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Conflicts of Interest for Former Law Firm Clerks Turned Lawyers

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COMMENT

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I. INTRODUCTION

The rules surrounding lawyers' conflicts of interest are more defined than those rules governing non-legal professionals.[1] However, the conflict of interest rules pertaining to former clerks[2] are not as clear as the other rules applicable to attorneys. The legal profession has addressed conflicts of interest for lawyers, but not every jurisdiction has focused on the conflicts stemming from work done while the attorney was still a law student. Because conflict of interest rules protect the integrity of the profession and the interests of current and former clients,[3] it is pertinent for the legal community to address conflicts of interest that arise from work performed as a clerk to more fully protect these interests.

The laws and rules governing conflicts of interest are broad, and the answers to many legal ethics questions are not always clear.[4] Should there

1. *See* MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 2013) (outlining the conflicts of interest an attorney may encounter with a current client and detailing how disqualification can be avoided); *Id.* at r. 1.8 (identifying the specific conflicts of interest that may arise from an attorney's representation of a current client); *Id.* at r. 1.9 (describing the duties an attorney owes to a former client); *Id.* at r. 1.10 (offering well-defined parameters for when a conflict of interest is imputed to an attorney's firm, as well as how imputation may be avoided).

2. For purposes of this Comment, unless otherwise specified, the terms "law clerk(s)" and "clerk(s)" will refer to law-school students performing legal responsibilities at a legal entity.

3. *See* United States v. Armedo-Sarmiento, 524 F.2d 591, 592–93 (2d Cir. 1975) (per curiam) (stressing the importance of avoiding conflicts of interest because the failure to do so could jeopardize private communications between an attorney and their client and harm "the integrity of the judicial process").

4. *See generally* MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2013). *See also* Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1469 (1966) (indicating three difficult questions lawyers face in maintaining their ethical

be a rule requiring the disqualification of a lawyer because of past work experiences while still in law school? Is a law clerk more analogous to a lawyer or some other legal position, such as a paralegal? The rules relating to conflicts of interest arising from time spent as a legal intern or law clerk for a firm are not well defined. The American Bar Association (ABA) briefly addresses the subject in the Model Rules of Professional Conduct (the Model Rules) in a comment to the rule discussing imputation of conflicts of interest.[5] Nonetheless, not all states have adopted the Model Rules,[6] and not all states that have adopted them accept and apply their rules uniformly.[7]

In August 2014, the Supreme Court of Texas's Professional Ethics Committee issued an opinion detailing how firms should deal with potential conflicts of interest that arise when a firm hires a new attorney who previously worked for opposing counsel as a clerk.[8] The Committee's opinion advocated a firm's withdrawal from such client representation because of the former clerk's possible knowledge of confidential information causing a conflict of interest.[9]

In March 2016, the Texas Supreme Court amended rule 1.06 of the Texas

duties).

5. *See* MODEL RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (AM. BAR ASS'N 2013) (indicating when applying the imputation conflict of interest guidelines to nonlawyer professionals, a firm is not prohibited from "representation if [a] lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did as a law student").

6. California is the only state missing from a list of jurisdictions that adopted the Model Rules. *See State Adoption of the ABA Model Rules of Professional Conduct*, A.B.A., https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited May 29, 2017) (listing the dates of adoption of the Model Rules for the forty-nine states and including the District of Columbia and the U.S. Virgin Islands). Further, besides differing remarkably in format, the California rules vary significantly from the Model Rules. *See* CAL. RULES OF PROF'L CONDUCT r. 3-310 (2015) (excluding any mention of how a law firm should address conflicts of interest when a lawyer, previously in the capacity of a legal intern or law clerk, worked on a case adverse to their present client).

7. *Compare* CONN. RULES OF PROF'L CONDUCT r. 1.10(a)(2) (2016) (providing an exception to imputation when the disqualified attorney is screened and proper notice is provided), *with* ALA. RULES OF PROF'L CONDUCT r. 1.10 (2016) (failing to establish a screening exception for firm imputation due to an attorney's conflict of interest).

8. Tex. Comm. on Prof'l Ethics, Op. 644, 77 TEX. B.J. 848, 849 (2014) (interpreting Texas rules to require a law firm "withdraw from representing a client in a lawsuit" if they hire an attorney who worked as a "clerk for the law firm representing the opposing party").

9. *See id.* at 849 (stressing a former law clerk "is conclusively presumed to have confidential information concerning [client A] and its claim against [client B]" in the situation where the law clerk worked for the firm who represented client A in its claim against client B). This is qualified based on whether or not the clerk assisted in the particular case. *Id.*

Disciplinary Rules of Professional Conduct.[10] This new amendment specifically permits a law firm to represent a client if the lawyer in question would only be conflicted because of work he or she did as a legal intern or law clerk and was properly screened from the case.[11] The amendment necessitated the Texas Committee on Professional Ethics to revisit their previous opinion in which the Committee concluded the opposite of its former opinion. The Committee subsequently amended Opinion 644 in accord with the new rule from the Texas Supreme Court.[12]

This conflict of interest issue—what to do when a nonlawyer who worked in a legal setting begins working at another firm after they become a lawyer—is not new.[13] Many states and the ABA have previously addressed this issue when it comes to paralegals and legal assistants; however the issue, as it pertains to clerks, is less clear.[14] Nineteen states have no provision in their rules of professional conduct that tackle this issue.[15] Texas attempted

10. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06 cmt. 19, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2016) (allowing representation by a law firm whose participation would be prohibited "merely because a lawyer of the firm has a conflict of interest arising from events that occurred before the person became a lawyer, such as work that the person did as a law clerk or intern").

11. *Id.*

12. Tex. Comm. on Prof'l Ethics, Op. 644 Revised, 79 TEX. B.J. 609, 609 (2016).

13. *Cf.* MODEL RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (AM. BAR ASS'N 2013) (interpreting the provision as permitting nonlawyers to be screened to avoid imputation).

14. *See* Daines v. Alcatel, S.A., 194 F.R.D. 678, 684 (E.D. Wash. 2000) (concluding disqualification was not required since the firm put appropriate screening measures into effect immediately upon hiring a paralegal who previously worked for opposing counsel); Hodge v. URFA-Sexton, LP, 758 S.E.2d 314, 323–24 (Ga. 2014) (finding appropriate screening measures were taken upon the firm being informed of the nonlawyer conflict of interest, thus avoiding imputed disqualification to the firm); Green v. Toledo Hosp., 764 N.E.2d 979, 979–80 (Ohio 2002) (holding there was no error when the judge ruled the attorney and the firm should be disqualified from the litigation because the firm hired the legal secretary of an opposing firm); Hayes v. Cent. States Orthopedic Specialists Inc., 51 P.3d 562, 564 (Okla. 2002) (stating the trial court erred when it ruled the hiring of a legal secretary from opposing counsel's firm disqualified their firm in representing the client in the litigation even though the firm arranged a "Chinese Wall" screening device to prevent the flow of confidential information from the employee to other members of the firm); *In re* Columbia Valley Healthcare Sys., L.P., 320 S.W.3d 819, 829 (Tex. 2010) (concluding "the trial court abused its discretion in refusing to disqualify [the law firm]" representing opposing party because they hired a legal secretary who had done a substantial amount of work on the litigation at hand); *see also* Widger v. Ownes-Corning Fiberglass Corp. (*In re* Complex Asbestos Litig.), 283 Cal. Rptr. 732, 751 (App. 1991) (stressing the court "must balance the important right to counsel of one's choice balancing the competing interests of the client to be able to select counsel of their own choice against the competing fundamental interest in preserving confidences of the attorney–client relationship").

15. *See, e.g.*, CAL. RULES OF PROF'L CONDUCT r. 3-310 (2016) (failing to acknowledge whether there is imputation of a conflict of interest when one of the lawyers at the firm previously worked on a case adverse to one of the firm's clients when the attorney was still a law student).

to address the issue in an ethics committee opinion which was ultimately reversed as a result of the Texas Supreme Court amendment to rule 1.06 of the Texas Disciplinary Rules—now inline with the standard set by the Model Rules.[16] Conversely, other states remain entirely silent on the issue.[17]

This Comment aims to address the law's ambiguity on how former clerks should be treated once they become attorneys, specifically in regards to conflicts of interest that arise from clerkships they had during law school. Section II of this Comment focuses on background information pertaining to conflicts of interest, and how conflicts may be avoided or dealt with when they do occur. Section III analyzes the current state of the law regarding conflicts of interest that arise because of a lawyer's experiences as a law student. In addition, Section III examines conflicts of analogous non-attorney firm employees and how they relate to the conflicts a law student may face, as well as the economic and educational implications of a rule imposing conflicts of interest on law students that would follow them into their career. In closing, Section IV proposes a solution that protects the interests of clients while complying with the Model Rules and preventing the attachment of unnecessary implications to a law student that could later affect their legal career.

II. HISTORIC AND BACKGROUND INFORMATION

A conflict of interest is "[a] real or seeming incompatibility between the interests of two of a lawyer's clients, such that the lawyer is disqualified from representing both clients if the dual representation adversely affects either client or if the clients do not consent."[18]

16. *Compare* Tex. Comm. on Prof'l Ethics, Op. 644 Revised, *supra* note 12, at 609–10 (finding a law firm would not be required to withdraw from representation if a lawyer had previously been involved with the case prior to becoming a lawyer), *with* MODEL RULES OF PROF'L CONDUCT, r. 1.10 cmt. 4 (AM. BAR ASS'N 2016) (concluding the same).

17. *See* KAN. RULES OF PROF'L CONDUCT r. 1.10 (2015) (declaring a firm may not knowingly represent a party when any attorney at the firm would be precluded from practicing alone but remaining silent about conflicts arising from when the attorney was a law student); LA. RULES OF PROF'L CONDUCT r. 1.10 (2016) (outlining imputation of conflict rules without indicating that the rule applies to a former law student's conflicts); N.Y. RULES OF PROF'L CONDUCT r. 1.10 (2015) (ignoring whether conflicts of interest arise from work done as a law student).

18. *Conflict of Interest*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* Plumlee v. Masto, 512 F.3d 1204, 1210 (9th Cir. 2008) (en banc) (citation omitted) (referring to *Black's Law Dictionary* for the legal definition of conflict of interest).

A. *When Does a Conflict of Interest Arise?*

Conflicts of interest can arise in a variety of situations, and the appropriate response to handling a conflict is not always clear.[19] The courts and the ABA have sought to establish bright-line rules for conflicts of interest; however, this is not a simple task.[20] Forty-nine states have adopted the Model Rules in some variation,[21] but California has fashioned their own rules, including a conflict of interest rule, for attorney ethics.[22]

The different types of conflicts of interest include "concurrent client conflicts,[23] former client conflicts, [and] lawyer-to-client conflicts."[24] This Comment focuses on the interests of former clients. The Restatement indicates an issue arises when a former client's interests are materially adverse to a present client's interests in a substantially related matter, which it defines as: (1) a "current matter" the lawyer is seeking to work on that

19. *See* Marc I. Steinberg & Timothy U. Sharpe, *Attorney Conflicts of Interest: The Need for a Coherent Framework*, 66 NOTRE DAME L. REV. 1, 1–2 (1990) (illustrating the vagueness that often surrounds conflict of interest scenarios and pointing out that the answers are not always clear).

20. *See* MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 2013) (providing a plethora of commentary regarding different scenarios in which the rule would or would not apply); *see also* Schiessle v. Stephens, 717 F.2d 417, 420 (7th Cir. 1983) (describing the method in which their analysis was to proceed by first inquiring as to whether a substantial relationship between the two representations exists and then delving into whether the attorney rebutted the presumption of shared confidences with either representation); Burgess-Lester v. Ford Motor Co., 643 F. Supp. 2d 811, 814–16 (N.D. W. Va. 2008) (citation omitted) (considering the rulings of other courts on how to determine if an attorney is disqualified from representation and opting to follow the *Schiessle* analysis as a bright-line standard); *cf.* Essex Cty. Jail Annex Inmates v. Treffinger, 18 F. Supp. 2d 418, 444 (D.N.J. 1998) ("While in an ordinary case the appropriate standard may very well be the potential prejudice at trial, this is not an ordinary case.").

21. *State Adoption of the ABA Model Rules of Professional Conduct*, *supra* note 6.

22. While California has developed its own rules for representation amidst adverse interests, its rule still uses some language similar to the Model Rules. *Compare* CAL. RULES PROF'L CONDUCT r. 3-310 (2015) (indicating a conflict of interest may be overcome with a client's informed consent in certain circumstances), *with* MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 2013) (providing some conflicts of interest may be permissible with a client's informed consent). California case law indicates "[c]onflicts of interest may arise in a variety of circumstances where an attorney assumes a role other than as an attorney at law adverse to an existing client." Am. Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton, 117 Cal. Rptr. 2d 685, 701–02 (Cal. Ct. App. 2002).

23. A concurrent conflict of interest arises when an attorney undertakes a representation that may be materially limited by the attorney's own personal interest or the responsibilities the attorney owes "to another client, a former client[,] or third person." This centers on the duty of loyalty that an attorney owes their client. *See* MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 1 (AM. BAR ASS'N 2013) ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client."). Alternatively, a conflict of interest can also arise if representation of a party would be "directly adverse to another client." *Id.* at r. 1.7(a).

24. W. William Hodes, *Getting Lawyer Disqualification Straight*, 17 GEO. J. OF LEGAL ETHICS 339, 342 (2004) (book review).

deals with the work the attorney previously did in representing the former client; or (2) a current matter in which "there is a substantial risk" of using information gained from past representation of the former client.[25] The purpose of conflict of interest rules is to prevent the disclosure of confidential or sensitive information obtained from the former client.[26] In essence, it would be fundamentally unfair (and not in the interest of justice) to allow one side to have superior, inside knowledge of the opposing side's arguments and legal strategy.[27]

25. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132 (AM. LAW INST. 2000); *see* Green v. Montgomery Cty., 784 F. Supp. 841, 843 (M.D. Ala. 1992) (asserting that Rule 1.9 from Alabama's Rules of Professional Conduct is essentially "a codification of the standard articulated in the landmark case of *T.C. Theater Corp. v. Warner Bros. Pictures*"); T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 268 (S.D.N.Y. 1953) (acknowledging payment of the attorney's fee does not end the duty of loyalty owed to the client except as provided by law, and recognizing if the subject matter of the former client's representation is substantially related to a subsequent adverse representation, then representation of the new client is barred); Porter v. Huber, 68 F. Supp. 132, 135 (W.D. Wash. 1946) (finding the former client's interests were possibly jeopardized through the disclosure of information by counsel who had formerly represented them and holding this was grounds for barring counsel from representing the client); People v. Gerold, 107 N.E. 165, 177 (Ill. 1914) (emphasizing this ethics rule is "rigid" because even the most honest of practitioners should not place himself in a situation where he is forced to choose between the duties owed to separate clients that are in conflict).

26. *See* Note, *Disqualification of Attorneys for Representing Interests Adverse to Former Clients*, 64 YALE L.J. 917, 918 (1955) (citations omitted) ("Disqualification rules were fashioned at common law to assure the public that any information confided in an attorney would never be disclosed or utilized adversely without the client's permission."); Keith Swisher, *The Practice and Theory of Lawyer Disqualification*, 27 GEO. J. LEGAL ETHICS 71, 80 (2014) (indicating the conflict of interest and disqualification rules were put in place to prevent an attorney from not fulfilling his fiduciary duty to his current or former client by disclosing or acting on sensitive information); *see also* Consol. Theatres, Inc. v. Warner Bros. Circuit Mgmt. Corp. (*In re* Nickerson), 216 F.2d 920, 924–25 (2d Cir. 1954) (noting concern over an attorney's possession of a former client's confidential information and disqualifying the lawyer despite the lack of evidence that any of the information passed from the lawyer to the new clients); GEO Specialty Chems., Inc. v. Husisian, 951 F. Supp. 2d 32, 43–44 (D.D.C. 2013) (rejecting the claim of conflict of interest since no showing was made that confidential information was shared, but proceeding to inquire into whether a substantial relationship existed between the representations of the former client and the new client that would cause the attorney to take an adverse stance to one of them); *In re* Boone, 83 F. 944, 964 (N.D. Cal. 1897) (finding the lawyer had special and peculiar knowledge in relation to his former client and imposing a penalty of disbarment for the unethical behavior exhibited by using such knowledge against the former client).

27. *Cf.* Strickland v. Washington, 466 U.S. 668, 692 (1984) (indicating a client may be denied effective assistance of counsel when the attorney is burdened by a conflict of interest, and agreeing a presumption of prejudice applies to such a claim (citing Cuyler v. Sullivan, 446 U.S. 335, 345–50 (1980))); Glasser v. United States, 315 U.S. 60, 70 (1942) (asserting Sixth Amendment concerns regarding ineffective assistance of counsel may result from a conflict of interest), *superseded on other grounds by* FED. R. EVID. 104(a); United States v. Alvarez, 580 F.2d 1251, 1256 (5th Cir. 1978) (emphasizing an attorney, either retained or appointed, who operates under the burden of an actual

B. *Duty Owed to the Client*

Attorneys owe a fiduciary duty to their clients.[28] This includes both a duty of care[29] and a duty of loyalty.[30] Lawyers must act solely in the interest of their client.[31] The fiduciary duty extends from a lawyer to their client

conflict of interest is incapable of representing their client effectively without prejudicing the case); Porter v. United States, 298 F.2d 461, 463–64 (5th Cir. 1962) (arguing constitutional rights may be implicated when conflicts of interest arise due to a lawyer's representation of multiple clients because the parties are deprived of a fair trial).

28. *See* John F. Sutton, Jr., *Guidelines to Professional Responsibility*, 39 TEX. L. REV. 391, 406 (1961) ("Fidelity of advocate to client is of course fundamental to our adversary system of justice."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(3) (AM. LAW INST. 2000) (asserting a lawyer must "comply with obligations concerning the client's confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client"); *see also* Mickens v. Taylor, 535 U.S. 162, 183 (2002) (affirming an attorney owes a fiduciary duty to their client even upon death of the client); Von Motke v. Gillies, 332 U.S. 708, 725 (1948) ("The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client." (quoting Glasser v. United States, 315 U.S. 60, 70 (1942))); Campbell Harrison & Dagley L.L.P. v. Lisa Blue/Baron & Blue, 843 F. Supp. 2d 673, 685–86 (N.D. Tex. 2011) (listing common violations of an attorney's fiduciary duty, such as "failure to disclose a conflict of interest" or improper use of a client's confidences (citing Goffney v. Rabson, 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2001, pet denied))); State v. Vaughn, 859 N.W.2d 492, 504 (Iowa 2015) (Appel, J., concurring specially) (citations omitted) (stressing the duty of loyalty an attorney owes to their client is "essential"); Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C., 284 S.W.3d 416, 428–29 (Tex. App.—Austin 2009, no pet.) ("In addition to the duty of ordinary care, an attorney owes fiduciary duties to his client as a matter of law." (citing Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1988))); State v. Holland, 876 P.2d 357, 359 (Utah 1994) ("The faithful discharge of [the] duty [of loyalty] is a vital factor both in uncovering and making clear to a court the truth on which a just decision depends and in protecting the rights of persons charged with a crime.").

29. *See* Marc R. Greenough, Note, *The Inadmissibility of Professional Ethical Standards in Legal Malpractice Actions After* Hizey v. Carpenter, 68 WASH. L. REV. 395, 397 (1993) ("To conform to the duty of care, an attorney must possess and exercise the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the [s]tate of Washington."); *see also In re* Hatten, 592 A.2d 896, 899 (Vt. 1991) ("The appropriate standard of care is 'that degree of care, skill, diligence[,] and knowledge commonly possessed and exercised by a reasonable, careful[,] and prudent lawyer in the practice of law in this jurisdiction.'" (quoting Russo v. Griffin, 510 A.2d 436, 438 (Vt. 1986))).

30. *See* MODEL RULES OF PROF'L CONDUCT r. 1.9 cmt. 4 (AM. BAR ASS'N 2013) (contending an attorney still owes a duty of loyalty to the former client when the attorney moves from one firm to another); *see also* Bonin v. California, 494 U.S. 1039, 1045 (1990) (Marshall, J., dissenting to the denial of certiorari) ("When a known conflict undermines counsel's duty of loyalty, 'perhaps the most basic of counsel's duties,' . . . a court must presume the counsel's divided loyalties adversely affected his performance on behalf of his client." (quoting Strickland v. Washington, 466 U.S. 668, 692 (1984))); Mazon v. Krafchick, 144 P.3d 1168, 1172 (Wash. 2006) (holding co-counsel on a case each owe their client an undivided duty of loyalty).

31. *See* Mueller v. Guardian Life Ins., 143 F.3d 414, 416 (8th Cir. 1998) (holding the attorney did not act in a manner in accord with his duty to act solely for the client's benefit).

and is a "special and onerous" duty.[32] Indeed, the attorney must act solely in the interest of their client and not in the interest of the attorney themselves.[33]

The duty of loyalty is of paramount concern to the attorney–client relationship.[34] It is the attorney's obligation to ensure conflicts of interest do not arise as a result of relationships with former clients.[35] If such conflict of interest does arise, the attorney must withdraw from the representation.[36]

32. Charles W. Wolfram, *A Cautionary Tale: Fiduciary Breach As Legal Malpractice*, 34 HOFSTRA L. REV. 689, 689 (2006) (proclaiming different members of the legal profession unanimously agree there is a fiduciary duty attorneys owe to their clients, and this duty is an "onerous" one).

33. *See Mueller*, 143 F.3d at 416 (concluding the attorney did not breach "his duty to act solely for [the client's] benefit"); Kimleco Petrol., Inc. v. Morrison & Shelton, 91 S.W.3d 921, 923 (Tex. App.—Fort Worth 2002, pet. denied) ("A breach of fiduciary duty occurs when an attorney benefits improperly from the attorney–client relationship by, among other things, subordinating his client's interests to his own . . . ." (citing Goffney v. Rabson, 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2001, pet. denied))). The duty an attorney owes the client may still exist regardless of whether a client satisfies their obligation to pay the attorney. *See T.C. Theatre Corp.*, 113 F. Supp. at 268 ("A lawyer's duty of absolute loyalty to his client's interests does not end with his retainer. He is enjoined for all time, except as he may be released by law, from disclosing matters revealed to him by reason of the confidential relationship."); *cf. In re* Thomsen, 499 P.2d 815, 816 (Or. 1972) (asserting an attorney, in the situation where they have not informed the client that they have not paid in full, may not unilaterally withdraw from representing the client as a result of nonpayment without permission from the court). Analogously stringent duties exist between trustees and beneficiaries, as well as companies and their shareholders. *See* Nat'l Labor Relations Bd. v. Amax Coal Co., 453 U.S. 322, 329 (1981) (asserting a trustee owes an unwavering, undivided fiduciary duty of loyalty to the beneficiaries in administering the trust); *see also* Mfrs. Tr. Co. v. Becker, 338 U.S. 304, 315 (1949) (Burton, J., dissenting) ("While corporate directors are not classed as express trustees, their obligations to their respective corporations are fiduciary in nature.").

34. *See* Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15, 21 (1987) ("In the relationship with a client, the lawyer is required above all to demonstrate loyalty."); Eli Wald, *Loyalty in Limbo: The Peculiar Case of Attorneys' Loyalty to Clients*, 40 ST. MARY'S L.J. 909, 911 (2009) ("Attorney loyalty to clients is considered a cornerstone of the attorney–client relationship." (first citing CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 146 (West Publishing Co. 1986); and then citing Hazard, Jr., *supra*)).

35. *See* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.09(a), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A, art. X, § 9, r. 1.09 (West 2016) (Tex. State Bar R. art. X, § 9) (prohibiting Texas's lawyers from representing a client in certain matters adverse to a former client, and imputing this conflict of interest to the attorney's firm).

36. *See* Stanley v. Richmond, 41 Cal. Rptr. 2d 768, 775 (Cal. Ct. App. 1995) (alteration in original) (citations omitted) (holding once a conflict of interest arises, an attorney has a duty to withdraw from the representation "as soon as practical, but only after taking 'reasonable steps to avoid foreseeable prejudice to the rights of [her] client, including giving due notice to [the] client [and] allowing time for employment of other counsel'"); *see also* Concat LP v. Unilever, PLC, 350 F. Supp. 2d 796, 822 (N.D. Cal. 2004) (concluding a firm violated its duty of loyalty despite the firm's attempts to prevent the breach through screening since screening serves the role of protecting confidential information and

C. *Imputed Disqualification*

Conflicts may arise even when an individual attorney is not personally conflicted in representing a client but when a law firm itself is conflicted.[37] This form of a conflict of interest is referred to as imputation.[38] Conflicts of interest follow an attorney from firm-to-firm throughout their career.[39] When an attorney starts working at a new law firm, a conflicts check must be performed, in which the new firm analyzes past cases the attorney participated in that may create a conflict with the interests of the clients the new law firm represents.[40]

The law's modern trend generally holds that when a lawyer is individually prohibited from representing a client, then that attorney's entire firm is likely to be prohibited as well.[41] The rules of imputation vary from state-to-state depending upon how recently the state updated their professional conduct

was insufficient to preserve loyalty where two partners in the same firm concurrently represented adverse parties).

37. *See* United States v. Ross, 33 F.3d 1507, 1523 (11th Cir. 1994) ("[I]f one attorney in a firm has an actual conflict of interest, we impute that conflict to all the attorneys in the firm, subjecting the entire firm to disqualification." (citing United States v. Kitchin, 592 F.2d 900, 904 (5th Cir. 1979))); Cox v. Am. Cast Iron Pipe Co., 847 F.2d 725, 729–30 (11th Cir. 1988) (reiterating an attorney's prior representation is imputed to their current firm's partners and employees); Wade v. Nationwide Mut. Fire Ins., 225 F. Supp. 2d 1323, 1328 (S.D. Ala. 2002) ("Disqualification may be either 'actual,' based on the attorney's own relation to the movant, or 'imputed,' based on the attorney's relation to another attorney disqualified from representing the movant.").

38. *See* MODEL RULES OF PROF'L CONDUCT r. 1.10(a) (AM. BAR ASS'N 2013) ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prevented from doing so . . . ."); *see also* ProEducation Int'l, Inc. v. Mindprint (*In re* ProEducation Int'l, Inc.), 587 F.3d 296, 300 (5th Cir. 2009) (recognizing "imputation can be removed when an attorney leaves a law firm" so the potential for conflicts to arise based on that attorney's prior representations is removed).

39. *See* Nemours Found. v. Gilbane, Aetna, Fed. Ins., 632 F. Supp. 418, 422 (D. Del. 1986) (disqualifying an attorney, who was employed at a new firm, from representing a client with interests adverse to a co-defendant of the attorney's former client since the attorney had gained confidential information about the co-defendant).

40. *See* Healthnet, Inc. v. Health Net Inc., 289 F. Supp. 2d 755, 763 (S.D. W. Va. 2003) (contending "a thorough conflicts check would have uncovered this problem" and noting the attorney and the entire firm should be disqualified); Bank Brussells Lambert v. Credit Lyonnais (Suisse), 220 F. Supp. 2d 283, 287–88 (S.D.N.Y. 2002) ("[T]he purpose of the conflict review . . . is to maintain the fiduciary duties of loyalty and confidentiality owed to the client." (citing Kassis v. Teacher's Ins. & Annuity Ass'n, 717 N.E. 2d 674, 674 (N.Y. 1999))); *In re* Conduct of Robeson, 652 P.2d 336, 343 (Or. 1982) (per curiam) (noting a conflicts check was conducted but it produced a negative result); *In re* Guar. Ins. Servs., 343 S.W.3d 130, 132 (Tex. 2011) (per curiam) (indicating the law firm conducted an initial conflicts check on a new, nonlawyer staff member prior to the start of their employment).

41. *See* MODEL RULES OF PROF'L CONDUCT r. 1.10 (AM. BAR ASS'N 2013) (mandating a law firm's disqualification in representing a client if an individual lawyer in the firm would be disqualified from the representation, but providing exceptions to the general rule).

rules and whether the state strictly follows the Model Rules.[42]

D. *Screening*

A process known as "screening" is a mechanism commonly utilized to avoid firm-wide imputation of a firm's new employee's conflict of interest.[43] This practice is meant to limit the possibility that a legal worker will share confidential or privileged information after side-switching to an opposing counsel's employ.[44] Screening occurs after a conflicts check is conducted during which the firm interviews the potential employee regarding cases they have previously worked on.[45]

The Model Rules allow for nonlawyers and law students to be screened out of imputation.[46] This is due to the fact that *lawyers* owe the duty to their clients,[47] and are the ones responsible for the actions of their employees.[48] Thus, lawyers must adhere to stricter rules than nonlawyers because of these duties.

42. *Compare* MINN. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015) (requiring a new lawyer to "be screened from any personal participation in the matter" based on conflicts they acquired during their time as a law clerk), *and* MODEL RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (AM. BAR ASS'N 2013) (choosing to permit a firm to screen a new attorney from personal participation in a matter in which they have a conflict of interest resulting from a clerkship position, and indicating such screening measures avoid imputation of the conflict), *with* MISS. RULES OF PROF'L CONDUCT r. 1.10 (2015) (failing to address the issue of whether an attorney's firm is conflicted out of client representation based on the attorney's past law clerk experience).

43. *See* VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 375 (West 2011) ("[Screening] isolates the conflicted lawyer from the representation in question and thereby obviates the risk that the client's representation will be distorted.").

44. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 124 cmt. D(ii) (AM. LAW INST. 2000) ("Screening must assure that confidential client information will not pass from the personally prohibited lawyer to any other lawyer in the firm.").

45. *See* Susan Saab Fortney & Jett Hanna, *Fortifying a Law Firm's Ethical Infrastructure: Avoiding Legal Malpractice Claims Based on Conflicts of Interest*, 33 ST. MARY'S L.J. 669, 681 (2002) ("A conflicts check is the process of identifying the persons whose interests an attorney must consider, and determining whether those interests require action in order to avoid conflict related claims.").

46. *See* MODEL RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (AM. BAR ASS'N 2013) (noting imputation of the entire firm can be avoided where a conflict of interest emerges from a non-attorney member of the firm's staff).

47. *Cf.* Adrienne T. McCoy, Comment, *Law Student Advocates and Conflicts of Interest*, 73 WASH. L. REV. 731, 734 (1998) (stating law clerks do not develop attorney–client relationships with a firm's clients); Frances P. Kao, *No, a Paralegal Is Not a Lawyer*, A.B.A. BUS. L. SEC. (Jan.–Feb. 2007), http://www.americanbar.org/content/dam/aba/publications/blt/2007/01/full-issue-200701.authcheckdam.pdf ("[A] paralegal may not establish the attorney–client relationship.").

48. *See* MODEL RULES OF PROF'L CONDUCT r. 5.3(b) (AM. BAR ASS'N 2013) ("[A] lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer . . . .").

Absent a conflicts check and subsequent screening, the entire firm could be subject to imputation, which would require it to withdraw from representing a client altogether because of the duty of loyalty attorneys owe to their client.[49] These rules pertain to lawyers and non-attorney employees, such as paralegals or legal assistants.[50] Whether the screening rules apply to clerks who previously worked for opposing counsel during law school is not as evident. Are they non-attorney workers who need to be screened when they go on to become attorneys employed by an opposing firm? Not all states require attorneys to be screened because of a conflict that results from work they performed while they were still a law student.[51]

The conflict rules pertaining to licensed attorneys working for an opposing firm are brighter. Lawyers move from firm-to-firm more frequently than they did in the past.[52] Law students attempt to experience many different legal environments throughout their law school tenure as they seek to gain experience prior to passing the bar and finding post-graduation employment.[53] It is likely that conflicts of interest could easily arise since a law student can change jobs with less hassle and commitment than an established attorney given the abundance of different employment opportunities while in law school.[54]

The difference between conflicts of interest that arise when a lawyer is

49. *See* MODEL RULES OF PROF'L CONDUCT r. 1.10 cmt. 2 (AM. BAR ASS'N 2013) ("The rule of imputed disqualification . . . gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm.").

50. *See* Daines, 194 F.R.D. at 682 ("If those non-attorneys violate th[e] ethical obligations, the supervising attorneys can be held responsible.").

51. *See* FLA. RULES OF PROF'L CONDUCT r. 4-1.10 cmt. para. 7 (2015) (allowing non-attorneys to be screened but not mentioning law students' conflicts). *See generally* GA. RULES OF PROF'L CONDUCT r. 1.10 (2015) (omitting any reference to screening measures as it relates to law students as well as other non-attorney professionals).

52. *See* Lee A. Pizzimenti, *Screen Verité: Do Rules About Ethical Screens Reflect the Truth About Real-Life Law Firm Practice?*, 52 U. MIAMI L. REV. 305, 305 (1997) ("As law firms have grown markedly through mergers and lateral hiring, the probability of disqualifying conflicts of interest has exponentially increased.").

53. *See Internship and Summer Associate Program*, OFF. ATT'Y GEN., http://oag.dc.gov/page/internship-summer-prgm (last visited May 29, 2017) (including the various tasks a legal intern could expect to participate in, including assisting attorneys with drafting memoranda and doing legal research, among other things); *see also* McCoy, *supra* note 47 ("The major responsibilities of [clerkship] positions include research, writing legal memoranda and briefs, drafting motions, and performing important background functions." (quoting Susan D. Kovac, *Part-Time Employment of Full-Time Law Students: A Problem or an Opportunity*, 58 TENN. L. REV. 669, 698–700 (1991))).

54. *See* McCoy, *supra* note 47 ("Law students have many opportunities to perform legal work while in law school. The most traditional student positions are clerkships for law firms or externships for judges." (citing Kovac, *supra* note 53)).

admitted to practice law versus when an individual is preparing for bar admission is murky. It is a serious question and one that needs to be more adequately addressed. The Texas Committee on Professional Ethics attempted to answer this question in a recent ethics opinion issued in August of 2014.[55] According to the Committee at that time, conflicts of interest arising from experience gained while in law school should be treated similarly to a licensed attorney's conflicts derived from changing firms.[56] This was later revised in 2016 following the amendment to the Texas Disciplinary Rules of Professional Conduct by the Texas Supreme Court.[57]

But what about other non-attorney legal workers who are not in law school? There are many roles in the legal profession, yet not all follow the same strict measures or have such carefully defined rules as an attorney does.[58] For example, paralegals and legal assistants do not face the same strict imputation rules as attorneys do.[59]

Generally, it is the district or trial court that has the responsibility to determine whether a conflict exists.[60] There are different remedies and sanctions that follow a conflict of interest finding by a court.[61] A trial judge may dismiss an attorney from participation in a case where the attorney engaged in conflicts that breached the duty they owed to a former client.[62]

55. Tex. Comm. on Prof'l Ethics, Op. 644, *supra* note 8.

56. *Id.* at 849.

57. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06 cmt. 19, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2016).

58. *See* Widger v. Owners-Corning Fiberglass Corp. (*In re* Complex Asbestos Litig.), 283 Cal. Rptr. 732, 583 (Cal. Ct. App. 1991) ("The courts have discussed extensively the remedies for the ethical problems created by attorneys changing their employment from a law firm representing one party in litigation to a firm representing an adverse party. Considerably less attention has been given to the problems posed by nonlawyer employees of law firms who do the same.").

59. *See* MODEL RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (AM. BAR ASS'N 2013) ("The [imputation rule] does not prohibit representation by others in the law firm where the person prohibited from involvement in the matter is a nonlawyer, such as a paralegal or legal secretary.").

60. *See* Quintero v. United States, 33 F.3d 1133, 1134 (9th Cir. 1994) (writing a trial judge should ensure the defendant is aware a conflict of interest exists when there are third parties paying legal fees).

61. *See* Bd. of Educ. v. Nyquist, 590 F.2d 1241, 1245–46 (2d Cir. 1979) (citations omitted) ("[C]uriously, the power of the federal courts to disqualify attorneys in litigation pending before them has long been assumed without discussion . . . ."); *see also In re* Park-Helena Corp., 63 F.3d 877, 882 (9th Cir. 1995) (citations omitted) (declaring a "failure to disclose fully relevant information" can result in disgorgement of all fees an attorney has collected); *In re* Carpenter, 155 P.3d 937, 944 (Wash. 2007) (affirming the suspension of an attorney for violations of conflict of interest rules and holding disciplinary measures were appropriate).

62. *See* Roe v. United States (*In re* Doe), 781 F.2d 238, 251 (2d Cir. 1986) (en banc) ("[C]ourts have the power and duty to disqualify counsel where the public interest in maintaining the integrity of the judicial system outweighs the accused's constitutional right."); *cf.* Wheat v. United States, 486 U.S. 153, 159–60 (1988) (noting an individual does not have an absolute right to choose an attorney

A judge also has the discretion to sanction an attorney for failing to initially detect or avoid the conflict.[63]

E. *Analogous Conflicts*

Other members of the legal community, such as adjudicatory officials, may also have conflict issues arise.[64] Issues resulting from conflicts between adjudicatory officials and the attorneys or parties in their courtroom have been litigated at length.[65] States adopted rules to deal with interests that a former judge or adjudicatory official may have with the litigating parties.[66] One of the most obvious problems with adjudicatory conflicts of interest is where a presiding judge has a direct pecuniary interest in the outcome of the proceedings before them.[67]

when the attorney is otherwise barred because of duties owed to opposing parties); *see also* MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 6 (AM. BAR ASS'N 2013) (commenting on disclosure of information that is adverse to the client, and recognizing "the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients" but there are limited exceptions).

63. *See* Rome v. Braunstein, 19 F.3d 54, 58 (1st Cir. 1994) (citing *In re* Martin, 817 F.2d 175, 182–83 (1st Cir. 1987)) (holding the Bankruptcy Code permits a bankruptcy court to impose sanctions upon an attorney, such as "disqualification and the denial or disgorgement of all fees," for not avoiding an "impermissible" conflict); *see also* 11 U.S.C. § 328(c) (2005) ("[T]he court may deny allowance of compensation for services and reimbursement of expenses . . . [if] such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed."); *In re* Shea, 273 P.3d 612, 622 (Alaska 2012) (citations omitted) (indicating the ABA standards may issue an appropriate sanction if an attorney breaches a duty owed to a court, to a client, or to the legal system and thereby "causes injury or potential injury").

64. *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 880 (2009) (recognizing that a judge, in addition to the conflict that may arise from having a pecuniary interest in the case, may have a conflict of interest due to their participation in an earlier stage of the case).

65. *See id.* at 884 (holding a judge should have recused himself due to "a risk of actual bias" created by presiding over a case where an individual made substantial contributions to the judge's campaign); Tumey v. Ohio, 273 U.S. 510, 524 (1927) (concluding the mayor of a town could not serve as an adjudicatory official in a proceeding in which he has a direct pecuniary interest since he was entitled to a portion of the fine collected).

66. *See* COLO. RULES OF PROF'L CONDUCT r. 1.12(a)(c) (West 2015) (prohibiting the representation of a client by a lawyer who previously served as an adjudicatory official on the same matter, including imputation of the firm if one lawyer is disqualified from representation); N.Y. RULES OF PROF'L CONDUCT r. 1.12 (West 2015) (providing the ethical standards governing former judges and other adjudicatory officials' subsequent representations and employment); *see also* MODEL RULES OF PROF'L CONDUCT r. 1.12(a) (AM. BAR ASS'N 2013) (declaring a lawyer shall not represent a client in a matter in which the lawyer previously served as an adjudicatory official).

67. *See Tumey*, 273 U.S. at 535 (holding the defendant's constitutional right to an impartial judge was violated where the presiding adjudicatory official was the town's mayor, who had a "direct pecuniary interest in the outcome" and a motive to fine the defendant "to help the financial needs of

Because judges hire law clerks to assist them in their decision-making process,[68] ethics rules have been promulgated for judicial law clerks of adjudicatory officials.[69] One concern is that a judicial law clerk could extend their influence or provide information to sway the decisions of a judge or other adjudicatory officials.[70]

The rules governing conflicts of interest are constantly changing and evolving. What was deemed acceptable conduct for an attorney in the past may not be tolerated today.[71] The rules that were once "relevant" to

the village"); Cty. of Cheshire v. City of Keene, 314 A.2d 639, 641 (N.H. 1974) (per curiam) (first citing Op. of the Justices, 183 A.2d 909, 912–13 (N.H. 1962); and then citing Sherman v. Brentwood, 290 A.2d 47, 48 (N.H. 1972)) ("The standard of review for determining a conflict of interest is whether the judicial officer has a direct personal and pecuniary interest in the matter before it."). *Compare* Ward v. Vill. of Monroeville, 409 U.S. 57, 59–60 (1972) (citing *Tumey*, 273 U.S. at 523, 532–34 (1927) (relying upon the principles set forth in *Tumey v. Ohio* to conclude that a city official—the mayor—was not an impartial judge because of his financial interest in the outcome of the case), *with* Aetna Life Ins. v. Lavoie, 475 U.S. 813, 825–26 (1986) (citations omitted) (limiting the scope of *Tumey v. Ohio* by categorizing a "slight" pecuniary interest as insufficient to create the potential for impartiality that would require an adjudicatory official's disqualification).

68. *See* Parker B. Potter, Jr., *Law Clerks Gone Wild*, 34 SEATTLE U. L. REV. 173, 175 (2010) (discussing the varied roles a law clerk may have, which includes conducting legal research for the judge and participating in meetings in the judge's chambers). A law clerk helping a judge is analogous to a law clerk working for an attorney in a law firm. *Compare* David J. Richman, *How to Be a Great Law Clerk*, AM. B. ASS'N, https://apps.americanbar.org/litigation/litigationnews/trial_skills/050510-tips-litigation-law-clerk-career.html (last visited May 29, 2017) ("The best law clerks know how to prepare their judges for hearings, trials, and oral arguments, and they manage dockets so matters are resolved timely, thoroughly, and correctly. Law clerks wear many hats—gatekeeper, scheduler, administrator, writer."), *with Associates and Summer Clerk Program*, SNOW, CHRISTENSEN & MARTINEAU, http://www.scmlaw.com/careers/associates-and-summer-clerk-program (last visited May 29, 2017) (describing the summer clerk program as focusing on "building and fine-tuning writing, analytical[,] and advocacy skills").

69. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 1.12(a) (AM. BAR ASS'N 2013) ("[A] lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person . . . unless all parties to the proceeding give informed consent, confirmed in writing.").

70. *See* Parker v. Connors Steel Co., 855 F.2d 1510, 1524–25 (11th Cir. 1988) (discussing the grounds for disqualification in the instant case and the impartiality and impropriety concerns thereby implicated, including: (1) the clerk's familial relationship with a party's attorney, which could cause the party to believe the judge would treat them favorably; (2) the judge gave the clerk credit in a footnote which could cause the public to believe the clerk decided the case; (3) the appearance of impropriety resulting from the clerk holding a hearing in the judge's absence (citing Hunt v. Am. Bank & Tr. Co., 783 F.2d 1011, 1016 (11th Cir. 1986)).

71. *See* Walker v. Johnston, 312 U.S. 275, 286–87 (1941) (refusing to limit the requirements of a judge reviewing an application for habeas corpus to what was required at common law or at the time a statute was originally adopted); State *ex rel.* Okla. Bar Ass'n v. Smolen, 17 P.3d 456, 458–59 (Okla. 2000) (citations omitted) (recognizing an amendment to ABA Model Rule 1.8(e) makes it permissible for an attorney to condition a client's repayment of court costs and litigation expenses on the case's

conflicts of interest have become outdated and need to make way for new rules that would apply to the varied roles a person may take in the legal system.[72]

III. ANALYSIS

"[A] law clerk who leaves a firm, becomes a lawyer, and joins a different firm falls between two situations: 1) when a nonlawyer legal assistant moves from one firm to another, and 2) when a lawyer moves from one firm to another."[73]

A. *Current State of the Law*

The current legal framework pertaining to former law students' and clerks' conflicts of interest is unclear and varies by jurisdiction.[74] The majority of jurisdictions follow the ABA rules permitting a firm's representation in a matter as long as the attorney is properly screened from participation.[75] The ABA rules make clear that while a student is clerking

outcome, while the previous rule required repayment regardless of any contingency); ANN. MODEL RULES OF PROF'L CONDUCT r. 1.10 notes to 2002 and 2009 amendments (AM. BAR. ASS'N 2015) (explaining the 2002 and 2009 amendments made the rules more liberal for attorneys, and increased the permissibility of when an attorney might be subject to screening to avoid imputation of the entire firm).

72. *See* Audrey I. Benison, Note, *The Sophisticated Client: A Proposal for the Reconciliation of Conflicts of Interest Standards for Attorneys and Accountants*, 13 GEO. J. LEGAL ETHICS 699, 700 (2000) (citations omitted) ("[T]he legal profession is searching for ways to make the traditional rules of ethical lawyering relevant to modern practice.").

73. Letter from the Deans of the Law Sch. in the State of Tex., to Mark N. Osborn, Chair, Prof'l Ethics Comm. for the State Bar of Tex. (Apr. 13, 2015) (citing the Tex. Comm. on Prof'l Ethics, Op. 644, *supra* note 8), https://law.utexas.edu/wp-content/uploads/sites/4/2015/04/texas-bar-opinion-644-reconsideration.pdf. The letter describes the Texas law school deans' unanimous opposition to this promulgated ethics opinion, and its effects on law students. Letter from the Deans of the Law Sch. in the State of Tex., *supra*.

74. *Compare* COLO. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2014) (permitting a firm to screen an attorney from a matter in which the attorney's past law clerk position may conflict with their new attorney position), *with* LA. RULES OF PROF'L CONDUCT r. 1.10 (2016) (remaining silent on the issue of imputation based on law clerks' former associations).

75. *See* MODEL RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (AM. BAR ASS'N 2013) (indicating the rule does not "prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer" but noting the attorney "must [still] be screened from any personal participation in the matter"). For state rules of professional conduct reflecting the ABA's approach, *see generally* ALASKA RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (West 2015); ARIZ. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015); ARK. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (West 2015); COLO. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2014); CONN. RULES OF PROF'L CONDUCT r. 1.10 (2016); DEL. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (West 2015); HAW. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (West 2015); IDAHO RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (West 2015); ILL. RULES

for an attorney, the attorney is responsible for the actions of the clerk, and for other non-attorney professionals who are in their office or under their supervision.[76] This rule specifies the attorney, and not the law clerk, is the party who owes a duty to the client.[77] As a result of the jurisdictional variations, there is no uniform law or rule pertaining to former clerks who are now attorneys.[78]

Some jurisdictions provide exceptions for law firm imputation as it relates to a conflict of interest of a lawyer within the firm.[79] The Model Rules

OF PROF'L CONDUCT OF 2010 r. 1.10 cmt. 4 (2015); IND. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015); IOWA RULES OF PROF'L CONDUCT r. 32:1.10 cmt. 4 (2015); KY. RULES OF THE SUP. CT. r. 3.130(1.10) cmt. 4 (2015); ME. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (West 2015); MD. LAWYERS' RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (West 2015); MINN. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (West 2015); MO. SUP. CT. RULES r. 4-1.10 cmt. 4 (West 2015); NEB. CT. R. OF PROF. COND. § 3-501.10 cmt. 4 (2016); N.H. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2016); N.M. RULES OF PROF'L CONDUCT r. 16-110 cmt. 4 (West 2015); N.C. REVISED RULES OF PROF'L COURT r. 1.10 cmt. 4 (West 2015); OHIO PROF. COND. RULE 1.10 cmt. 4 (2015); OKLA. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015); PA. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015); R.I. RULES OF PROF'L CONDUCT r. 1.10 (2016); S.C. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2014); S.D. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2016); UTAH RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015); VT. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2016); W. VA. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015); WIS. SUP. CT. RULES r. 20:1.10 cmt. 4 (2016); WYO. RULES OF PROF'L CONDUCT FOR ATTY'S AT LAW r. 1.10 cmt. 4 (2015).

76. *See* MODEL RULES OF PROF'L CONDUCT r. 5.3(b) (AM. BAR ASS'N 2013) ("[A] lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conflict is compatible with the professional obligations of the lawyer . . . ."). Most states follow the rule outlined by the ABA. *See* Douglas R. Richmond, *Watching over, Watching Out: Lawyers' Responsibilities for Nonlawyer Assistants*, 61 U. KAN. L. REV. 441, 442 (2012) ("Forty-nine states and the District of Columbia have adopted Model Rule 5.3 in whole or in part . . . ."); *Alphabetical List of States Adopting Model Rules*, *supra* note 6 (indicating how forty-nine states and the District of Columbia have adopted a version of ABA Model Rule 5.3).

77. *Cf.* McCoy, *supra* note 47, at 738 ("[N]o case or rule indicates whether nonlawyers directly owe clients a duty of loyalty.").

78. California, for example, is an outlier when it comes to professional conduct rules because it has not adopted any portion of the Model Rules. *See* Sande L. Buhai, *Everyone Makes Mistakes: Attorney's Fee Recovery in Legal Malpractice Suits*, 6 ST. MARY'S J. ON LEGAL MAL. & ETHICS 32, 37 n.22 (2016) (citing *Status of State Review of Professional Conduct Rules*, A.B.A. (Sept. 14, 2011), http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/ethics_2000_status_chart.authcheckdam.pdf) (showing California did not adopt the Model Rules as of 2011). *Compare* CAL. RULES OF PROF'L CONDUCT r. 3-310 (2015) (examining conflicts of interest for attorneys, yet failing to mention the potential conflicts that could arise from work done as a law student), *with* UTAH RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015) (acknowledging lawyers may be screened from conflicts derived from their experiences as law clerks).

79. *See, e.g.*, PA. RULES OF PROF'L CONDUCT r. 1.10(b) (2016) (excepting strict imputation if the attorney is properly screened from participation in the matter in which the conflict is present, does not receive any funds from the client in the conflicted matter, and the firm promptly notifies the client of the conflict).

permit an attorney to work for a new firm despite a conflict of interest if three general requirements are met: (1) the attorney is properly screened from the case; (2) the attorney receives no portion of the fee the firm derives from the matter; and (3) the firm timely notifies the client of the conflict, the screening measures in place, and other available compliance measures.[80] States that strictly follow the Model Rules take a more permissive approach compared to other states.[81]

B. *The Attorney–Client Relationship*

An attorney's duty of loyalty is one of the main reasons an attorney is precluded from undertaking subsequent representations adverse to a former client.[82] Whether an attorney owes a duty of loyalty is contingent upon whether an attorney–client relationship exists.[83] However, there is a dearth

80. MODEL RULES OF PROF'L CONDUCT r. 1.10(a)(2) (AM. BAR ASS'N 2013).

81. *Compare* CONN. RULES OF PROF'L CONDUCT r. 1.10(a)(2) (2016) (providing an exception to imputation when proper notice is provided and "the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom"), *and* ILL. RULES OF PROF'L CONDUCT OF 2010 r. 1.10(e) (2015) (allowing the entire firm to avoid imputation by timely screening the attorney with the conflict and giving the attorney no portion of the fee from the matter), *with* ALA. RULES OF PROF'L CONDUCT r. 1.10 (2016) (establishing no screening exception for firm imputation in the case of an attorney's conflict of interest), *and* FLA. RULES OF PROF'L CONDUCT r. 4-1.10 (2014) (mandating imputation of an attorney's conflict of interest to the attorney's new law firm without an exception for screening), *with* GA. RULES OF PROF'L CONDUCT r. 1.10 (2015) (providing mandatory imputation rules with no provisions providing for a screening exception).

82. *See* ANN. MODEL RULES OF PROF'L CONDUCT r. 1.9 notes to Para. (a): Lawyer's Associated in a Firm (AM. B. ASS'N 2015) (first quoting MODEL RULES OF PROF'L CONDUCT r. 1.9 cmt. 2 (AM. B. ASS'N 2013); and then citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123 cmt. b (AM. LAW INST. 2000) ("Imputation imposes each individual lawyer's obligations of client loyalty upon every lawyer with whom the lawyer is 'associated in a firm.'")).

83. *See* Tessier v. Plastic Surgery Specialists, Inc., 731 F. Supp. 724, 730 (E.D. Va. 1990) (citing Allegaert v. Perot, 565 F.2d 246, 250 (2d Cir. 1977) (conditioning an attorney's disqualification upon the existence of a former attorney–client relationship and on a showing that the current matter is substantially related to the former representation)); *see also* MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 1 (AM. BAR ASS'N 2013) ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client."). *Compare* City of Waukegan v. Martinovich, No. 03 C 3984, 2005 WL 3465567, at *5 (N.D. Ill. Dec. 16, 2005) (disqualifying an attorney from representing the defendant based on a finding the attorney had previously served as counsel for the plaintiff in a substantially related matter), *and* Stratagene v. Invitrogen Corp., 225 F. Supp. 2d 608, 611 (D. Md. 2002) (finding disqualification to be merited based on a past attorney–client relationship where an associate attorney performed work on a patent even though the work only consisted of "administrative tasks"), *with* City of Kalamazoo v. Mich. Disposal Serv., 151 F. Supp. 2d 913, 918 (W.D. Mich. 2001) (holding an attorney–client relationship existed between plaintiff's counsel and a group of defendants because of prior representation in a matter that was substantially related to the litigation), *and* SuperGuide Corp. v. DirecTV Enters., Inc., 141 F. Supp. 2d 616, 622–24 (W.D.N.C. 2001) (disqualifying an attorney who previously represented the opposing party in litigation and rejecting the attorney's argument that he

of information in case law and in academic writings to indicate an attorney–client relationship exists between a firm's law clerk and the client it represents.[84]

A conflict of interest arises when: (1) there was an attorney–client relationship with the alleged former client; and (2) "the matter at issue in the former representation was the same or substantially related to that in the current action."[85] Accordingly, to determine if a conflict exists, one must first establish the existence of an attorney–client relationship.[86] This standard requires representation itself, which may simply include doing work on a case.[87] A clerk might work on part of a case but it is difficult to argue that a clerk "represents" a client.

Ultimately, an attorney–client relationship does not exist between a clerk and a firm's client.[88] It also does not arise with other non-attorney legal workers, such as paralegals or legal assistants.[89] These non-attorneys do not meet the same standards of representation as an attorney.[90] Although

was not disqualified since he did not provide legal advice on the contract in dispute), *with In re* James, 679 S.E.2d 702, 711 (W. Va. 2009) (per curiam) (concluding an attorney–client relationship was not formed during a meeting in which a victim's parents did not disclose "any confidential information [to the attorney] that was not otherwise available").

84. *Cf.* McCoy, *supra* note 47 ("[L]aw clerks and judicial externs neither advocate on behalf of nor develop attorney–client relationships with litigants.").

85. *Stratagene*, 225 F. Supp. 2d at 610; *SuperGuide*, 141 F. Supp. 2d at 621. It is possible for an attorney with a conflict of interest to undertake a subsequent representation, but only if the former client waives the conflict by providing "informed consent, confirmed in writing." MODEL RULES OF PROF'L CONDUCT r. 1.9(a) (AM. BAR ASS'N 2013).

86. The United States Court of Appeals for the Seventh Circuit provided a standard, which is facially inapplicable to law clerks, to determine the issue:

> [A]n implied attorney–client relationship exists when "[a]n attorney has . . . consented to the establishment of the attorney–client relationship[,] there is proof of detrimental reliance, [and] the person seeking legal services reasonably relies on the attorney to provide them and the attorney, aware of such reliance, does nothing to negate it."

Rosenbaum v. White, 692 F.3d 593, 601 (7th Cir. 2012) (alteration in original) (quoting Douglas v. Monroe, 743 N.E.2d 1181, 1186 (Ind. App. Ct. 2001)). The rationale laid out by the Seventh Circuit is not in accord with what a law student does as a law clerk. *Id.*

87. *See Stratagene*, 225 F. Supp. 2d at 611 (equating "administrative tasks," with representation sufficient to establish an attorney–client relationship since court appearances, consultation, trial participation, or settlement activities are not required to establish a relationship with a client).

88. *See* McCoy, *supra* note 47 (rejecting the notion that a law clerk working for a firm undertakes an attorney–client relationship or advocacy role on behalf of a client).

89. *See* Kao, *supra* note 47 (differentiating between what a paralegal can do for the client and what an attorney can do by clarifying that "a paralegal may not establish the attorney–client relationship").

90. *See* Brown v. Iowa, 152 F.R.D. 168, 172–73 (S.D. Iowa 1993) (indicating the requested amount of fees was reduced in recognition of the fact that "a law student in a legal clinic . . . is probably not able to discharge his duties as efficiently as, say, a practicing attorney would have been able to do").

clerks and other legal workers may have knowledge relevant to a case, they do not have the same type of relationship or duty to a client that exists as an attorney because these nonlawyers are not doing the same work or carrying the same responsibilities as an attorney.[91]

A clerk's inability to enter an attorney–client relationship produces confounding results for purposes of their subsequent disqualification in future clerkship positions and in representations upon becoming licensed. Different states use various standards to determine if a conflict of interest is present in the absence of an attorney–client relationship.[92] While the Model Rules approach the issue rather leniently,[93] Texas takes a comparatively strict view of imputation:

> [E]ven if the new firm uses a screening process, however, absent consent from the former employer's client: "disqualification will always be required under some circumstances, such as (1) when information relating to the representation of an adverse client has in fact been disclosed, or (2) when screening would be ineffective or the nonlawyer necessarily would be required to work on the other side of a matter that is the same as or substantially related to a matter on which the nonlawyer has previously worked. Ordinarily, however, disqualification is not required as long as the 'practical effect of

91. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123 cmt. f (AM. LAW INST. 2000) (equating law clerks with other non-lawyer employees since they "typically have limited responsibilities and thus might acquire little sensitive confidential information about matters"); *see also* Stewart v. Bee-Dee Neon & Signs, Inc., 751 So. 2d 196, 205 (Fla. Dist. Ct. App. 2000) (refusing to apply an automatic disqualification rule to non-lawyers when they are hired by a new firm because attorneys and non-lawyers are different in reference to their responsibilities, training, and use and acquisition of confidential information (citing *In re* Complex Asbestos Litigation, 283 Cal. Rptr. 732, 745 (Dist. Ct. App. 1991))).

92. *Compare In re* Am. Home Prods. Corp., 985 S.W.2d 68, 75 (Tex. 1998) ("While the presumption that a legal assistant obtained confidential information is not rebuttable, the presumption that information was shared with a new employer may be overcome."), *with Stewart*, 751 So. 2d at 206 (citing Smart Indus. Corp., MFG v. Superior Court, 876 P.2d 1176, 1182 (Ariz. Ct. App. 1994)) ("[A] presumption of 'shared confidences' arises upon employment by the hiring firm, which can be rebutted by establishing that the lawyer or nonlawyer was not privy to the confidences of the former firm's client . . . .").

93. Comment four of Model Rule 1.10 exemplifies this leniency:

> The rule . . . does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer . . . . Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect.

MODEL RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (AM. BAR ASS'N 2013).

formal screening has been achieved."[94]

The Restatement (Second), however, is not as explicit on the matter. Section 396 of the Restatement (Second) of Agency[95] imparts a duty of confidentiality upon an *attorney* to their client; it makes no mention of a law student or a clerk.[96] The requirement in the Restatement pertains to attorneys who "advise" or "represent" clients.[97] The duty of a clerk is not to advise or represent a client; the role of a clerk is supportive and observational in nature.[98]

The duty to advise and represent is the sole responsibility of the attorney handling the case rather than the clerk.[99] A clerk assists the attorney on a number of matters related to the attorney advising the client, such as researching a particular area of the law.[100] It is neither likely nor ethical that a firm's law clerk would ever represent a client in a matter.[101] For instance, while a clerk may draft motions that are submitted to courts, it is the responsibility of the attorney who is representing a client to review it prior to its submission.[102] The Restatement does mention, however, that it may

94. *In re* Columbia Valley Healthcare Sys., L.P., 320 S.W.3d 819, 825 (Tex. 2010) (orig. proceeding) (quoting Phoenix Founders, Inc. v. Marshall, 887 S.W.2d 831, 835 (Tex. 1994)).

95. RESTATEMENT (SECOND) OF AGENCY § 396 (AM. LAW INST. 1958).

96. *See id.* at cmt. i ("An attorney who has been employed to advise, or to represent a client in actions against others, is not entitled subsequently to advise or represent other clients as to matters in which a knowledge of the first client's affairs can be used to his disadvantage.").

97. *Id.*

98. *See Summer Program*, BAKER BOTTS, http://www.bakerbotts.com/careers/law-students/summer-program (last visited May 29, 2017) ("Baker Botts' Summer Associate Program provides real experience working for the firm's clients under the supervision of experienced lawyers and with the support of a strong mentoring program.").

99. *See* McCoy v. Court of Appeals of Wis., Dist. 1, 486 U.S. 429, 437 (1988) (declaring an attorney "has a duty to advise the[ir] client" if the appeal would be frivolous); Johnson v. Commc'ns, Inc., 660 F.3d 131, 140 (2d Cir. 2011) (holding an attorney breached their fiduciary duty by failing "to advise and represent each client individually, giving due consideration to differing claims, differing strengths of those claims, and differing interests"); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. b (AM. LAW INST. 2000) (stating a "lawyer is a fiduciary" to their client and is "entrusted" with their matters).

100. *See* McCoy, *supra* note 47, at 733 ("The major responsibilities of these positions include research, writing legal memoranda and briefs, drafting motions, and performing important background functions. As such, law clerks and judicial externs neither advocate on behalf of nor develop attorney–client relationships with litigants.").

101. *See* Wilmington Towing Co. v. Cape Fear Towing Co., 624 F. Supp. 1210, 1212 (E.D.N.C. 1986) (striking an argument for the recusal of a judge where the judge's son was a summer associate for a firm representing a party in the case since the summer associate was not employed as an actual attorney and did not act as an attorney in the matter).

102. *See* MODEL RULES OF PROF'L CONDUCT r. 5.3 (AM. BAR ASS'N 2013) (placing the burden

be enough that the attorney "acquired confidential information from the current opponent in litigation."[103] Arguably, this could mean that an attorney who gained information as a clerk could be barred from representation of a client that is opposing the old client's interests.

C. *Clerks*

It appears there is only a slight potential for unethical situations to arise from a law student's role as a firm's law clerk.[104] While cases implicating the exact problem tackled in this Comment are rare,[105] the ABA addressed the issue in the commentary for Model Rule 1.10.[106]

In the case of a potential conflict, an analysis is necessary to determine exactly what law clerks do during their time at law firms that could give rise to a later conflict. Does the average clerk actually have access to the information necessary for a conflict of interest to arise?[107] For instance, a clerk might review discovery or witness a deposition,[108] but that does not

on an attorney who supervises a non-lawyer to ensure that the non-lawyer does not violate any professional obligations); *see also* Mays v. Neal, 938 S.W.2d 830, 835 (Ark. 1997) ("[The] supervising attorney . . . has the ultimate responsibility for compliance by the non-lawyer with the applicable provisions of the Model Rules."); Disciplinary Counsel v. Blair, 944 N.E.2d 1161, 1166 (Ohio 2011) (finding the attorney did not properly supervise her non-attorney staff who filed a forged affidavit and false account in a guardianship proceeding); Richmond, *supra* note 76, at 446 ("[L]awyers generally must supervise nonlawyer assistants more closely than they supervise other lawyers because nonlawyer assistants usually lack formal legal education or training . . . ." (citing Mark L. Tuft, *Supervising Offshore Outsourcing of Legal Services in a Global Environment: Re-examining Current Ethical Standards*, 43 AKRON. L. REV. 825, 831 (2010))).

103. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 8, topic 1, cmt. f (AM. LAW INST. 2016).

104. *See id.* (failing to find any reported cases in which a lawyer was disqualified for conflicts relating to a case they worked on while still a law student).

105. *See id.* ("Law-student conflicts have not appeared in reported cases."); *see also* McCulloch v. Hartford Life & Accident Ins., No. 3:01CV1115(AHN), 2005 WL 3144656, at *2 (D. Conn. Nov. 23, 2005) (holding no conflict of interest existed where a judicial law clerk assisted the judge with the legal merits in a case and subsequently accepted a job with a law firm who maintained a client that was a party to that case).

106. *See* MODEL RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (AM. BAR ASS'N 2013) (discussing the rules' application to nonlawyers).

107. *See* Letter from the Deans of the Law Sch. in the State of Tex., *supra* note 73 (contending legal assistants obtain more exposure to confidential information than a firm's law clerks). "If anything, a legal assistant—who is a long-term employee—is more likely immersed in a case and exposed to confidential information than a law clerk—who may work at a firm for a few weeks or a few months." *Id.*

108. *See Summer Associates*, SKADDEN RECRUITING, http://recruit.skadden.com/law-students-graduates/united-states/summer-associates/ (last visited May 29, 2017) (explaining summer associates are given the opportunity to learn first-hand about the firm's practices, which includes, among other

necessarily mean the clerk knows the trial strategy the attorney intends to employ to effectively use that information to the client's detriment.[109] It is improper to assume that a clerk received confidential information to the extent that it would create a conflict of interest for a future firm they may work for.[110] Thus, the basic question to be answered is what access to or knowledge of sensitive client information does a clerk actually have that would require the law to treat law clerks differently than other non-attorney legal professionals?

Some duties of a clerk—such as drafting motions[111]—involve information that is open to the public.[112] When a motion is submitted to a court, the information contained therein becomes public and would not give rise to a conflict of interest if the law clerk drafted it.[113] Other duties may similarly involve public information and it is faulty to assume a clerk has access to damaging, confidential information when there is no clear evidence that this sort of conflict is occurring frequently.[114]

D. *Judicial Clerks*

The question of conflicts of interest as applied to clerks has arisen in the context of judicial officials and their respective law clerks. "[A] lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person . . . ."[115] It is relevant to compare a judicial clerkship to other positions that a law student might possess or from which a conflict of interest could later arise. A judicial law clerk performs similar types of research that a law clerk for an attorney might do but the

things, sitting in on client meetings and attending depositions).

109. *Cf.* Letter from the Deans of the Law Sch. in the State of Tex., *supra* note 73 ("[M]any experienced and highly trained legal assistants better recognize the usefulness of certain former client information and are better able to apply that knowledge than many law clerks who are still students.").

110. *See id.* (comparing the role of a law clerk to the role of a legal assistant in terms of the tasks they perform and the amount of confidential information they are exposed to).

111. *See* McCoy, *supra* note 47 (listing drafting motions as one of a clerk's potential responsibilities).

112. *See, e.g.*, PACER, https://www.pacer.gov (providing public access to court electronic records) (last visited May 29, 2017).

113. *See* MODEL RULES OF PROF'L CONDUCT r. 1.9 cmt. 3 (AM. BAR ASS'N 2013) ("Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying.").

114. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 8, topic 1, cmt. f (AM. LAW INST. 2016) (describing the incidence of law firm imputation for conflicts that manifest from work done while a lawyer was still in law school and finding no reported cases adjudicating this topic).

115. MODEL RULES OF PROF'L CONDUCT r. 1.12(a) (AM. BAR ASS'N 2013).

judicial clerk does it in a different capacity.[116] A judicial clerk serves as an "extension" of the judge[117] similar to how a clerk functions as an extension of an attorney.[118] The duty of loyalty seems even more important in the context of adjudicatory officials and their law clerks because a judge's duty is owed to the court and the public at large, as opposed to an individual client.[119] Therefore, it is notable that a firm can screen former adjudicatory law clerks to avoid imputation of the entire firm despite the fact that an adjudicatory clerk likely knows information about cases that could be privileged.[120]

E. *Other Nonlawyer Professionals*

Other professionals in the legal industry are not subject to the same strict rules and professional standards that apply to attorneys. A paralegal or a legal secretary is provided more leeway when changing employment, and there is some expectation of mobility between firms.[121]

Many jurisdictions permit non-attorney legal professionals to use screening procedures when they move to a new firm that represents a client

116. Similar to law clerks at a firm, a judicial clerk does not have exceptional access to work product that could be used against an opposing firm's client. *See* Olivia v. Heller, 839 F.2d 37, 40 (2d Cir. 1988) ("[A] law clerk generally performs discretionary acts of a judicial nature."); Freedonia Broad. Corp. v. RCA Corp., 569 F.2d 251, 255–56 (5th Cir. 1978) ("The law clerk has no statutorily defined duties but rather performs a broad range of functions to assist his judge."), *disavowed on other grounds by* Riquelme Valdes v. Leisure Res. Grp., Inc., 810 F.2d 1345 (5th Cir. 1987); Bishop v. Albertson's, Inc., 806 F. Supp. 897, 900 (E.D. Wash. 1992) ("[I]t is the law clerk who assists the [c]ourt in defining issues and locating authorities which have eluded counsel.").

117. *See* Olivia, 670 F. Supp. at 526, *aff'd*, 839 F.2d 37 (2d Cir. 1988) ("Law clerks are simply extensions of the judges at whose pleasure they serve.").

118. *See* MODEL RULES OF PROF'L CONDUCT r. 5.3 (AM. BAR ASS'N 2013) (requiring attorneys to ensure that the non-lawyers under their supervision comply with the ethical responsibilities of the legal profession).

119. *See* Crandon v. United States, 494 U.S. 152, 164–65 (1990) ("Legislation designed to prohibit and to avoid potential conflicts of interest in the performance of governmental service is supported by the legitimate interest in maintaining the public's confidence in the integrity of the federal service."); Chase Manhattan Bank v. Affiliated FM Ins., 343 F.3d 120, 128–29 (2d Cir. 2003) (identifying how a judge's financial stake in a case, with even one share in a company, is a disqualifying conflict of interest because the public's confidence in the judiciary must be protected); Rodriguez v. Dist. Court for City & Cty. of Denver, 719 P.2d 699, 706 (Colo. 1986) ("In some circumstances, fundamental considerations other than a defendant's interest in retaining a particular attorney are deemed of controlling significance. These considerations relate to the paramount necessity of preserving public confidence in the integrity of the administration of justice.").

120. MODEL RULES OF PROF'L CONDUCT r. 1.12(c) (AM. BAR ASS'N 2013).

121. *See id.* at r. 1.10 cmt. 4 ("The rule . . . does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary.").

adverse to the interests of their old firm's client.[122] This rule is not absolute, although the Model Rules may have intended it to be.[123] Some courts have held that where a paralegal or legal secretary had to perform a sufficiently large quantity of work, even screening measures could not overcome the conflict of interest that was counter to the former client's interests.[124]

A clerk's role and work are similar to that of a paralegal or a legal secretary.[125] A clerk does not actually represent a client, but rather assists an attorney who represents the client.[126] Only a licensed attorney, and not any other employee of a law office, owes a duty of loyalty to a client because the attorney is the party who is ultimately responsible for the actions of the non-attorneys.[127] A non-attorney owes a duty of loyalty to their

122. *Compare* MINN. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015) (allowing law firms to use screening measures as a way of mitigating the risk that confidential or sensitive information could be revealed), N.C. REVISED RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015) (granting law firms the ability to employ screening measures for a new staff–member who previously worked for opposing counsel as a paralegal or legal secretary), *and* OKLA. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015) (accepting a paralegal or legal secretary may be screened as a way to avoid disclosure for sensitive information gained during a previous employment), *with* N.Y. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015) (endorsing the idea that a non-attorney staff member of a firm may be properly screened to avoid conflict of interest issues but not conceding that this necessarily extends to law students).

123. *See* MODEL RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (AM. BAR ASS'N 2013) (AM. BAR ASS'N 2013) (indicating the imputation rule does not apply to "representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary").

124. *See* Grant v. Thirteenth Court of Appeals, 888 S.W.2d 466, 468 (Tex. 1994) (orig. proceeding) (per curiam) (holding disqualification of the entire firm was proper where a non-attorney worked extensively on a case by interviewing clients, overseeing medical appointments, and preparing investigative reports for the firm at the non-attorney's former firm and was not adequately screened at the new firm initially); *see also* Green v. Toledo Hosp., 764 N.E.2d 979, 983 (Ohio 2002) (determining conflict of interest for a non-attorney requires the court to make a finding that the non-attorney was exposed to confidential information based on credible evidence and not the mere fact the non-attorney worked on the case).

125. The duties of a law student clerking in a firm are similar to a paralegal's duties as law clerks also frequently perform legal research and draft documents for an attorney. *See* Barbara Berry, *Typical Paralegal Duties*, CAREER CHRON., at 22–38 (2008), https://www.nala.org/sites/default/files/2009-ff-job-descriptions.pdf (compiling a list of duties and roles a paralegal or legal assistant performs, and showing their duties can be complex and varied with responsibilities ranging from drafting documents to participating in client interviews). *See generally* Letter from the Deans of the Law Sch. in the State of Tex., *supra* note 73 (comparing the roles of law clerks and legal assistants).

126. *See* Estate of Divine v. Giancola (*In re* Estate of Divine), 635 N.E.2d 581, 587–88 (Ill. App. Ct. 1994) (observing a paralegal or law clerk is not held to the same standards as an attorney because a paralegal is an assistant to the attorney and is not the one practicing law or owing a duty to a client).

127. *See* MODEL RULES OF PROF'L CONDUCT r. 5.3 (AM. BAR ASS'N 2013) (promulgating the idea that attorneys are responsible for the actions of the non-attorney staff members they supervise).

supervising attorney because of the rules of agency,[128] but not because of any specific duty the non-attorney owes to a client.[129]

F. *Economic Effects*

Law firms hiring new attorneys should be aware of the potential for imputation of new attorneys because of a conflict of interest. Accordingly, the law firm will need to conduct an economic analysis to determine if it is financially sound to hire the new attorney who could possibly cause the entire firm to lose a client.[130]

Imagine a scenario where a law student clerks for Exxon Mobil within their in-house counsel department. That student would be exposed to a wide range of legal issues and areas of law that will benefit the student's professional development, as well as any firm that chooses to hire the student in the future. However, hiring a new attorney who clerked for Exxon as a law student would not make sense from a financial perspective since that could subsequently limit the firm's ability to pursue litigation against Exxon—the world's largest oil and gas company.[131] As a result, entire areas of law could suffer from a deprivation of experience, as well as decrease the potential for firms to engage in litigation with certain companies due to conflicts imputed from whom they have hired.[132]

128. RESTATEMENT (THIRD) OF AGENCY § 8.01 (AM. LAW INST. 2006).

129. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 70 cmt. b (AM. LAW INST. 2000) (stating communications between a client or prospective client and their lawyer or agents of either the lawyer or client are privileged); Fortney & Hanna, *supra* note 45, at 683 ("As agents of the law firm, legal assistants must conform to the same ethical obligations as the firm." (first citing Jett Hanna, *Moonlighting Law Professors: Identifying and Minimizing the Professional Liability Risk*, 42 S. Tex. L. Rev. 421, 439–41 (2001); and then citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 70 (2000))); *see also In re* Estate of Divine, 635 N.E.2d at 588 (concluding it would be inappropriate to hold a paralegal responsible to the same extent as an attorney because it is inconsistent with the theory of *respondeat superior*, and noting "paralegals do not independently practice law, but simply serve as assistants to lawyers"); Carstensen v. Chrisland Corp., 442 S.E.2d 660, 668–69 (Va. 1994) ("The existence of an attorney–client relationship is essential to establishing a claim of legal malpractice . . . . An attorney–client relationship cannot be created by a non-attorney acting as an attorney.").

130. *See* Ward Bower, *Fine-Tuning Your Firm's Economics*, OR. ST. B. BULL., Oct. 1994, at 17, 19 ("[A] partner or committee should work with the . . . office manager/administrator to conduct the [economic] analysis and prepare a report, selling forth recommended strategies and tactics for improvement of profitability . . . [because] a thorough economic analysis is an investment every firm should make in its future.").

131. Lauren Gensler, *The World's Largest Oil and Gas Companies 2016: Exxon is Still King*, FORBES (May 26, 2016), http://www.forbes.com/sites/laurengensler/2016/05/26/global-2000-worlds-largest-oil-and-gas-companies/#784628c18d9e.

132. For example, the Kansas Supreme Court affirmed a lower court's decision to disqualify a

Adding to that detriment, an expansion of the conflict of interest rules could also adversely affect the manner in which many law firms hire new attorneys. Because a clerk's pipeline begins as a law student,[133] law firms may need to consider a law clerk's prior summer associations and employment before extending an employment offer to a law student.[134]

Law firms rely on clerks to perform valuable legal research that firms are otherwise unable to conduct[135] because a clerk can perform the kind of in-depth analysis an attorney may not have the time to complete due to their own workload. Thus, clerks' work may be highly beneficial to firms. Accordingly, any limitation on the employment of clerks is detrimental to both clerks and the firms who benefit from their work.

G. *Educational Effects*

States should be cautious not to create disincentives for law students to pursue clerkships with law firms. In addition to the aforementioned reasons, practical work experience is invaluable to a law student's future success.[136] It is unreasonable to handicap law students' career prospects

firm from continuing its representation of a client since a legal secretary the firm hired had a conflict of interest. *See generally* Zimmerman v. Mahaska Bottling Co., 19 P.3d 784 (Kan. 2001). The court did not permit a screening exception for non-lawyers and concluded, "The need for confidentiality, the trust of the client, and the public's respect for the legal system all support the rule in Kansas prohibiting the use of screening devices." *Id.* at 793.

133. *See* Shawn P. O'Connor, *Make the Most of Your First Law School Summer*, U.S. NEWS (May 6, 2013, 10:00 PM), https://www.usnews.com/education/blogs/law-admissions-lowdown/2013/05/06/make-the-most-of-your-first-law-school-summer ("As you explore your 1L summer options, keep in mind that your 2L summer internship could result in a job offer for after graduation."); *see also* Kevin Winters, *A Time for Talent Spotting*, J.L. SOC'Y OF SCOT. (Sept. 16, 2013), http://www.journalonline.co.uk/Magazine/58-9/1013030.aspx (showing the prevalence of recruiting future attorneys from summer internships).

134. *See* Letter from the Deans of the Law Sch. in the State of Tex., *supra* note 73 (arguing against an ethics opinion that would support a ban on screening conflicts from the time a lawyer was in law school, and stating the measure would harm young lawyers because a firm would potentially not hire the lawyer when "they otherwise would").

135. *See* Former Emps. of Tyco Elecs., Fiber Optics Div. v. U.S. Dep't of Labor, 350 F. Supp. 2d 1075, 1092 (Ct. Int'l Trade 2004) (awarding fees charged for work, including research, performed by summer associates and paralegals at market rate); *Summer Associates Program Overview*, COVINGTON & BURLING LLP, https://www.cov.com/en/careers/lawyers/summer-associates (last visited May 29, 2017) ("We also help summer associates develop their writing, research, and advocacy skills as the summer progresses.").

136. As a law clerk, a law student gains insight into different areas of the law, as well as the beneficial insight of what it is like to work in a law firm. *See New York Summer Program*, BAKERHOSTETLER, https://www.bakerlaw.com/careers/lawstudents/summerassociateprograms/newyork (last visited May 29, 2017) ("Summer associates gain valuable, firsthand experience at BakerHostetler. Our program is designed to provide a realistic view of life as an associate at the firm,

with overbearing rules that limit the potential to gain real-world experience in a professional legal setting.

H. *Clerk Experience*

A clerk's work encounters vary depending on the type of firm the clerk joins and the clerk's supervising attorney.[137] The type of experiences gained shapes whether a conflict of interest actually exists, and if it does, what steps are necessary to avoid the likelihood of exposing confidential or sensitive information the clerk obtained.[138]

A clerk may be asked to perform an assortment of tasks during his tenure at a firm such as crafting a legal memorandum on a complex legal issue, or as broad in scope as reading through pages of discovery to find information useful to a case.[139] Additionally, a clerk might attend meetings with attorneys and their clients where important strategy is being discussed.[140] Since clerks' roles vary, it is difficult to determine precisely what a clerk is exposed to that creates a conflict of interest. A memorandum analyzing legal research is unlikely to give rise to a conflict, but awareness of trial

working alongside teams of partners and associates on a variety of billable and pro bono assignments across many practice areas."). Additionally, the ABA recognizes experiential learning as an important and beneficial method of seeing an authentic variety of legal work by encouraging law students to gain experience and requiring law schools to include practical learning opportunities, such as clerkships, law clinics, or externship programs, in their curriculum to gain accreditation. AM. BAR ASS'N, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, at 16–18 (2015–2016), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2015_2016_aba_standards_for_approval_of_law_schools_final.authcheckdam.pdf (requiring accredited law schools to provide opportunities for experiential learning through programs such as clerkships or externships); *see also* Brian Sites, *Experiential Learning: ABA Standards 303 and 304*, BEST PRACS. FOR LEGAL EDUC. (Sept. 13, 2015), http://bestpracticeslegaled.albanylawblogs.org/2015/09/13/experiential-learning-aba-standards-303-and-304/ (acknowledging law clinics and field placements are "[t]wo well-known ways to meet the [ABA's experiential learning] requirement[,]" both of which are already widely offered in law schools throughout the country).

137. *See* Eric Thiergood, *How to Get the Most Out of Your Law Clerk: A Law Clerk's Perspective*, HOUS. LAW., Nov.–Dec. 2005, at 43, 43–44, http://www.thehoustonlawyer.com/aa_nov05/page42.htm ("The range of law clerks' job duties can vary from administrative roles to significant law-related duties.").

138. Law clerks and legal assistants perform similar tasks—research, discovery, and case preparation—all of which may provide them with "access to similar sorts of confidential information." Letter from the Deans of the Law Sch. in the State of Tex., *supra* note 73.

139. *See* O'Connor, *supra* note 133 ("Before accepting a 1L summer associate position, ensure that you will have the opportunity to contribute in a meaningful way, such as by conducting legal research and drafting motions, orders[,] or memos under the supervision of an attorney.").

140. *See Summer Associate Program,* TROUTMAN SANDERS, http://www.troutmansanders.com/laterals/summer_program/ (last visited May 29, 2017) ("Our summer associates work on real projects for real clients. They meet with clients and attend strategy sessions and closings.").

strategy surely would.[141] This uncertainty makes it difficult to create bright-line rules that would apply to clerks that are now attorneys. Clerks' work does not often expose them to the kind of confidential information that would benefit another party in the case; thus, a bright-line rule that would forbid a former law clerk from representing an opposing party of his former firm's client would not fit many of the situations the rule would be designed to protect against.

The likelihood that that this issue will arise in the real world must also be considered. Admittedly, it is foreseeable enough for the ABA to discuss it in the comments to the Model Rules[142] and for the Texas Committee on Professional Ethics to write an opinion on the topic (twice).[143] Although it will depend on a number of factors,[144] the likelihood an attorney will work on a case they also worked on as a clerk may be small.[145] Case law on this specific issue is scant,[146] thus implying that, in all probability, there are a minimal number of attorneys affected by any information they may have obtained while formerly employed as a law clerk at a firm.

Despite the lack of case law on this specific issue, many states have addressed the topic by adopting the language of the Model Rules into their

141. *See* Carreno v. City of Newark, 834 F. Supp. 2d 217, 223–24 (D.N.J. 2011) (hearing arguments that the plaintiff-attorney's knowledge of trial strategies from past representation of the defendant warrants a conflict of interest disqualification); *see also* Steel v. Gen. Motors Corp., 912 F. Supp. 724, 739–40 (D.N.J. 1995) (holding disclosure of trial strategy, even when generally known by other attorneys, is grounds for disqualification because it may "create . . . an 'appearance of impropriety'" (quoting N.J. RULES OF PROF'L CONDUCT r. 1.7 (2015))). *But see* Holloway v. Arkansas, 435 U.S. 475, 491 (1978) ("[T]o assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.").

142. *See generally* MODEL RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (AM. B. ASS'N 2013) (discussing imputation of conflicts of interest and the availability of screening mechanisms as it pertains to non-lawyers).

143. Tex. Comm. on Prof'l Ethics, Op. 644 Revised, *supra* note 12, at 609.

144. *See* Ellen Yankiver Suni, *Conflicts of Interest*, 2005 A.B.A. SOLO, SMALL FIRM & GEN. PRAC. DIVISION 7, http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/conflictsofinterest.html ("The extent to which lawyers will confront potential conflicts of interest is influenced by the size, type, and location of the practice. For example, lawyers in specialized practice areas . . . or practicing in small towns are more susceptible to conflicts owing to the interrelationships among their constituencies.").

145. *Cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123 note f (AM. LAW INST. 2000) ("Law students who clerk in firms, like other nonlawyer employees, typically have limited responsibilities and thus might acquire little sensitive confidential information about matters."). *See also* Suni, *supra* note 144 (listing and discussing factors that will influence whether attorneys will face potential conflicts).

146. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123 note f (AM. LAW INST. 2000) ("Law-student conflicts have not appeared in reported cases.").

respective state rules of professional conduct.[147] The states which decline to adopt a provision for attorneys to avoid their firm's imputation based off of work they did as law students fail to follow the majority rule, and these outliers may see an increasing number of firms subjected to imputed disqualification or find law students experiencing difficulty securing employment based on a past association.[148]

I. *The Interests of the Client*

When analyzing the effects a new or proposed rule will have on law firms or attorneys, it is important to consider the ethics rules' primary purpose[149]—to protect the interests of the client.[150] Accordingly, it is

147. *See* DEL. LAWYERS' RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015) (allowing for screening mechanisms to be used for a lawyer's conflict that arose from their time as a law student); HAW. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015) (recognizing screening of lawyers is permitted to avoid imputation of conflicts that originate from experience they gained while still a law student); ILL. RULES OF PROF'L CONDUCT OF 2010 r. 1.10 cmt 4 (2015) (granting a method for firms to avoid imputed disqualification because of an attorney's conflict manifesting from when the attorney was a law student); PA. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015) (indicating the rules do not "prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student").

148. The majority rule, based upon the ABA rule, permits screening of a lawyer whose conflict arises from their experience prior to becoming a lawyer. *See* CPR Policy Implementation Committee, *Variations of the ABA Model Rules of Professional Conduct: Rule 1.10*, A.B.A. (Jan. 5, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_10.authcheckdam.pdf (listing variations of the rule of imputation); *see also* CAL. RULES OF PROF'L CONDUCT r. 3-310 (2015) (providing no guidance as to what firms should do in a conflict of interest situation with a new attorney whose conflict arises from experience prior to becoming an attorney); N.Y. RULES OF PROF'L CONDUCT r. 1.10 (2015) (promulgating imputation rules but failing to make any mention of conflicts a lawyer may have from the time he was still in law school). The states that have not adopted the ABA's version of the rule are some of the largest and most populist states, and thus these outliers represent a substantial portion of the country. *See id.* (demonstrating California, New York, and Texas have not adopted Model Rule 1.10 or its comments); Sumit Passary, *U.S. Population Grows to 320.09 Million*, TECH TIMES (Dec. 30, 2014), http://www.techtimes.com/articles/23784/20141230/u-s-population-grows-to-320-09-million-california-still-reigns-as-most-populous-us-state.htm (indicating California is the most populous state, with Texas following in second place and New York in fourth).

149. *See* MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 13(AM. BAR ASS'N 2013) ("Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship."); *see also* TEX. DISCIPLINARY RULES PROF'L CONDUCT pmbl. ¶ 1 ("Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.").

150. *See* MODEL RULES OF PROF'L CONDUCT r. 1.4 cmt. 5 (AM. BAR ASS'N 2013) ("The guiding

important to consider the question or issue from the perspective of what a client would want or how a client may feel if they were aware that a conflict of interest arose in their case.[151] We must ask, in this scenario, how a client may feel if they knew that a law student who knows details about their case because the law student previously worked for the attorney representing them is now working for the opposing party. The answer to this question, in conjunction with the aforementioned factors, must guide the decisions of those who craft and distribute ethics rules. The ethics rules generated need consider the perspective of the client, the practical factors of legal training, and the nature of the profession as a whole. Conflict of interest rules should not be so burdensome as to make it impractical for lawyers to operate after they graduate from law school, but should always strive to protect the clients' interests.

IV. PROPOSAL

To avoid these problems, one alternative solution is to seek a waiver of a conflict from the opposing counsel and party.[152] In an effort to work out issues that may arise, attorneys often contact one another prior to actually litigating the case.[153] Furthermore, a former client may waive a conflict of

principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests . . . ."); Hizey v. Carpenter, 830 P.2d 646, 653 (Wash. 1992) (explaining ethics rules protect the interests of the public, as well as "the integrity of the profession"); Singleton v. Stegall, 580 So. 2d 1242, 1244–45 (Miss. 1991) (illustrating the different duties a lawyer owes to his client, namely the duty of care and the duty of loyalty); Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring and dissenting) (arguing an attorney's "sole" duty is to protect his client); *see also* Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1246 (1991) ("The duties of loyalty and confidentiality legitimate the representation of clients, including business clients."). An attorney's ultimate goal is to further the client's interests, even if those interests are contrary to the attorney's interests (including a new lawyer's interest in their future) or the business prospects of a law firm. *See* MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2013) ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

151. *See* Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1269 (7th Cir. 1983) (stating a client will not disclose information to an attorney they do not trust and especially will not trust entire firms that nimbly switch sides in a case); Brennan's, Inc. v. Brennan's Rests., Inc., 590 F.2d 168, 172 (5th Cir. 1979) ("A client would feel wronged if an opponent prevailed against him with the aid of an attorney who formerly represented the client in the same matter."); *see also* State v. Carmouche, 508 So. 2d 792, 803 (La. 1987) ("Even while the issue [of a conflict of interest] is being raised before the trial judge, the attorney must be wary not to betray the confidences that may underlie his conflict.").

152. *See* MODEL RULES OF PROF'L CONDUCT r. 1.10 cmt. 6 (AM. BAR ASS'N 2013) (providing the opportunity for waiver as long as it is not prohibited by the rules and informed consent is given in writing).

153. *See* United States v. Brown, 202 F.3d 691, 697–98 (4th Cir. 2000) (holding a waiver of

interest.[154] A waiver helps avoid any surprises that counsel may be subject to once attorneys begin litigating a case.[155]

However, notwithstanding a waiver signed by clients, attorneys can still be held responsible by their respective state bar for violating professional rules and ethical duties.[156] In addition to disqualification, the attorney may be subject to various forms of discipline from his state bar, including suspension.[157] Attorneys should consult their jurisdiction's ethics rules before making any decisions regarding a waiver of a conflict of interest.

The stronger alternative solution is for ethics rules to provide uniformity in resolving this issue. Law firms should not be subject to strict imputation based on a lawyer's participation in a matter while they served as a clerk during law school.[158] Ethics rules should uniformly allow for permissive screening of lawyers who may have conflicts based on past law firm clerkships, as the states that follow the example of the Model Rules have done.[159]

conflict of interest is appropriate as long as the client has "knowledge of the crux of the conflict" and they comprehend the "implications" of the waiver); *see also* Kratsas v. United States, 102 F. Supp. 2d 320, 326–27 (D. Md. 2000) (deciding the pre-trial waiver of conflicts between the attorney and a witness was valid, and noting despite the waiver there was no conflict present).

154. *See* United States v. Greig, 967 F.2d 1018, 1021 (5th Cir. 1992) ("For a waiver to be effective, the record must show that the trial court determined that it was knowingly, intelligently, and voluntarily done . . . ."). *But see* United States v. Abner, 825 F.2d 835, 845–46 (5th Cir. 1987) (determining waiver of the right to object to a conflict of interest is allowed but was not done in the proper manner in this case because it failed to address the counsel's personal interest in the outcome of the case); *and* Edward L. Wilkinson, *Conflicts of Interest in Texas Criminal Cases*, 54 BAYLOR L. REV. 171, 216 (2002) (commenting on courts' "latitude" in refusing a waiver of conflicts even if the client "knowingly, intelligently and voluntarily waived a conflict of interest").

155. *See* Raspberry v. State, 741 S.W.2d 191, 196 (Tex. App.—Fort Worth 1987, pet. ref'd) (agreeing a surprise conflict of interest occurred during the trial because of a witness, although it did not reach to a level of prejudice against the defendant).

156. *Compare In re* Ockrassa, 799 P.2d 1350, 1354 (Ariz. 1990) (filing a complaint against an attorney for a conflict of interest caused the State Bar of Arizona to suspend him for violating ethics rules), *with* Owens v. State, 357 S.W.3d 792, 794–95 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd) (concluding the mere filing of a grievance against an attorney with the State Bar does not create grounds for an ethical violation such as a conflict of interest).

157. *See In re* Conduct of Wittemyer, 980 P.2d 148, 155–57 (Or. 1998) (discussing the suspension sanction on the attorney was appropriate because "[he] violated his duty to his clients to avoid conflicts of interest").

158. *See* MODEL RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (AM. BAR ASS'N. 2013) (permitting a firm to screen an attorney from conflicts arising from work performed while they were in law school).

159. *See* ALASKA RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015) (allowing for screening in situations where a conflict arises from work performed prior to becoming an attorney); IND. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015) (giving law firms the ability to screen attorneys to avoid imputation when the attorney's conflict arises from experience gained while a law student).

There should not be a conclusive presumption that a clerk substantially gained knowledge that would serve as insight into the mental processes of the opposing attorney.[160] Screening is a widely accepted method in many jurisdictions for limiting the effect of nonlawyers' potential conflicts when they move from one firm to another.[161] It is unlikely that a non-attorney clerk would gain *such* substantial insight into an opposing party's confidential information[162] that any conflict thus presented could not be solved by screening process, as is done with paralegals or legal assistants.[163]

Screening is a strong start to preventing the transfer of sensitive information about a past client.[164] While the rules should permit screening, they must also account for what is best for a client and how a client would feel if their attorney betrayed their trust.[165] Accordingly, bright-line ethics

160. *See* Petrol. Wholesale, Inc. v. Marshall, 751 S.W.2d 295, 300 (Tex. App.—Dallas 1988, writ denied) (indicating one of the presumptions that gives rise to vicarious disqualification is "an irrebuttable presumption that a client gives confidential information to an attorney actively handling the client's case" (citing *In re* Corrugated Container Litig., 659 F.2d 1341, 1347 (5th Cir. 1981))).

161. *See generally* ARIZ. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015) (permitting screening measures for non-attorney professionals such as paralegals or secretaries, in addition to lawyers whose conflicts manifest from work they performed while a law student); COLO. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015) (allowing a non-attorney professional to be screened to prevent firm-wide imputation of the conflict); ILL. RULES OF PROF'L CONDUCT OF 2010 r. 1.10 cmt. 4 (2015) (granting firms the ability to screen non-attorney employees, including lawyers whose conflict arises from work they did while in law school). *But see* N.Y. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015) (giving law firms the ability to screen out non-attorney staff such as paralegals, but not including lawyers whose conflicts emanate from work done while still in law school).

162. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123 cmt. f (AM. LAW INST. 2000) (considering the potential risk of a law clerk transmitting confidential information to an opposing firm and concluding there is little risk because non-lawyers understand less than lawyers when it comes to "the legal significance of information they learn").

163. *See id.* ("Law students who clerk in firms, like other nonlawyer employees, typically have limited responsibilities and thus might acquire little sensitive confidential information about matters. Absent special circumstances, they should be considered nonlawyer employees for the purposes of [imputation.]"); *see also* MODEL RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (AM. BAR ASS'N 2013) (permitting screening for a non-attorney staff member such as a paralegal or legal assistant).

164. *See* Hodge v. UFRA-Sexton, LP, 758 S.E.2d 314, 320 (Ga. 2014) ("[O]ur Rules recognize that screening is effective at protecting a client's confidences."); Leibowitz v. Eighth Jud. Dist. Ct. of Nev., 78 P.3d 515, 520 (Nev. 2003) ("[T]he majority of professional legal ethics commentators, ethics tribunals, and courts have concluded that nonlawyer screening is a permissible method to protect confidences held by nonlawyer employees who change employment.").

165. *See* Interview with Jonathan Smaby, Exec. Dir., Tex. Ctr. for Legal Ethics, in Austin, Tex. (Nov. 19, 2015) ("Where a law clerk could potentially make a client feel betrayed . . . then the profession has to address that . . . ."); *see also* Flatt v. Superior Court, 885 P.2d 950, 955 (Cal. 1994) (emphasizing the client is not likely to feel comfortable or trusting in a situation where an attorney is representing him while also representing the opposing client in a completely unrelated matter, and most clients would not want to continue the representation).

rules are not the best solution to this ethical issue. Rather, screening should merely be presumed to constitute a reasonable method of preventing a clerk from discussing or sharing any confidential information he may possess.

Technology may aid in implementing this solution or at least help minimize the problem's occurrence.[166] As time progresses and firms continue to modernize their practices, managing attorneys should place greater emphasis on limiting the potentially conflicted involvement of attorneys. With the aid of technological advances, an attorney with no involvement in a case should be prohibited from electronically accessing files that he or she has no authority or reason to access.[167] Screening would be a more trusted and viable option in combatting conflicts of interest if there was a data or electronic trail a firm could show to a court if employment of a new attorney is challenged. This would enable a firm to present a paper trail evidencing the new attorney never accessed the implicated information, as well as demonstrating that the new attorney was prohibited from discussing anything about the case at hand with the rest of the firm.

V. CONCLUSION

There is no consensus for how states should treat a lawyer who has a conflict that arises from the time when the attorney was still in law school and working as a clerk.[168] The majority of states permit a lawyer to be screened if there is a conflict manifesting from work they performed when they were still in law school.[169] However, other states—specifically

166. *See* Kevin Hopkins, *Law Firms, Technology, and the Double-Billing Dilemma*, 12 GEO. J. LEGAL ETHICS 95, 95–96 (1998) (discussing the likelihood of technology changing the manner in which firms conduct business and handle information).

167. *See* Nate Lord, *Law Firm Data Security: Experts on How to Protect Legal Clients' Confidential Data*, DIGITAL GUARDIAN, https://digitalguardian.com/blog/law-firm-data-security-experts-how-protect-legal-clients-confidential-data (last visited May 29, 2017) (compiling the opinions of lawyers with expertise in the area of data protection, including one lawyer's statement: "[Y]ou never know when a conflict of interest may arise or an employee may go rogue . . . . [Therefore,] you need to be able to track who has access to what information.").

168. *Compare* N.M. RULES OF PROF'L CONDUCT r. 16-110 cmt. 4 (2015) (permitting screening for an attorney's conflict that arises from when they were still in law school), *with* N.Y. RULES OF PROF'L CONDUCT r. 1.10 (2015) (failing to state any particular rule that would pertain to a conflict stemming from the time a lawyer was in law school).

169. ALASKA RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015); ARIZ. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015); ARK. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015); COLO. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015); CONN. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015); DEL. LAWYERS' RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015); HAW. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015); IDAHO COURT RULES r. 1.10 cmt. 4 (2015); ILL. RULES OF PROF'L

California and New York—are silent on the issue in their professional conduct rules.[170]

The benefits of clerking for a law firm are vast.[171] A law student gains experience in a law practice as opposed to only gaining classroom experience.[172] They get hands-on experience by conducting research and writing motions for actual cases, and law firms benefit from this extra help.[173] A law firm might also use a clerkship as a method of determining if a law student would be a good fit to hire as an attorney upon graduation and bar passage.[174] Therefore, if firms or students limit these experiences because of the fear of subsequent imputed disqualification, the entire legal industry will suffer from the loss of students' educational opportunities through experiential learning and the absence of extra hands at law firms.

During these educational opportunities, no attorney–client relationship is created between a firm's clerk and the clients the firm represents.[175] While

CONDUCT OF 2010 r. 1.10 cmt. 4 (2015); IND. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015); IOWA RULES OF PROF'L CONDUCT § 32:1.10 cmt. 4 (2015); KY. RULES OF PROF'L CONDUCT § 3.130 (1.10) cmt. 4 (2015); ME. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015); MD. LAWYERS' RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015); MINN. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015); MO. SUP. CT. RULES r. 4-1.10 cmt. 4 (2015); NEB. RULES OF PROF'L CONDUCT § 3-501.10 cmt. 4 (2015); N.H. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015); N.M. RULES OF PROF'L CONDUCT r. 16-100 cmt. 4; N.C. REVISED RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015); OHIO RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015); OKLA. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015); PA. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015); R.I. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015); S.C. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015); S.D. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015); UTAH RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015); VT. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015); W. VA. RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (2015); WIS. RULES OF PROF'L CONDUCT FOR ATTORNEYS r. 20:1.10 cmt. 4 (2015); WYO. RULES OF PROF'L CONDUCT FOR ATTORNEYS AT LAW r. 1.10 cmt. 4 (2015).

170. CAL. RULES OF PROF'L CONDUCT r. 3-310 (2015); N.Y. RULES OF PROF'L CONDUCT r. 1.10.

171. *See* O'Connor, *supra* note 133 (encouraging students to find summer positions that will enable them to "hone the relevant skills to be successful in the long term"). For example, real world experience "provides a unique and invaluable method of teaching students ethical behavior." McCoy, *supra* note 47, at 735 (citing David R. Barnhizer, *The Clinical Method of Legal Instruction: Its Theory and Implementation*, 30 J. Legal Educ. 67, 73 (1979)).

172. *Cf.* McCoy, *supra* note 47, at 735 (recognizing the ethical lessons students gain from partaking in student practice in clinical education and indicating students choose to engage in these activities to develop legal skills and gain advocacy experience).

173. *See id.* at 734 (describing a few of the duties of a law clerk in a firm (citing Kovac, *supra* note 53, at 698–700)).

174. *See* O'Connor, *supra* note 133 (advising law students to be aware that a summer experience with a firm after their second year of law school could lead to an offer for employment upon graduation).

175. *Cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123 cmt. f (AM. LAW INST. 2000) (indicating a former law student now attorney should be treated as a non-attorney for

a clerk may work directly with clients, the clerk only owes a duty to the lawyer or firm he is working for under the law of agency (not through any duty of loyalty, which is reserved for the attorney–client relationship).[176] A lawyer and a clerk do not hold the same roles and should not be treated in the same manner.

Clerks often perform work that would not otherwise lead to a conflict, or they may not fully understand the legal implications of what they are observing.[177] It is less likely for a lawyer to disclose information obtained while still in law school than for a lawyer to disclose information obtained when the lawyer simply moved from one firm to another.[178]

For these reasons, it is necessary to implement a change in the ethical approach to a clerk's conflicts of interest. Screening is already permitted for other non-attorney staff members in a law firm.[179] The roles of a paralegal or legal assistant are similar to the role of a clerk.[180] If states allow a non-attorney to be screened to avoid imputation, then an analogous role—such as a clerk—should also be permitted to be screened.

Ethics rules protect the interests of the client, and allow public confidence to be instilled in the judicial system.[181] Consideration must be given to how a client would feel if she knew someone who had worked on her case was now working for the opposing law firm. It would be understandable if the client felt betrayed, so ethics rules should be empathetic to such legitimate concerns.[182]

A client can waive a conflict of interest from an opposing firm.[183] That

purposes of conflicts arising from clerkships since they have fewer responsibilities and are less likely to acquire sensitive information).

176. *See* Fortney & Hanna, *supra* note 45, at 682–83 (classifying a non-attorney as an agent of the firm); McCoy, *supra* note 47, at 734 (indicating law clerks working for a law firm do not develop attorney–client relationships with clients).

177. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123 cmt. f (AM. LAW INST. 2000) (discussing the potential risk of a law clerk disclosing confidential information).

178. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 124 cmt. d(ii) (AM. LAW INST. 2000) ("Screening must assure that confidential client information will not pass from the personally prohibited lawyer to any other lawyer in the firm.").

179. MODEL RULES OF PROF'L CONDUCT r. 1.10 cmt. 4 (AM. BAR ASS'N 2013).

180. *See In re* Estate of Divine, 635 N.E.2d at 588 (Ill. App. Ct. 1994) (articulating a paralegal is not the party who is held to the strict standards because the paralegal is assisting the attorney who is ultimately responsible).

181. *See* MODEL RULES OF PROF'L CONDUCT r. 1.3(1) (AM. BAR ASS'N 2013) (stressing the importance of "commitment and dedication to the interests of the client and with a zeal in advocacy . . . ").

182. *See* Interview with Jonathan Smaby, *supra* note 166 (addressing a client's feeling of betrayal due to a conflict of interest is important for the legal profession to understand).

183. *See* MODEL RULES OF PROF'L CONDUCT r. 1.10 cmt. 6 (AM. BAR ASS'N 2013) (allowing a

does not eliminate the potential for disclosure of confidential or sensitive information. Screening measures should be permitted to prevent the disclosure of information and provide a client with some ease as to whether or not information is being disclosed and to avoid the negative effects of law firm imputation.

former client to waive a conflict of interest).