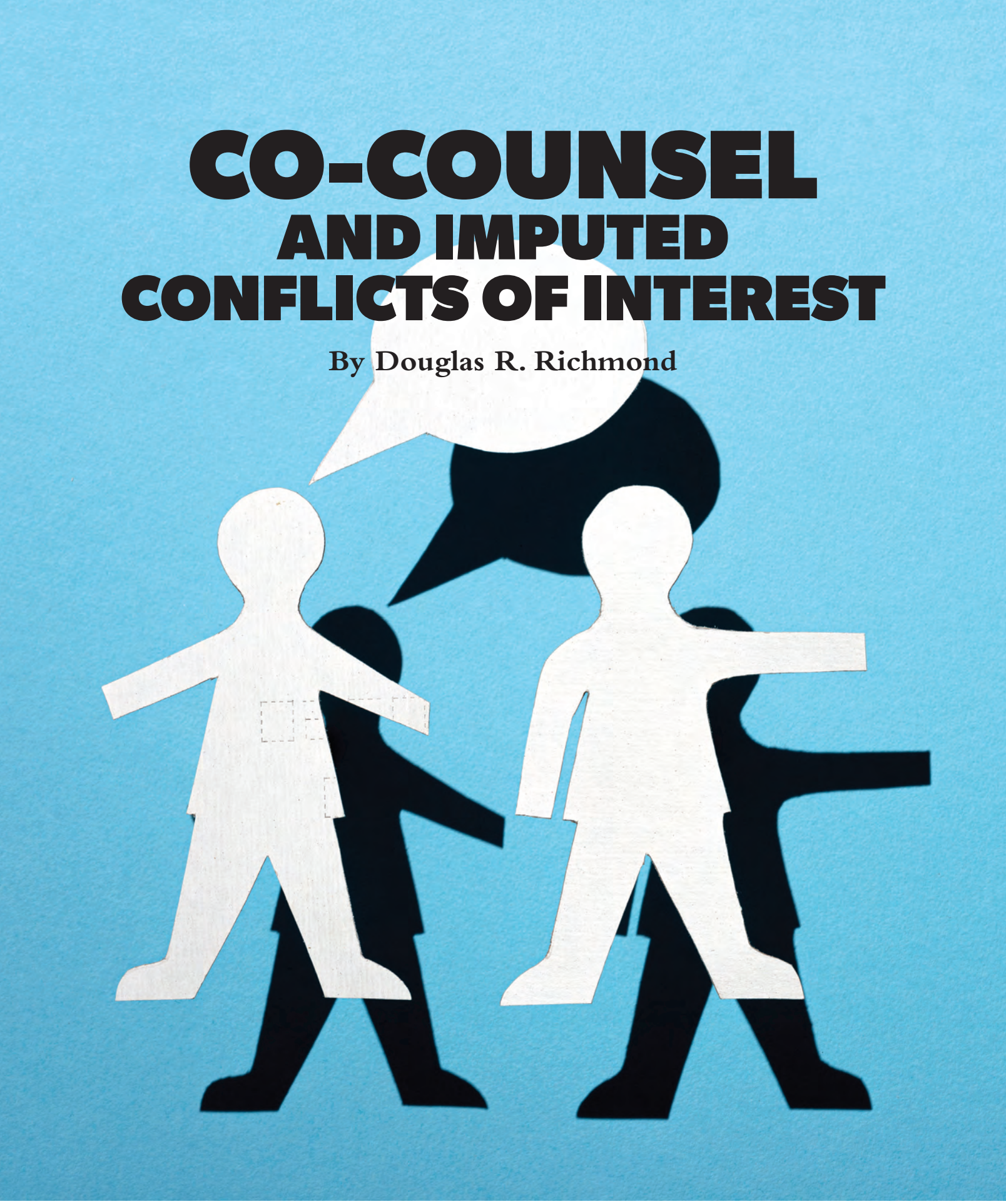
CO-COUNSEL AND IMPUTED CONFLICTS OF INTEREST

By Douglas R. Richmond



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Lawyers commonly form co-counsel relationships. Unfortunately, those relationships sometimes create unanticipated conflicts of interest.

For example, assume that you lead your law firm's litigation practice and, once again, your colleagues have turned to you for help with a sensitive matter. Company *A* retained one of your fellow partners to sue Company *B* for patent infringement in federal court in a state where your law firm has no offices. Accordingly, your partner, with Company *A*'s consent, engaged Law Firm *L* to serve as local counsel. Your firm sued *B* on *A*'s behalf and alleged that *B*'s software platform, known as Orion, infringed *A*'s patent. *B* has now moved to disqualify both *L* and your firm. According to *B*'s motion, a senior associate at *L* formerly was in-house intellectual property counsel at *B*. While employed as an in-house lawyer by *B*, the associate's duties allegedly included studying various potentially patentable aspects of Orion, as well as evaluating the risks of lawsuits against *B* for patent infringement linked to Orion. *B* asserts that the associate has a conflict of interest because (1) under Model Rule 1.9(a), her Orion-related work for *B* was substantially related to the claims in the lawsuit; (2) while in-house at *B*, the associate acquired confidential information of *B*'s that is material to the current litigation, triggering Model Rule 1.9(b); and (3) under Model Rule 1.9(c), she is prohibited from using information related to Orion to *B*'s disadvantage and is barred from even revealing information about Orion.

Naturally, *B* alleges that the associate's conflict is imputed to all other lawyers in her firm under Model Rule 1.10(a), such that *L* must be disqualified from representing *A* in the lawsuit. But *B* further alleges that the associate's conflict of interest should also be imputed to your law firm even though your firm never employed her, and, for that matter, your partner did not know that any of *L*'s lawyers ever had any sort of relationship with *B* when he engaged *L* as local counsel.

You recognize the basis for *L*'s disqualification; indeed, if *B*'s allegations are true, the court may well disqualify *L*. The disqualification of your law firm, however, seems counterintuitive. Although Model Rule 1.10(a) generally imputes one lawyer's conflict of interest to other lawyers in the same firm, the rule does not impute conflicts between or among law firms, and the term "firm" as used in Model Rule 1.10 does not encompass co-counsel arrangements such as yours.[1] In fact, such double imputation or re-imputation of conflicts is disfavored by courts. Relatedly, and as a general rule, a co-counsel relationship will not alone justify a law firm's disqualification.[2] As a Florida federal court once explained, the fact that two law firms "have associated as co-counsel does not itself establish that their relationship is so close as to impute disqualification."[3] Likewise, disqualification cannot be based on speculation that co-counsel have shared confidential information.[4]

TIP: Rather than applying a per se rule, courts tasked with reviewing the interfirm imputation of conflicts of interest must conduct a case-specific analysis of the facts.

On the other hand, it is also generally understood that lawyers may be disqualified based on their actual or presumed acquisition of adversaries' privileged information.[5] Although it obviously does not control across the board, California law can sometimes be especially troubling on this point.[6] And, regardless of the jurisdiction, the general rule that a co-counsel relationship will not alone warrant disqualification may be overcome on the right facts.[7]

So, what result in our hypothetical case? The answer, as is so often true in the law, depends on more facts than initially meet the eye.

Courts Reject a Per Se Imputation Rule

Co-counsel relationships may vary widely. For example, a law firm serving as local counsel in one case may have a very limited role in the litigation, while, in another case, two firms may work together intimately in prosecuting or defending the matter. In the former instance, no confidential information regarding an adversary may pass between the law firms; in contrast, in the latter situation, there may be a regular exchange of such information. Recognizing the breadth of co-counsel relationships and the varying nature of law firms' collaborative efforts, courts typically decline to impose any sort of per se rule that would uniformly impute conflicts of interest between law firms.[8]

Four reasons for courts' reluctance to impute conflicts of interest between law firms stand out. First, although it may make sense to impute conflicts of interest within a law firm because lawyers associated in a firm presumably will share or at least enjoy access to all clients' confidential information, the same reasoning does not necessarily apply where two law firms or lawyers are operating as co-counsel.[9] Again, co-counsel relationships vary widely. In some cases—perhaps even a fair number—the collaboration between two law firms serving as co-counsel will be so insubstantial that there is little or no risk that they have shared supposedly disqualifying information about an opponent.[10] Imputing conflicts of interest between law firms in that situation is inappropriate.

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Second, and relatedly, a per se rule enforcing the disqualification of co-counsel "risks elevating the label assigned to a relationship over the substance of that relationship."[11] Third, as a policy matter, re-imputation of knowledge between lawyers in different firms "could lead to an unending and unwarranted stream of disqualifications."[12] That possibility is to be avoided for obvious practical reasons. Fourth, the double or re-imputation of conflicts of interest may interfere with a party's right to counsel of its choice and encourage tactical disqualification motions.[13]

Occasionally, a party seeking to disqualify an adversary's co-counsel will argue that a close relationship between the adversary's law firms creates an appearance of impropriety that justifies disqualification. The "appearance of impropriety" standard for determining a conflict of interest is a disfavored relic from another era. It certainly is no basis on which to disqualify a lawyer or law firm today.[14]

Courts' Preferred Approaches to Co-Counsel Disqualification Disputes

Rather than applying a per se rule in co-counsel disqualification disputes or relying on the discredited appearance of impropriety standard, courts tasked with reviewing the alleged interfirm imputation of conflicts of interest must conduct a case-specific analysis of the facts.[15] In doing so, courts usually apply (1) a so-called functional approach or (2) a burden-shifting approach. These are not necessarily separate approaches.[16] After all, a functional approach to resolving any factual dispute normally involves burden-shifting in some form, whether express or unstated, and allocating burdens of proof or persuasion is a functional means of justly resolving a factual dispute.

The functional approach. A court applying a functional approach examines the substance of the two law firms' relationships and the procedures in place to limit the sharing of the adversary's supposedly confidential information.[17] Merely labeling two law firms as co-counsel is insufficient for disqualification purposes.[18] So is simply asserting that the co-counsel firm sought to be disqualified potentially had access to confidential information.[19] Similarly, speculation that lawyers in separate firms serving as co-counsel shared confidential information will not support disqualification.[20] Rather, a court applying a functional approach to disqualification must scrutinize the facts surrounding the lawyers' co-counsel relationship.

Broadly speaking, the closer or more intertwined the relationship and the greater the sharing of responsibility for a matter between law firms affiliated as co-counsel, and the greater the possibility that their interaction may permit the sharing of an opposing party's confidential information (whether accidentally or intentionally), the greater the likelihood that the court will impute a conflict between the firms. In contrast, the more limited the relationship between the two law firms, and the more secure and effective their precautions against the possible sharing of the adversary's allegedly confidential information, the less appropriate imputation becomes.[21]

Consider now two cases at opposite ends of the functional approach spectrum: *Fund of Funds, Ltd. v. Arthur Andersen & Co.*[22] and *Smith v. Whatcott*.[23] Both are leading cases on co-counsel conflicts.

The *Fund of Funds* facts are numbingly complex. Briefly, former accounting firm giant Arthur Andersen & Co. (Andersen) was allegedly involved in a fraudulent natural resources scheme. Fund of Funds, a Canadian mutual fund, planned to sue Andersen and others in the Southern District of New York. Fund of Funds was represented by the Canadian law firm Borden & Elliot, which needed U.S. co-counsel to help prepare and prosecute the case. Fund of Funds retained Morgan Lewis & Bockius (Morgan Lewis) for those purposes. This was a problem for Morgan Lewis, which was Andersen's regular New York counsel and had represented Andersen in matters concerning Fund of Funds. Morgan Lewis thus screened the lawyers who worked on Andersen matters from the Fund of Funds case.[24] Tension still flared, as Morgan Lewis tried not to implicate Andersen during the pre-suit investigation and insisted to Borden & Elliot that it would never consider Andersen's fault, much to the Canadian lawyers' annoyance and dismay. Even so, Morgan Lewis lawyers representing Fund of Funds pored through related documents, flagged any that were "'really hot' as to Andersen," and sent them to Borden & Elliot.[25] Ultimately, everyone on the Fund of Funds side of the "v" concluded that Morgan Lewis was in an untenable position. Thus, the decision was made to replace Morgan Lewis with Robert Meister of Milgrim Thomajan & Jacobs (Milgrim), with whom Morgan Lewis had a long and close relationship, in any litigation against Andersen.

Fund of Funds later filed two lawsuits, with Andersen named as a defendant in one but not the other. Morgan Lewis was co-counsel with Borden & Elliot in the so-called King case, while Meister was the Canadian firm's co-counsel in the case against Andersen. Despite the seeming divide, Meister relied on Morgan Lewis's work product in drafting the complaint in the Andersen case, a Morgan Lewis associate helped him prepare the complaint, and the same associate helped Meister retain an expert witness (whose fees were to be split between Morgan Lewis and Milgrim) and joined in a key witness interview with Meister.

Andersen moved to disqualify Milgrim based on Meister's work with Morgan Lewis. The district court concluded that Morgan Lewis had a conflict of interest that would have prevented it from suing Andersen but declined to disqualify Milgrim on the basis that it was "highly unlikely" that it had obtained Andersen's confidential information through Morgan Lewis.[26] Andersen appealed to the Second Circuit.

The *Fund of Funds* court reversed the district court's decision. The Second Circuit saw Morgan Lewis and Milgrim as "working closely to represent a common client."[27] In particular:

> In undertaking the background investigation, and in segregating the papers which were, in part, ultimately used against Andersen, Morgan Lewis was applying its privileged knowledge with respect to Andersen. . . . Morgan Lewis was privy to Andersen's practices and procedures, and had access to internal papers. It is inevitable that Meister, who dealt closely with Morgan Lewis throughout this entire period, was afforded the opportunity to benefit from this privileged information with regard to Andersen.[28]

Smith was a simpler case. There, plaintiff-appellee Leon Smith tried to disqualify the defendants' trial counsel, the law firm of Jeffs and Jeffs, from representing the defendants on appeal. Dayle Jeffs had tried the case for the defendants, who then hired Clark Nielsen of Nielsen and Senior to represent them on appeal to the Tenth Circuit. Nielsen listed Jeffs as co-counsel on some appellate filings as a courtesy, even though their contact was limited to one short phone call over the defendants' docketing statement.[29] As luck would have it, the Tenth Circuit disqualified Nielsen and Senior based on an imputed conflict of interest attributable to one of its lawyers, Mark Anderson, who had formerly represented Smith at another law firm.[30] Smith sought to further impute Anderson's conflict to Jeffs and Jeffs, which the defendants had substituted for Nielsen and Senior. The court rebuffed Smith's effort:

> [W]e have already imputed Mark Anderson's knowledge to disqualify . . . Nielsen and Senior. It is not reasonable to re-impute that knowledge to Dayle Jeffs and his firm based on his limited contact with Clark Nielsen. Although Jeffs actually conducted the trial, he was only peripherally connected with Nielsen and

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> Senior's efforts on appeal. Clark Nielsen . . . contacted him to learn of possible issues to raise in the docketing statement. During that conversation, information flowed from Jeffs to Nielsen, not from Nielsen to Jeffs. This cannot be considered the "close working relationship" so dispositive . . . in *Fund of Funds*.
>
> Moreover, Jeffs is not associated with any of the attorneys infected by Mark Anderson's prior representation of plaintiff Smith. Jeffs had no access to firm files and no opportunity to hear inadvertent remarks that might disclose confidential information. . . . The courtesy of listing him as co-counsel should not now prevent him from serving as appellate counsel.[31]

There is obviously a vast middle ground between the factual scenarios in *Fund of Funds* and *Smith*. This realization simply highlights the need for courts to carefully analyze the facts of the specific cases before them.

The burden-shifting approach. Along with the functional approach, courts have adopted burden-shifting approaches to avoid the unfairness and other faults associated with a per se approach to disqualification in co-counsel cases. *In re American Home Products Corp.*[32] is a leading burden-shifting case.

In *American Home Products*, the Texas Supreme Court explained that a party seeking to impute disqualification "must first demonstrate that there were substantive conversations between disqualified counsel and co-counsel, joint preparation for trial by those counsel, or the apparent receipt by co-counsel of confidential information."[33] Once the party does so, a rebuttable presumption then arises that the tainted lawyer or law firm shared the moving party's confidential information with co-counsel. The party resisting the disqualification of co-counsel may then rebut this presumption "by providing probative and material evidence that the tainted person . . . did not disclose confidential information of his adversary."[34]

A Missouri court more comprehensively outlined the burden-shifting approach to co-counsel disqualification in *Polish Roman Catholic St. Stanislaus Parish v. Hettenbach*.[35] Under the burden-shifting framework detailed by the *St. Stanislaus* court, a party seeking to disqualify an adversary's co-counsel based solely on the firm's co-counsel relationship "bears the initial burden of raising the presumption of shared confidences by either offering direct evidence of disclosure or, alternatively, 'by showing substantial communications, joint preparation for litigation or the apparent receipt of confidences.'"[36] Once the moving party has satisfied this initial burden, a rebuttable presumption arises that co-counsel and the conflicted law firm shared the movant's confidential information. The party opposing disqualification may then rebut the presumption of

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shared confidences "by either contesting the existence of the facts relied on by the movant or rebutting the presumed fact by disclosing the full extent of exchanged information and showing that co-counsel did not in fact share confidential information."[37] If the party opposing disqualification presents sufficient rebuttal evidence, "the presumption falls, and the court then may weigh that evidence against any remaining *inference* of [shared confidences] created by the base facts of the rebutted presumption."[38]

In rebutting the presumption of shared confidences, a law firm may rely on affidavits submitted by its lawyers and by lawyers in the affiliated firm.[39] A firm may, of course, rely on a range of other evidence to rebut the presumption, such as affidavits or declarations from key witnesses, copies of email messages or letters, and lawyers' time sheets.

Presumed Sharing of Confidential Information

Finally, while most courts called upon to review the alleged interfirm imputation of conflicts of interest favor case-specific analysis of the facts, a few courts are willing to basically liberalize the burden-shifting approach and presume that co-counsel share confidences.[40] This position rests on the idea that co-counsel have a powerful incentive to share all information relevant to their case and that the potential for the misuse of an adversary's confidential information by lawyers in separate firms may be even greater than the potential for misuse among lawyers in a single firm.[41]

Although courts holding this position consider the presumption of shared confidences to be rebuttable,[42] as it surely must be to track the burden-shifting approach, that allowance does not fix the position's flaws. First, the presumption of shared confidences simplistically assumes that all co-counsel relationships are the same. In fact—and as any experienced trial lawyer can attest—they are not. Second, it effectively assumes that the lawyers in the disqualified firm, who owe an ethical duty of confidentiality to their former client, either will share or have already shared the former client's information with co-counsel in violation of that duty.[43] So dim a view of lawyer conduct ought to require at least some initial showing that client information may have been shared between the law firms. Third, disqualification deprives a party of the important right to representation by counsel of its choice and may subject that party to considerable expense and substantial prejudice.[44] The presumption of shared confidences increases the potential for these severe and possibly unfair consequences.

Conclusion

Co-counsel conflicts of interest are difficult for law firms to manage because they must always depend on their fellow firm's diligence in checking conflicts, correctness in evaluating those matters that any search surfaces, and transparency in communicating any issues to them. Nonetheless, when potentially affiliating with co-counsel, whether on a local counsel basis or otherwise, it is important to insist that the other law firm check conflicts and then confirm that it did so before agreeing to any co-counsel arrangement. In a case where the possible co-counsel's role will be very limited or perhaps in a local counsel situation where the choice of the "right" firm may not be critical, the identification of any conflict on the part of the potential co-counsel firm arguably should cause a firm to consider a different affiliation out of abundant caution.[45] ◄

A party seeking to disqualify an adversary's co-counsel based solely on the firm's co-counsel relationship bears the initial burden of raising the presumption of shared confidences.

Notes

1. Model Rules of Pro. Conduct r. 1.10(a) & cmt. 1 (Am. Bar Ass'n 2022); *id.* r. 1.0(c) & cmts. 2–4; *see Ex parte* Terminix Int'l Co., L.P., 736 So. 2d 1092, 1094 (Ala. 1998) (interpreting Alabama Rule 1.10(a)); N.Y. State Bar Ass'n Comm. on Pro. Ethics, Op. 1141, 2017 WL 6614790, at *2 (2017).
2. Smith v. Whatcott, 774 F.2d 1032, 1034 (10th Cir. 1985).
3. Est. of Jones *ex rel.* Gay v. Beverly Health & Rehab. Servs., Inc., 68 F. Supp. 2d 1304, 1311 (N.D. Fla. 1999).
4. *See, e.g.*, Est. of Salaam v. City of Newark, No. 18-14473 (EP), 2022 WL 3098098, at *5 (D.N.J. Aug. 4, 2022) (noting further that the lawyer had satisfactorily disputed the claim of shared confidences).
5. *See, e.g.*, Mirch Law Firm, LLP v. Nakhleh, No. 20-56207, 2022 WL 1689252, at *1–2 (9th Cir. May 26, 2022) (applying California law).
6. *See, e.g.*, Pound v. DeMera, 36 Cal. Rptr. 3d 922, 927–30 (Ct. App. 2005) (presuming that co-counsel shared confidences and reasoning that no inquiry into the actual sharing of confidences was required).
7. *See, e.g.*, Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 235–36 (2d Cir. 1977) (involving an intense working relationship between two law firms in a case where

one of them reportedly was attempting to skirt a conflict of interest through the co-counsel arrangement).

8. *See, e.g.*, Brennan's, Inc. v. Brennan's Rests., Inc., 590 F.2d 168, 174 (5th Cir. 1979) ("The courts have abjured a per se approach to the disqualification of cocounsel of disqualified counsel."); Akerly v. Red Barn Sys., Inc., 551 F.2d 539, 543 (3d Cir. 1977) ("This Court is urged to adopt a per se rule that if one co-counsel is disqualified for ethical reasons, all co-counsel must be barred from representation. We decline to follow such a path. Instead, we adhere to the mode of analysis employed in earlier attorney disqualification controversies [that requires] a careful sifting of all of the facts and circumstances."); Essex Chem. Corp. v. Hartford Accident & Indem. Co., 993 F. Supp. 241, 251 (D.N.J. 1998) (listing cases where the courts rejected double imputation of conflicts); Frazier v. Super. Ct., 118 Cal. Rptr. 2d 129, 135 (Ct. App. 2002) (reasoning that double imputation "would be to go too far").

9. *See, e.g.*, Hempstead Video, Inc. v. Incorporated Village of Valley Stream, 409 F.3d 127, 136 (2d Cir. 2005) (rejecting imputation and affirming the magistrate judge's refusal to disqualify an "of counsel" lawyer who also maintained his separate law firm).

10. *See, e.g.*, Smith v. Whatcott, 774 F.2d 1032, 1035 (10th Cir. 1985); Baybrook Homes, Inc. v. Banyan Constr. & Dev., Inc., 991 F. Supp. 1440, 1447 (M.D. Fla. 1997).

11. *Hempstead Video*, 409 F.3d at 135.

12. *In re* Am. Home Prods. Corp., 985 S.W.2d 68, 81 (Tex. 1998); *see also* Am. Can Co. v. Citrus Feed Co., 436 F.2d 1125, 1129 (5th Cir. 1971) (asserting that the re-imputation of conflicts between co-counsel would lead to disqualification "ad infinitum" and reasoning that carrying "imputation-on-an-imputation to its logical terminus could lead to extreme results in no way required to maintain public confidence in the bar").

13. *Hempstead Video*, 409 F.3d at 135–36.

14. *See, e.g.*, H.R. Bushman & Son Corp. v. Spud Packers, Inc., No. 4:06CV1638 CDP, 2007 WL 9805609, at *2 (E.D. Mo. Nov. 5, 2007) (refusing to disqualify the plaintiffs' co-counsel based on an alleged appearance of impropriety); *In re* Airport Car Rental Antitrust Litig., 470 F. Supp. 495, 507 (N.D. Cal. 1979) (refusing to disqualify a law firm based on the allegation that their role as co-counsel to a disqualified firm created an appearance of impropriety, particularly in light of the general rule that co-counsel are not to be disqualified automatically).

15. Essex Chem. Corp. v. Hartford Accident & Indem. Co., 993 F. Supp. 241, 252 (D.N.J. 1998); *Baybrook Homes*, 991 F. Supp. at 1445.

16. *See, e.g.*, *Hempstead Video*, 409 F.3d at 135–38 (discussing presumptions when employing a functional approach in a disqualification case).

17. *Id.* at 135.

18. *Baybrook Homes*, 991 F. Supp. at 1445; Venters v. Sellers, 261 P.3d 538, 546 (Kan. 2011).

19. *Baybrook Homes*, 991 F. Supp. at 1445.

20. *See, e.g.*, Kelly v. Paulsen, 44 N.Y.S.3d 263, 266 (App. Div. 2016) (concluding that the trial court erred in granting disqualification).

21. *Hempstead Video*, 409 F.3d at 135.

22. 567 F.2d 225 (2d Cir. 1977).

23. 774 F.2d 1032 (10th Cir. 1985).

24. *Fund of Funds*, 567 F.2d at 229.

25. *Id.*

26. *Id.* at 233.

27. *Id.* at 236.

28. *Id.*

29. Smith v. Whatcott, 774 F.2d 1032, 1034 (10th Cir. 1985).

30. Anderson's history with Smith and Nielsen and Senior's disqualification are discussed in another decision in the case. *See* Smith v. Whatcott, 757 F.2d 1098 (10th Cir. 1985), *superseded by rule as stated in* SLC Ltd. V v. Bradford Grp. W., Inc., 999 F.2d 464 (10th Cir. 1993).

31. *Smith*, 774 F.2d at 1035.

32. 985 S.W.2d 68 (Tex. 1998).

33. *Id.* at 81.

34. *Id.*

35. 303 S.W.3d 591 (Mo. Ct. App. 2010).

36. *Id.* at 604 (quoting Baker v. Bridgestone/Firestone, Inc., 893 F. Supp. 1349, 1364 (N.D. Ohio 1995)).

37. *Id.* (citing *Baker*, 893 F. Supp. at 1362–64).

38. *Id.* (alteration in original) (quoting *Baker*, 893 F. Supp. at 1364).

39. *See, e.g.*, Bristow First Assembly of God v. BP p.l.c., No. 15-CV-523-TCK-FHM, 2018 WL 4931997, at *6–7 (N.D. Okla. Oct. 11, 2018) (finding that the lawyers' affidavits swearing that no confidential information was shared were persuasive); IPVX Patent Holdings, Inc. v. 8x8, Inc., No. 4:13-cv-01707 SBA (KAW), 2013 WL 6700303, at *5 (N.D. Cal. Dec. 19, 2013) (accepting a lawyer's sworn declaration as compelling rebuttal evidence).

40. *See, e.g.*, P.R. Fuels, Inc. v. Empire Gas Co., 133 D.P.R. 112, 126 (P.R. 1993) (holding that a rebuttable presumption of shared confidences is triggered when one of the co-counsel is shown to have a conflict of interest). *But see* United States v. Kelly, No. 19-CR-286 (AMD), 2022 WL 2316177, at *44 (E.D.N.Y. June 29, 2002) (refusing to disqualify the lawyers and explaining that that there is no presumption of confidence sharing "between a law firm that received confidential information and a separate firm serving as co-counsel" (quoting Benevida Foods, LLC v. Advance Mag. Publishers Inc., No. 15-CV-2729, 2016 WL 3453342, at *12 (S.D.N.Y. June 15, 2016))).

41. *P.R. Fuels*, 133 D.P.R. at 125–26 (quoting Paul R. Taskier & Alan H. Casper, *Vicarious Disqualification of Co-Counsel Because of "Taint,"* 1 Geo. J. Legal Ethics 155, 160 (1987)).

42. *Id.* at 126.

43. *In re* Airport Car Rental Antitrust Litig., 470 F. Supp. 495, 506 (N.D. Cal. 1979).

44. *See id.*

45. *See* Akerly v. Red Barn Sys., Inc., 551 F.2d 539, 544–45 (3d Cir. 1977) ("It may have been more prudent to have selected as local co-counsel an attorney who had enjoyed no prior professional relationship whatsoever with the defendants. This is particularly so since it was conceded at the hearing that lead counsel 'could have gotten anybody' to perform this role. It would be preferable for attorneys . . . to employ a cautious approach to this type of matter.").