, however, the federalist nature of the professional ethics code makes action on the part of Congress largely impotent, and therefore, my focus in this context will remain on the state law-making bodies.

198See Green, supra note 51, at 109-10. See also the prophetic words of one of America's premier scholars:

I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regime of . . . [its] ancestors.


199See infra text accompanying note 201 (discussing the feasibility of changing the Model Rules legislatively).

200See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983). See also supra text accompanying note 79 (discussing how the Model Rules mandate protection of client confidences).
ends in mind is a practical way to appease the conservatives and the progressives alike. Legislative action on this matter would provide an impetus and a vehicle for the necessary changes. While the integrity and protection provided by the Model Rules must never be compromised, the Model Rules should be changed to become more pragmatic. In conclusion, revising the Model Rules is important to the growth of the profession, and can be done in a manner consistent with the Model Rules' purpose. But, nevertheless, an even more practical public-based initiative is action taken on the part of the judicial system.\(^{201}\)

The judicial initiative that needs to be undertaken manifests itself in the volition of the courts. The courts must allow themselves to look beyond the Model Rules and make decisions that not only comport with the legal issues before them, but that also serve important policy ends. This note previously discussed the pertinent Rules of the Code of Professional Conduct and explained how and why the strict application of these rules often retards the progress of the modern practice of law.\(^{202}\) Having already posed suggestions for how legislators can fashion limited relief, the analysis now turns on how state judicial branches should act to similarly facilitate the transition.\(^{203}\)

In short, courts need to be more open-minded to the conflicts issues they encounter.\(^{204}\) Not all courts have taken a cynical approach, as did the Cheng court, which rejected a screening device,\(^ {205}\) but many are still reluctant to give ethical screens the validity they deserve.\(^{206}\) A heightened respect and appreciation of the ethical screen by those courts which deny its effectiveness requires no tremendous leap in logic. Such a construct is only a natural progression of the legal practice as it was envisioned when the

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\(^{201}\)See Green, supra note 51, at 87 (discussing the efficiency of judicial enforcement as related to litigators' conflicts of interests).

\(^{202}\)See supra notes 113-17 and accompanying text.

\(^{203}\)See generally Green, supra note 51, at 128 (stating "courts have ultimate authority to make and enforce the law governing litigators' conflicts of interest").

\(^{204}\)An interesting note along similar lines to the thesis presented here is Green, supra note 51, at 128-29. The note discusses the power of the courts to rule on these important conflict issues, and rejects judicial approaches that refuse to take into consideration the interests of the litigant in the context of disqualification. Id. While this note focuses more closely on the implications disqualification penalties have on the attorney and the firm, and not on the litigant per se, I agree with the author's critical analysis regarding the flawed rationales employed by many courts to reach decisions on conflict issues. Id.

\(^{205}\)See supra note 134 and accompanying text.

\(^{206}\)See Brown, supra note 17, at 692-93 (discussing cases such as Cheng v. GAF Corp., 631 F.2d 1052 (2d. Cir. 1980); Yaretsky v. Blum, 525 F. Supp. 24 (S.D.N.Y. 1981); In re Asbestos Litig., 514 F. Supp. 914 (E.D. Va. 1981)) (where the courts were exceedingly skeptical of the use of the ethical screen and thus, denied its application).
Model Rules were drafted. The drafters were not ignorant of the possibility of attorneys changing jobs, nor were they unaware that such a stringent disqualification standard would deter young attorneys from beginning their careers in a government position. Therefore, the drafters provided the courts with a way to rectify such situations by including the screen provision in Rule 1.11 for former government lawyers.

Later, cases, such as Nemours Foundation, extended the doctrine to encompass attorney movement solely within the private arena. Now, in what seems to be a predictable development, all courts should, at the very least, adopt an open-minded stance on the ethical screen and acknowledge its potential for effectively ceasing the disclosure of client confidences. While even those courts that allow the screening defense to be raised deny its efficacy in some circumstances, their general acceptance of the device is what is most important. Moreover, without the support of the individual judges presiding over these cases, the transition to a greater understanding of today's complex legal dilemmas is virtually impossible. Therefore, universal acceptance of the screening mechanism, when utilized in

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207See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11 (1983) (providing, from its inception, relief for the attorney who started his or her career in the government arena, and later switched to private practice). "[T]he rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government." Id. Rule 1.11 cmt. 3.

208See supra text accompanying notes 112-16.


210No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a manner unless: (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

211Id.


213Recognition of the screen defense however, is not a guarantee that a court will always deem it to be effective. See Brown, supra note 17, at 688. "While not all courts have approved the concept of screening attorneys, the courts which do accept the practice will look to the facts of the individual cases . . . to determine whether the screening of disqualified attorneys is sufficient to protect the law firm from disqualification." Id.

214See id. at 694 (discussing a federal appeals court decision which "approve[d] the concept of screening of attorneys with conflicting interests to prevent the wholesale disqualification of a law firm," but denied its application based on the issue of timeliness of the screen used in the case).

215This note proposes not a mere relaxation of the Model Rules, but rather a more enlightened approach on the part of the judiciary with the hope that a greater understanding of conflict issues will enable courts to make more informed decisions. If confidences have been disclosed, or an easily identifiable failure to adequately screen a conflict has occurred, then of course, nothing should preclude disqualification. In the majority of other situations, however, where a "bright line" does not exist, a view supported by insight into the development of the profession would be the best way to resolve a conflicts question.
appropriate situations, is another key link in the evolutionary development of the practice of law.

Notwithstanding the importance of both judicial and legislative initiatives, both influences pale in comparison to private-based solutions; the primary means of solving impending problems. Regardless of whether the legislature revises the Model Rules, or courts reconsider their interpretation, the onus of solving conflict of interest problems rests with the attorneys and firms themselves. What I propose is a proactive, technology-based approach that can be implemented by the larger firms whose normal operation of business puts them at great risk of harmful potential conflicts of interest.

Consistent with the theme of this note, is that none of the aforementioned rules, devices or judicial action can alone adequately address the increasing ethics problems caused by law firm growth. What has yet to be discussed is likely the most viable and innovative way to track and prevent client conflicts from hindering attorneys and firms in their pursuit of success in today's changing legal environment.\(^\text{214}\) The use of high level capacity databases, computer technology, and newly-developed conflict-tracking software may provide means to the solution the practice of law desperately needs.

The first step in tracking potential client conflicts is the intake sheet.\(^\text{215}\) The intake sheet goes by several different names,\(^\text{216}\) but serves the same function regardless of its title, which is to act as "the principal method of ferreting out actual or potential conflicts."\(^\text{217}\) The intake sheet is comprised of vital information provided by the client, including formal parties, names of the financing institutions involved, and any other major parties who have a stake in the outcome of the litigation.\(^\text{218}\) Disclosure of corporate subsidiary and affiliate names are especially important to large firms which are most affected by mergers, acquisitions, and other corporate activity.\(^\text{219}\) Such disclosure will enable the attorney to better detect a potential conflict when he or she enters the client information into the computerized database.

Many of the larger law firms today rely on such complex databases for better access to client information, as well as file information more


\(^{215}\)Fischman, supra note 10, at 74.

\(^{216}\)Intake sheets are sometimes referred to as new engagement reports or new business reports. Id. at 74. See also Miller et al., supra note 74, at 200 (referring to intake sheets as "new matter" sheets).

\(^{217}\)Fischman, supra note 10, at 74.

\(^{218}\)Id.

\(^{219}\)Id.
efficiently. Major firms can utilize a comprehensive database to input information such as "the billing partner, the nature of the matter, the lawyers who worked on the matter, and [any] other relevant information." More importantly, a database, as my theory suggests, can be used in conjunction with the advanced conflict-tracking software to help firms take a proactive, automated approach to discovering and preventing potential conflicts of interest.

The database represents an integral part of the attorney's initial efforts to prevent a client conflict before it occurs, but nevertheless, it suffers from two major flaws. First, the database, by itself, has no means to track conflicts. Second, the database is limited to the information that is input and will only be as effective as the thoroughness of the attorneys' efforts to update it. Like the initial client meeting and the "Chinese Wall," the database provides the rudimentary tools necessary to avoid disqualification. But just as those two devices require considerable effort to maintain their effectiveness in preventing conflicts, so, too, does the database. Consequently, though the database has great potential to prevent client conflicts, its passive nature makes it incapable of keeping up with the accelerated growth and change inherent to the legal profession today.

The second reason for the inability of the database to handle all types of conflicts issues is that "a mechanism to avoid conflicts of interest is only as effective as the quality of the data that is input." This natural limitation is inherent to any system where you can only get a result commensurate with what you put in. The maxim: "a chain is only as strong as its weakest link," proves especially true for the computerized database which, unfortunately, can only be as effective as the quality and degree of the input entered.

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220 Id.; see also Wendy R. Liebowitz, Client Conflict Software: No Panacea—Complexity of Client Relationships at Firms Like Willkie Farr Presents Ethical Traps, Nat'L L.J., July 21, 1997, at A12, A13 (mentioning some large firms that currently employ database technology to defend against client conflicts: Wilkie Farr & Gallagher; Milbank, Tweed, Hadley & McCloy; Baker & McKenzie; Cravath, Swaine & Moore; Fox & Horan; Lucash, Gesmer & Updegrove; and Manatt, Phelps & Phillips, L.L.P.).
221 Fischman, supra note 10, at 75.
222 Daiker, supra note 214, at 14.
223 Id. at 16.
224 The initial meeting provides an excellent source of information that might demonstrate a potential client conflict, if the attorney puts that information to use. The "Chinese Wall," also a potentially effective tool, can not be functional unless it is timely, and major efforts are undertaken to ensure its permanent impenetrability. The database is no different: the database only stores information and if no person is going to analyze the data and make the connections regarding the client conflicts revealed by the information in the system, it cannot solve the problems.
225 Fischman, supra note 10, at 74.
226 Id.
Since the database has only limited effectiveness, today's large firms have been forced to find a suitable alternative to meet their conflict-tracking needs.\textsuperscript{227} New conflict-tracking software must be further developed to overtake the database as the primary computerized means of tracking client conflicts.\textsuperscript{228}

Such software will enable a large firm to identify possible ethical violations when representing certain clients.\textsuperscript{229} One software company called Accutrac, has developed a program that is capable of detecting potential conflicts of interest by identifying and indexing all parties to an action, allowing attorneys to define the parties' relationships.\textsuperscript{230} According to a representative from Accutrac, the software goes beyond the database capacities by actually processing the various types of information inputted into the program.\textsuperscript{231} The software also comes equipped with a security device enabling an attorney to protect certain sources of information by creating a computerized ethical screen not unlike the typical "Chinese Wall."\textsuperscript{232} This function denies access to a tainted attorney and has differing levels of security that can be calibrated by setting passwords and denying access to those not privy to sensitive information.\textsuperscript{233}

Conflict-tracking software represents the next wave of hi-tech problem solving for today's business and legal atmosphere. In light of this, the time is ripe for these types of software programs to gain universal awareness and eventual implementation. Unlike the other devices and techniques discussed earlier, the unique conflict-tracking software can take the information that has been obtained, and put it to use automatically. It is vastly different from conventional conflict prevention strategies because it is an active agent, and once vital information has been acquired, the software can single-handedly do its job and alert the firm to a potential conflict of interest before it occurs. Although client-tracking software has its imperfections, they are outweighed by its overall effectiveness.\textsuperscript{234}

\begin{itemize}
\item \textsuperscript{227}Liebowitz, \textit{supra} note 220, at A13.
\item \textsuperscript{228}Id. (listing a few companies that are marketing conflict-tracking software products including Legalkey). "Conflicts-checking software traces companies' hierarchies, affiliates and officers, and if accurate and current information is entered, displays relationships among adverse parties and identifies their opposing counsel." \textit{Id.}
\item \textsuperscript{229}Id.
\item \textsuperscript{230}Telephone Interview with Mr. Jay Calder, Accutrac Software, Inc. (Oct. 27, 1997).
\item \textsuperscript{231}Id.
\item \textsuperscript{232}Id.
\item \textsuperscript{233}Id.
\item \textsuperscript{234}Liebowitz, \textit{supra} note 220, at A3. I agree with Ms. Liebowitz in so far as she believes conflict-tracking "software is a tool and not a solution," however, I believe that in time, conflict-tracking software, when used in conjunction with the other methods and devices I have addressed here, will represent an ideal solution. \textit{Id.}
\end{itemize}
First, even though the program may supplant the database as an efficient sorter and collector of information, some rapidly changing business and financial situations may potentially be beyond the current capability of any software to track.\textsuperscript{235} Though highly complicated mergers, takeovers, and corporate recombinations and joint ventures can help matters by consolidating entities, some are simply too incredible to accurately track.\textsuperscript{236} Though this can present problems for the software, as technological advances occur, hopefully so, too, will the development and capabilities of the software.

Second, because software is limited to the information you put in,\textsuperscript{237} the database and the conflict-tracking software are analogous. Thus, if the database possesses only limited information, then, obviously, the ability of the software to detect conflicts will be similarly limited. The difference, however, is that, given adequate information, the software can perform a function which databases are incapable of: data analysis and processing to form links and connections with the information that can thereby reveal the various potential conflicts of interests.\textsuperscript{238} Therefore, like the database, information in the system or program must be updated regularly and repeatedly verified for accuracy. But after such updating is complete, the conflict-tracking software becomes an invaluable weapon against the client conflicts.\textsuperscript{239}

VI. CONCLUSION

Because many courts addressing conflict issues are unforgiving, and a strict interpretation of the Model Rules can result in disqualification when there is little or no evidence of contamination, a solution independent of the courts must be found to remedy the burgeoning conflict of interest dilemmas. This solution, as proposed here, consists of several devices, actions, and tools, that when used cooperatively, will provide the legal profession with the means required to continue its development. This outcome is, hopefully, extremely important to every practicing attorney who hopes to see the profession develop, and to reap the rewards of such development. The growth of the large law firm is not without its patent risks, however, the increased quality and effectiveness of the service lawyers provide is incentive enough to perpetuate this trend. In conclusion, it is the role of all

\textsuperscript{235}Id. at A13.
\textsuperscript{236}Id.
\textsuperscript{237}Fischman, supra note 10, at 73.
\textsuperscript{238}Telephone Interview with Mr. Jay Calder, Accutrac Software, Inc. (Oct. 27, 1997).
\textsuperscript{239}Id.
those involved with the law to help maintain this growth, while simultaneously protecting the integrity of the profession. This exact scenario can be achieved with help from the legislature, the courts in general, and, most importantly, through the efforts of attorneys and firms to prevent client conflicts of interest.

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