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Many ethics practitioners have argued for strict application of the imputation of receipt of confidential information to all lawyers who are members of a law firm, regardless of where each lawyer is physically situated, and regardless whether there is any reasonable probability that the distant lawyer actually was exposed to confidential information. It is generally accepted that the duty of loyalty to an existing client precludes any lawyer affiliated with the law firm from accepting any engagement adverse to the client. It is also commonly assumed that neither geographic distance, nor separation of the lawyers within the firm (e.g., by department), is sufficient to prevent the vicarious imputation to each lawyer in the firm of the presumption that client confidences have been communicated throughout the firm.

In addition to the duty of loyalty, other arguments are made to justify the application of an irrevocable presumption that confidential information has been transmitted to every lawyer in a firm, and the imputation of the presumption to all lawyers of the firm in which the "tainted" lawyer works. One such justification is that it is not fair to require an affected client to prove that confidential information has actually been transmitted, and it certainly would not be appropriate to require the information to be revealed so that an analysis could be conducted as to whether the information does or does not include confidential information. The bright line rule was therefore adopted, making a firm *per se* disqualified from accepting representation adverse to a former client if the subject matter of the prospective engagement is substantially related to the subject matter of the prior engagement. In many jurisdictions, the disqualification of the entire firm is mandated

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regardless of whether the tainted attorney is ethically screened,[1] and, regardless of whether there is any evidence that the tainted lawyer communicated any of the confidential information to other lawyers in the firm.

The "substantial relationship test," developed in California, provides that disqualification of a lawyer or law firm is required whenever it can be demonstrated that the subject matter of a previous representation of a client is substantially related to the subject matter of a new engagement in which the new client is adverse to the former client.[2] The test was first articulated in *Global Van Lines v. Superior Court.*[3] The rule was refined over years, and the proposition has come to be accepted that three factors are considered in applying the test: "(1) factual similarities between the two representations, (2) similarities in legal issues, and (3) the nature and extent of the attorney's involvement with the case and whether he [or she] was in a position to learn of the client's policy or strategy."[4]

As stated in *Faughn v. Perez,*[5] "[w]here the attorney was involved personally and directly in providing legal advice and services to the former client, the substantial relationship test is used to determine whether the presumption applies."[6]

However, the irrevocable presumption applies harshly where a non-conflict tainted lawyer member of the tainted law firm moves laterally to a new, non-conflict tainted law firm, by preventing lawyers from moving to new employment. Additionally, the application of such a rule where the moving lawyer has only vicarious, imputed receipt of confidences, to the new firm, which has a longstanding professional relationship with a client, precludes the existing client from continuing the attorney-client relationship with its counsel of choice.

In light of the extreme adverse affect such a rule would have on both the non-conflicted lawyer and the non-conflicted firm, as well as the preclusion of the client in maintaining a relationship with non-tainted counsel of the client's choice, a new rule has emerged in California. This rule, known as the "modified substantial relationship test," would appear to have application in the context of a multinational law firm, where geographic, structural and governance of the separate offices is

1. This practice is also known as being "walled off."
2. Global Van Lines v. Superior Court, 144 Cal. App. 3d 483, 487-88 (1983).
3. *Id.*
4. Adams v. Aerojet-General Corp. 86 Cal. App. 4th 1324, 1332 (2001).
5. Faughn v. Perez, 145 Cal. App. 4th 592 (2006).
6. *Id.* at 603 (citing Farris v. Fireman's Fund Ins. Co., 119 Cal. App. 4th 671 (2004)).

sufficiently attenuated to make remote and unlikely, the possibility that each of the firm's multiple offices had actually received confidential information relating to the clients of any particular office. Leaving the issue of screening to another day, below is a summary of the "modified substantial relationship test" developed in California.

The modified substantial relationship test was detailed in *Adams*,[7] where the court held that there is no double imputation of receipt of client confidences when the attorney who was not involved in representing a client moves to a new firm; furthermore, the new firm will not be presumed to have received the confidential information communicated to the former firm of the moving lawyer, absent evidence that "confidential information material to the current lawsuit would normally have been imparted to the attorney by virtue of the nature of the former representation."[8] Other California appellate courts have reached similar conclusions.[9]

In *Ochoa v. Fordel, Inc.*,[10] the appellate court explained the difference between the traditional "substantial relationship test" and the modified test. First, the moving party must make an adequate showing that the attorney sought to be disqualified was likely to have acquired confidential information material to the current representation.[11] The burden then shifts to the attorney whose disqualification is sought; he or she prove that he or she had no exposure to confidential information relevant to the case by an "affirmative showing" rather than simply a cursory denial.[12] As the court explained:

> Under the modified substantial relationship test, a presumption that the attorney knows confidential information applies only where the moving party (the client of the attorney's former law firm) makes "an adequate showing that the attorney was in a position vis-a-vis the client to likely have acquired confidential information material to the current representation."[13]

In *Adams*, the court described the inquiry as "whether the attorney was reasonably likely to have obtained confidential information."[14]

* * *

7. *See Adams*, 86 Cal. App. at 1324.
8. *Id.* at 1332.
9. *See, e.g.*, Derivi Constr. & Architecture, Inc. v. Wong, 118 Cal. App. 4th 1268, 1274-76 (2004); Frazier v. Sup. Ct., 97 Cal. App. 4th 23, 33-34 (2002).
10. Ochoa v. Fordel, Inc., 146 Cal. App. 4th 898 (2007).
11. *Id.* at 908.
12. *Id.* at 908-09.
13. *Id.* (quoting Jessen v. Hartford Cas. Ins. Co., 111 Cal. App. 4th 698, 710 (2003)).
14. *Id.* (quoting *Adams*, 86 Cal. App. at 1333).

> Where the modified version of the substantial relationship test has been met, the last step of the analysis is to determine whether the attorney whose disqualification is sought has carried "the burden of proving that he had no exposure to confidential information relevant to the current action while he was a member of the former firm." That burden requires an affirmative showing and is not satisfied by a cursory denial.[15]

The concept that a distant branch of a law firm may accept representation adverse to an existing client of a different branch of the same law firm is repugnant to many lawyers and legal ethicists. However, in practical reality, many lawyers have no contact with, and do not share information with, lawyers who work in a different state or national branch of the law firm. It warrants further consideration whether the modified substantial relationship test should apply to determine whether a multinational law firm should be disqualified from accepting an engagement adverse to a client of a distant branch office, where there is no proof that any attorney in the distant office actually obtained confidential information from the firm's branch in which the client matter is situated, and where the relationship between the two branch offices of the firm is peripheral or attenuated.

15. *Ochoa*, 146 Cal. App. 4th at 908-09 (quoting *Adams*, 86 Cal. App. at 1341) (internal citation omitted).