

AMERICAN BAR ASSOCIATION
ADOPTED BY THE HOUSE OF DELEGATES

FEBRUARY 16, 2009

RECOMMENDATION

RESOLVED, That the American Bar Association amends Model Rule of Professional Conduct 1.10(a) and related Comments, and to Model Rule of Professional Conduct 1.0, Comment [8] to read as follows: (additions are underlined; deletions are ~~struck through~~):

Rule 1.10 Imputation of Conflicts of Interest: General Rule

* * *

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based upon a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a), (or (b)), and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefore;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable

intervals upon the former client's written request and upon termination of the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Comment

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10 (b).

* * *

[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.

[8] Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.

[10] The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.

[711] Where a lawyer has joined a private firm after having represented the government, imputation is governed under Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[812] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

* * *

Rule 1.0 Terminology

Comment

* * *

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

Rule 1.10 Imputation of Conflicts of Interest: General Rule (“Clean version”)

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based upon a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a), (or (b)), and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefore;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Comment

Definition of “Firm”

[1] For purposes of the Rules of Professional Conduct, the term “firm” denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether to or more lawyers constitute a firm within this definition can depend upon the specific facts. See Rule 1.10, Comments [2]–[4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10 (b).

[3] The rule in paragraph (a) does not prohibit representation whether neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be

disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also 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. Nor does paragraph (a) 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 as a law student. 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. See Rules 1.0(k) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer for formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client

waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.

[8] Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.

[10] The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.

[11] Where a lawyer has joined a private firm after having represented the government, imputation is governed under Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d),

where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[12] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

REPORT

Model Rule of Professional Conduct 1.10(a) imputes the disqualification under Rule 1.7 or 1.9 of one lawyer in a law firm to all other lawyers associated in the firm except when the disqualification is based on a personal interest of the lawyer that will not limit the ability of the other lawyers in the firm to represent the client. The only other exceptions to the broad application of imputation are in Model Rules 1.11 (addressing private firms that hire former government lawyers), 1.12 (addressing private firms that hire a former judge, judicial law clerk, arbitrator, mediator, or other “third-party neutral”), and 1.18 (discussing situations in which material non-public information has been imparted by a prospective client). In each of those situations, the law firm may avoid imputed disqualification by screening the disqualified lawyer from any involvement in the matter.

To date, proposals to amend the Model Rules to allow screening when a lawyer moves from one private firm to another have been unsuccessful. A proposal by the Commission on Evaluation of the Rules of Professional Conduct (“Ethics 2000”) was rejected in 2002 by the House of Delegates by a margin of 176 to 130. Since the advent of the Model Rules, however, 23 states have adopted rules of professional conduct generally permitting the movement of a personally disqualified lawyer to a new firm without imputing that lawyer’s disqualification to other lawyers in the new firm, if the lawyer is timely screened from participation in the matter.¹ Ten of those states adopted their screening rules since the Ethics 2000 vote.² Although twelve of the 23 rules are consistent with this proposal, many of the rules vary in significant details. This variation underscores the need for leadership by the ABA on the topic.

The Standing Committee on Ethics and Professional Responsibility carefully considered the issues relating to imputed disqualification, and concluded that it is time for the American Bar Association to extend the concept of screening, which the Model Rules have long permitted in other contexts, to lawyers who move between private firms.³ Such a change must be accomplished without diminishing the duties that a lawyer owes to a former client. Screening “denotes isolation of a lawyer” to prohibit both his participation in a matter and his communication or use of information he may have about the matter. Rule 1.0(k). Screening therefore serves to reinforce the lawyer’s duties to former clients under Rules 1.6 and 1.9.

¹ See Arizona Rule 1.10(d); Colorado Rule 1.10(d); Delaware Rule 1.10(c); Illinois Rule 1.10(b),(2); Indiana Rule 1.10(c); Kentucky Rule 3.130(1.10)(d); Maryland Rule 1.10(c); Massachusetts Rule 1.10(d)-(e); Michigan Rule 1.10(b); Minnesota Rule 1.10(b); Montana Rule 1.10(c); Nevada Rule 1.10(e); New Jersey Rule 1.10(c)(2); North Carolina Rule 1.10(c); North Dakota Rule 1.10(b); Ohio Rule 1.10(c)-(d); Oregon Rule 1.10(c); Pennsylvania Rule 1.10(b); Rhode Island Rule 1.10(c)(1); Tennessee Rule 1.10(c)-(d); Utah Rule 1.10(c); Washington Rule 1.10(e); and Wisconsin Rule 20:1.10(a).

² Arizona (2003), Delaware (2003), North Carolina (2003), Tennessee (2003), Montana (2004), Indiana (2005), New Jersey (2004), Nevada (2005), Utah (2005), and Rhode Island (2007)

³ Standing Committee Members Susan Martyn and James McCauley dissent from this Recommendation.

The Committee proposed a substantially similar change at the 2008 Annual Meeting in Report 114 that was postponed for subsequent consideration, due in part to the late introduction of significant amendment proposals. After careful consideration of the submitted amendments, the Committee issued a new discussion draft for comment on September 18, 2008. It invited input and testimony on a series of questions related to the history of screening in states that permit it, and upon review of all the responses it received added further procedural requirements to the proposal. The concerns identified throughout the Committee's drafting process are addressed in this Report with Recommendations.

Comments received from a number of sources, including the ABA Standing Committee on Client Protection, the Standing Committee on Professionalism, and others, caused the Committee expressly to identify in the Rule procedures designed to assure the former client that the transferring lawyer does not share the former client's confidences with his new colleagues and does not participate in the same or a substantially related matter against the former client. These procedures:

- Require that a prompt notice to the former client confirm that no material confidential information was shared with the new firm prior to implementation of the screen;
- Require a statement about review of the screening process being available; and
- Require certification by both the lawyer and firm, upon request and at the end of the process, that the screening procedures were followed and that no material confidential information was shared with the new firm and that the transferring lawyer had not participated in the same or substantially related matter against the former client.

The Committee believes that the Rule's stringent screening and notice procedures, if adhered to, resolve legitimate client concerns about a transferring lawyer's conduct. The certification requirement focuses the lawyer and the new firm on their responsibilities for protecting the former client's interests. Consequently, it should rarely be necessary to impute the transferring lawyer's disqualification to all of her new lawyer colleagues in order to meet the former client's concerns. In exceptional cases, disqualification by a tribunal is available when lawyers themselves fail to exercise the necessary restraint.

Lawyer Mobility and Protection of Confidentiality. The Committee believes that framing the issue of imputation as a choice between client protection and lawyer mobility presents a false choice. Clients must be protected, and their confidence (as well as that of the public) in their lawyers' promise to keep their secrets must be preserved. The question is not *whether* but *how* that should be accomplished. No one contends that the lawyer himself may represent others against a former client on substantially related matters after moving to a new firm. Rule 1.9(a) is unequivocal on this subject. In addition, no one disputes that the confidentiality duty continues after termination of the client-lawyer relationship. If a lawyer breaches that duty, she is subject to discipline, whether she has changed firms or not. Screening

is a mechanism to give effect to the duty of confidentiality, not a tool to undermine it.

History Reveals No Problems with Ethical Screens. The Committee inquired of states with screening and received responses from disciplinary counsel, state bar association officials, and practicing lawyers in those jurisdictions that properly established screens are effective to protect confidentiality. Moreover, the Committee considered the applicable case law, and found that courts have exhibited no difficulty in reviewing and, where screening was found to have been effective, approving screening mechanisms.

The Model Rules of Professional Conduct have permitted screening in public-private moves since they were first adopted by the ABA in 1983, and the Committee has not been made aware of even a handful of instances in which confidentiality has been breached. Similarly, the Committee is unaware of any pattern of disciplinary actions arising out of screening in those states that permit the screening of transferring lawyers.

The Requirement of Client Consent. An often heard argument against permitting private lateral screening, articulated in the dissent, is the notion that a lawyer's client should effectively hold veto power over the lawyer's transferring to a new firm. The Committee is very concerned that clients' rights be protected, but we do not think protection of a client's confidentiality interests requires a ban on mobility unless the client consents to the lawyer's move. Clients have no obligation not to withhold consent unreasonably. This change permitting private lateral screening is particularly timely now, when law firms are downsizing and new job opportunities are shrinking, and a substantial number of lateral moves by lawyers may be involuntary. In addition, restrictions on mobility affect the interests of other clients in being represented by the lawyer of their choice.

Some have raised the specter that in the midst of a matter a lawyer with a significant role in the matter may be wooed by the law firm representing the other side. That situation almost never happens. A lawyer's move from one private firm to another almost invariably requires confidential discussions between the lawyer and the new firm before the lawyer terminates her prior relationship, to determine whether or not the move will be in the lawyer's and the new firm's best interest. If the lawyer is currently representing a client adverse to a client of the new firm, the lawyer must inform the client of her intention to begin discussions with the new firm because the personal interest of the lawyer in changing firms creates a conflict under Rule 1.7(a)(2). Screening is therefore of principal utility in cases where the lawyer's role in the prior representation is concluded.

Even if in a rare case the lead lawyer in a litigation moves to the opposing party's law firm, the court may disqualify that firm rather than authorize it to screen the disqualified lateral lawyer. The same would continue to be true under the proposed amendment. The court can disqualify a firm when it is reasonable in the particular circumstances for the former client to fear that a screen may not be effective.

Screening Protects the Interests of the Clients Both of a New Law Firm and of a Former Law Firm. Although much of the debate over lateral screening has been focused on the concerns of the clients of the lateral's former firm, there is a parallel set of interests: after a

transferring lawyer has been hired, every imputed disqualification based on the unavailability of screening results in a client that loses its law firm of choice. The harm to all such clients is real, not theoretical. Often the disqualification of a firm, based upon an imputed conflict of a newly-hired lawyer, occurs after a matter is well under way and the affected client has spent substantial sums in fees. Typically, such clients have played no part in the circumstances that led to the imputed disqualification, yet they suffer the cost, disruption, and delay resulting from it.

If the new firm does represent a client adverse to the former client, in many cases the new firm could, consistent with Rule 1.16, withdraw from representing such a client in order that it can hire the transferring lawyer. That client may be adversely impacted because it has lost the law firm of its choice. If that firm, on the other hand, declines to hire the lawyer because of the conflict, clients of the new firm will be deprived of a lawyer the new firm thinks would serve their interests. Thus, clients have interests on both sides of the screening question. Screening does not solve all such problems, but reduces them to situations where the interests of the former clients cannot adequately be addressed by the screening mechanism.

Disqualification Protects Against Exceptional Cases. Although courts look to ethical rules for guidance on when counsel should be disqualified, standards for discipline do not bind tribunals called upon to rule on disqualification motions. Both the proposed Rule and accompanying Comment expressly recognize that a former client may file a disqualification motion, and the tribunal will not be bound to authorize the representation. For example, if a substantial number of lawyers on one side of a litigation move to the law firm representing the other side, a tribunal might disqualify the other side's law firm, because it would be reasonable to doubt the efficacy of screens established for so many lawyers who possess so much material confidential information. Other less extreme situations, may also cause a tribunal to disqualify counsel despite the existence of a screen that is permitted under the Rules.

Cases such as *Kala v. Aluminum Smelting Co.*, 688 N.E.2d 258, 265 (Ohio 1998), have balanced the interest of a former client in preserving confidences against the interest of a new firm's client in preventing disqualification from being used to gain tactical advantage. The court in *Kala* addressed a lawyer who negotiated for employment with opposing counsel without advising his client of the personal conflict, and disqualified that lawyer's new firm because of "appearance." The case demonstrates that *disqualification* standards in a given state, under a court's "inherent power to supervise members of the bar appearing before it," *id.* at 261, may not be the same as the standards for *discipline* under the Model Rules. Nonetheless, in reflecting agreement with the policy underlying the current Committee proposal, the *Kala* court said:

If used properly, the process of screening attorneys who possess client confidences from other members of a firm can preserve those confidences while avoiding the use of the motion to disqualify as a device to gain a tactical advantage.

688 N.E.2d at 265.⁴

⁴ See also *Clinard v. Blackwood*, 46 S.W.3d 177, 181 (Tenn. 2001) (although "adequate procedures to screen [an] attorney can rebut the presumption of shared confidences," disqualification was appropriate despite a screen); *Steel*

In those cases where the transferring lawyer and the new firm may believe a screen to be effective, but it may be reasonable for clients to believe otherwise, tribunals are able to address such concerns. In future cases, lawyers can be expected to conform their conduct to the judicial decisions developed in the disqualification context, as well as to the Rules. Thus, both the Rules and the courts have a role in preserving confidence in the integrity of our profession.

“Side Switching” Is Not the Issue. Certain opponents of screening contend it permits “side switching,” which is a misnomer. A lawyer disqualified by a conflict of interest may never assist the “other side” in a matter by changing firms. The point of screening is to isolate that lawyer from participation in or communications about the matter, underscoring that the transferring lawyer is disqualified from “switching sides.” The purpose of this recommendation is to avoid imputed disqualification of all the other lawyers in the new firm, lawyers who have not changed sides at all.

Screening Employed after Public/Private Moves. Rules 1.11 (private firms hiring former government lawyers) and 1.12 (hiring a former judge, judicial law clerk, arbitrator, mediator, or other “third-party neutral”) have provided for screening since 1983 when the Rules were first adopted. The Comment to those rules explains that the government client need not have a veto on lawyer mobility and describes how screening procedures can adequately protect the government client’s interest.

The conclusion reflected in the rule was certainly influenced by a desire to promote lawyers’ entry into government service by not barring future employment in the private sector, where the former government lawyer will utilize the skills and experience developed during government employment. For example, an enforcement lawyer at the Securities and Exchange Commission could become a valued private practitioner. Although that lawyer may have acquired extremely sensitive information about the targets of Commission investigations, she may under Rule 1.11 join a firm defending such targets in Commission proceedings as long as she is appropriately screened. The Committee is unaware of evidence that governmental clients have seen their confidences eroded through breaches of the screen. The protections of confidential information afforded to the government client should work equally well for private clients. The growing number of states that endorse screening for lawyers in both contexts suggests a growing acceptance of this analysis.

Screening of Nonlawyer Staff. Rule 5.3 provides generally that lawyers are responsible to ensure that the conduct of their nonlawyer employees is consistent with the lawyers’ duties under the Rules. Comment [4] to Rule 1.10 states that the imputation rule of Rule 1.10(a) “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.” It goes on to say that “[s]uch persons, however, ordinarily must be screened from any personal involvement 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.” Law students who have been exposed to

v. *General Motors Corp.*, 912 F. Supp. 724, 746 (D.N.J. 1995) (disqualifying a lawyer’s new law firm despite a screen and despite acknowledging that “motions for disqualification are often filed to improperly delay proceedings and to deny a party the counsel of her choice”).

confidential information while working temporarily at law firms are similarly permitted to be screened in subsequent employment with law firms.⁵

The current Rule therefore suggests that *nonlawyers* possessing confidential information who are hired by a new firm may generally be screened without undue risk of injury to clients of their former firms.⁶ In the unusual cases where a screen does not adequately protect client confidences, courts disqualify the law firm that employs the moving nonlawyer. *See, e.g., Owens v. First Family Financial Services, Inc.*, 379 F. Supp. 2d 840 (S.D. Miss. 2005) (plaintiff's firm subject to imputed disqualification after hiring paralegal formerly employed by defendant's counsel). It therefore seems anomalous to conclude that lawyers cannot ordinarily be screened without undue risk of injury to clients.

“Substantial Involvement” as a Factor in Determining Imputation. Of the 23 states that permit private lateral screening, a majority have rules substantially similar to the proposal.⁷ Two states permit screening unless the disqualified lawyer had played a “primary” role in the former matter,⁸ and a significant minority permits private lateral screening unless the disqualified lawyer either had played a “substantial” role or has acquired “substantial” confidential information.⁹ The Committee considered, and rejected, the suggestion that prohibiting screening when the lawyer had been “substantially involved” should be the ABA model. It concluded, among other things, that the possibility of disqualification by a tribunal adequately addresses the unusual cases in which the extent of a disqualified lateral lawyer's role in a matter or the amount of the material confidential information possessed by that lawyer raises legitimate doubts about the efficacy of screening.

During its most recent solicitation of comments on its draft proposal, the Committee received persuasive comments expressing concern that such a “substantial involvement” limitation constitutes a vague standard to adopt in a situation where clear guidelines are necessary for disciplinary purposes. For example, in *Little v. Berman*, 802 N.E.2d 130 (Mass. App. 2004), the court interpreted Massachusetts' “substantial involvement” rule to require disqualification of a lawyer based on testimony from the former firm that the case was once discussed with the lawyer, where there was no clear evidence that the lawyer had even worked on the matter and the lawyer had no memory of the case. Clarity is required when a lawyer and a firm decide whether to consider associating with each other, at which time no tribunal is available to decide the “substantial involvement” question. Law firms are often appropriately

⁵ *See also* ABA FORMAL OP. 88-356 (screening permitted for temporary “contract” lawyers).

⁶ If an undue risk of injury to clients of the former law firm were perceived, a Model Rule could have been adopted to prohibit a law firm under those circumstances from hiring such nonlawyers.

⁷ Those states include Delaware, Illinois, Kentucky, Maryland, Michigan, Montana, North Carolina, Oregon, Pennsylvania, Rhode Island, Utah, and Washington.

⁸ Indiana and New Jersey.

⁹ Arizona, Colorado, Massachusetts, Minnesota, Nevada, North Dakota, Ohio, Tennessee, and Wisconsin.

very conservative in evaluating such standards, making a disciplinary rule with a vague test of limited value in removing bars to lawyer mobility.

The Committee's invitation for comments on its proposal also drew some advocates of this position, but the proposed tests for "substantial involvement" all involved balancing a series of facts and circumstances. Such balancing tests do not provide clear guidance for prospective behavior, although courts may use them in making disqualification judgments.

The Committee believes that adoption of a substantial involvement test implies that lawyers in private practice cannot be trusted to adhere to the Model Rules and to report honestly that they have conducted themselves in accordance with both the Rules and with established screening procedures. It suggests that screening should be sanctioned only where it is not likely to be needed (the transferring lawyer has no material confidential information or had only a slight involvement in the matter). This limitation to screening is not the rule in the situations governed by Rules 1.11(b) or 1.12, or with respect to nonlawyers moving from one firm to another.

Summary. Screening is not designed to impair the interests of clients, but to protect them. Screening provisions permitting private lateral screening have been adopted in nearly half the states, where hundreds of law firms and thousands of lawyers practice in cities like Baltimore, Charlotte, Chicago, Detroit, Louisville, Philadelphia, Pittsburgh, Portland, Seattle, and Wilmington, and in the various smaller communities in those states. No reported disciplinary cases or lawsuits have demonstrated any significant problem with the efficacy of screens. There is no record that screening in those states has been unable to protect confidentiality or to prevent the transferring lawyer from participating against the former client. Nor is there any record demonstrating that screens have been ineffective in the context of lawyers moving from government service to private practice. We are firmly convinced that screening can protect essential client interests in the context of private lawyers changing firms. The Ethics 2000 Commission came to the same conclusion.

One of the primary objectives of the Model Rules of Professional Conduct is the achievement of uniformity in the ethical principles adopted nationwide. This objective has not yet been realized because the ABA has not provided practical, effective, and up-to-date advice on this important issue. The effectiveness of the Rules as a unifying model will continue to be impaired if the ABA does not renew its leadership on this important issue.

We urge the members of the House of Delegates to adopt the attached Recommendation.

Respectfully submitted,

STANDING COMMITTEE ON ETHICS AND
PROFESSIONAL RESPONSIBILITY
Robert H. Mundheim, Chair

February 2009

MINORITY REPORT

We dissent from the Committee's Report with Recommendations because we believe that screening of the lateral hire should remain ineffective to avoid imputation under Model Rule 1.10 unless the lateral lawyer's former client consents. The Committee's proposal departs substantially from the rules in thirty-nine jurisdictions, twenty-three of which permit only consensual screening, and eleven more that permit nonconsensual screens only when a laterally hired lawyer had no substantial responsibility or acquired no significant confidential information in a previous adverse representation.

We believe that the current Model Rules serve lawyers and clients well by providing a bright line rule that protects both. When a lawyer leaves a firm, Model Rule 1.9 prevents that lawyer from acting adverse to her former clients in the same or substantially related matters. Model Rule 1.10 prohibits that lawyer's new firm from the same representations without the consent of the migrating lawyer's former client. Former clients can condition consent on a screen of the lateral lawyer. These consensual screens are becoming more common, and they protect the new firm, the new firm's current clients and the former client's interests

Fiduciary duty is the foundation of both of these rules. Rule 1.9 prohibits the lateral lawyer from using or disclosing confidential information of former clients. Rule 1.10 imputes this obligation to the new law firm because it presumes that lawyers in firms interact for the benefit of their current clients. Both of these conflict of interest rules derive from centuries old agency rules that require client consultation and consent to keep a lawyer-agent focused on the client-principal's interests.

The current articulation of these principles in the Model Rules protects lawyers against our own judgment when it might be impaired by our own or some other client's interests. The lateral lawyer interested in changing law firms and the clients at the new firm have interests of their own which well might conflict with those of the former client. It is this conflict which endows those clients with the right recognized by agency law and the current rules to determine their own best interests.

Consider for example, that in all of the following circumstances, the proposed rules would allow an involuntary screen when a former client reasonably might refuse consent.

1. A lawyer with a significant role in a matter who leaves a law firm while the matter is pending to join the firm representing the opposing party in the same matter.
2. A lawyer who billed no hours to a client matter, but spent a two hour lunch discussing it in detail with the lead lawyer on the case now has joined the firm representing the other side in the same matter.
3. A lawyer who gained significant information about a wife's business transactions soon thereafter joins the law firm representing the same woman's husband in a divorce.

We do not agree that Rule 1.10 should allow firms to set up nonconsensual screens in circumstances like these, where a lateral lawyer who joins the firm has been exposed to substantial material information or has had a significant involvement in the same or substantially related prior representation. In these circumstances and many more, the committee's proposal replaces the necessity of former client consultation and consent with a nonconsensual screen and notice provision. From the former client's perspective, the proposal allows a nonvoluntary screen of a lateral lawyer when the former client would not have consented if consulted. Also, the proposal potentially confuses lawyers, because it invites them to establish nonconsensual screens in situations where courts in disqualification motions may not recognize them. When this occurs, current clients of the firm involuntarily lose their counsel of choice.

The Committee's proposal rests on newly added procedural requirements to foster the former client's comfort with a nonconsensual screen. Yet, former clients may reasonably refuse consent when their lawyer had either a significant role or exposure to material confidential information in the prior representation. We do not dispute the good will of most lawyers who believe that they can establish and maintain effective screens, even in these circumstances. In fact, the committee's proposal acknowledges that the courts may grant disqualification relief to former clients, which put current clients of the firm at risk. But lawyers and clients recognize that both are human, and that law firm systems can break down. When lawyers and clients differ in their estimation of these risks, the client's view should prevail.

Current rule 1.10 protects former clients against the risk of adverse use or disclosure of confidential information. The proposed amendment substitutes the law firm's resolution of this risk for the client's. It catapults the lawyer's interests over the former client's determination at precisely the time the lateral lawyer and the new firm have their own and their client's interests understandably in mind. Lawyers should consult with former clients about these matters and be bound by the client's determination, which is precisely what current Model Rule 1.10 requires.

Susan R. Martyn and James M. McCauley
February 2009

GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Ethics and Professional Responsibility

Submitted By: Robert Mundheim, Chair
Standing Committee on Ethics and Professional Responsibility

1. Summary of Recommendation

The Recommendation calls for amendment of Model Rule of Professional Conduct 1.10 (“Imputation of Conflicts of Interest: General Rule”), to permit the screening of a lawyer who moves laterally from one private law firm to another, so that conflicts of interest that apply to the moving lawyer under Model Rule 1.9 (“Duties to Former Clients”) are not imputed to all the other lawyers in the new law firm.

The amended Model Rule would include, as part of any screening procedure employed by the new law firm, a provision requiring a series of statements and disclosures to the transferring lawyer’s former clients to enable them to ascertain compliance with the screening procedures used.

2. Approval by Submitting Entity

The Standing Committee on Ethics and Professional Responsibility approved the filing of this Report with Recommendations in a scheduled meeting on November 18, 2008. Two Committee members disagree with the majority, and have filed a Minority Report..

3. Has this or a similar recommendation been submitted to the ABA House of Delegates or Board of Governors previously?

The Commission on Evaluation of the ABA Model Rules of Professional Conduct (“Ethics 2000 Commission”) submitted a similar proposal to the House at the Association’s Annual Meeting in 2002 as part of its overall review of the Model Rules. The provision was rejected by a vote of 176-130 at that time. The Standing Committee on Ethics and Professional Responsibility subsequently submitted a similar recommendation to the Board of Governors and the House of Delegates at the Association’s Annual Meeting in August, 2008. At that time, the Board of Governors voted to pass the Recommendation to the House of Delegates with their approval. The House of Delegates voted, by a vote of 192-191, to postpone consideration of the Recommendation due to the insufficiency of time to review late-proposed amendments to the Recommendation.

4. What existing Association policies are relevant to this recommendation, and how would they be affected by its adoption?

Model Rule of Professional Conduct 1.11, (“Special Conflicts of Interest for Former and Current Government Officers and Employees”), and Rule 1.12, (“Former Judge, Arbitrator, Mediator or Other Third-party Neutral”), adopted in 1983, already permit screening of lawyers to avoid imputed disqualification. This amendment will create a consistency in the manner in which lawyer mobility is achieved, while preserving the legitimate interests of transferring lawyers’ former clients.

5. What urgency exists that requires action at this meeting of the House?

Since the Ethics 2000 Commission’s recommendation on this subject was made in 2002, ten state jurisdictions were added to the thirteen state jurisdictions adopting some version of a rule permitting screening in the private-firm environment, but no uniformity of approach has been achieved. In order to achieve leadership status nationally in achieving the Association’s Goal II, Objective 3, (“Promote Competence, Ethical Conduct and Professionalism”), it is critical that the Association provide timely guidance to all state and other entities responsible for crafting rules of professional conduct for lawyers.

6. Status of Legislation (If Applicable)

Not applicable.

7. Cost to the Association (Both direct and indirect costs)

None.

8. Disclosure of Interest (If Applicable)

None.

9. Referrals

All ABA Sections, Divisions, Forums, Task Forces and Working Groups
 All ABA Standing and Special Committees and Commissions
 National Organization of Bar Counsel
 Association of Professional Responsibility Lawyers
 National Client Protection Organization

10. Contact Person (Prior to the meeting)

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EXECUTIVE SUMMARY

1. Summary of Recommendation

The Recommendation calls for amendment of Model Rule of Professional Conduct 1.10 (“Imputation of Conflicts of Interest: General Rule”), to permit the screening of a lawyer who moves laterally from one private law firm to another, so that conflicts of interest that apply to the moving lawyer under Model Rule 1.9 (“Duties to Former Clients”) are not imputed to all the other lawyers in the new law firm.

The amended Model Rule would include, as part of any screening procedure employed by the new law firm, a provision requiring a series of statements and disclosures to the transferring lawyer’s former clients to enable them to ascertain compliance with the screening procedures used.

2. Summary of the issue that the Recommendation addresses

Under the current ABA Model Rules of Professional Conduct, lawyers moving between government and private practice may be screened from matters in which they are disqualified under Rule 1.9, so that their conflicts of interest are not imputed to other lawyers in their new practice setting. Under Rule 1.10, lawyers moving from one private law firm to another (moving “laterally”) may not be so screened.

3. Explanation of how the proposed policy position will address the issue

The proposed amendment to Model Rule 1.10 permits lawyers moving from one private firm to another to be screened from participation, at their new firm, in matters that they are disqualified from under Rule 1.9, and imposes upon both the moving lawyer and his new firm the obligation to make a series of disclosures and other statements that enable former clients to ascertain compliance with the screening procedures.

4. Summary of minority views or opposition that have been identified.

Two members of the Standing Committee believe that nonconsensual screening should be prohibited, arguing that only the client should be entitled to make the decision that the migration of the lawyer will not breach the duties of loyalty and confidentiality to the client.