

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON
ETHICS AND PROFESSIONAL RESPONSIBILITY

SUMMARY OF SCREENING RECOMMENDATION

February 2009

The recommended amendment permits a lawyer who has participated in a matter for a client to move laterally to a new firm with a client adverse to the former client in that matter:

- Current Rule 1.10(a) would impute the lateral lawyer's former client conflict to all the lawyers in the new firm, effectively preventing the lateral lawyer from joining the new firm unless the former client consents or the new firm abandons its existing client.
- The recommended amendment would remove the automatic imputation and permit the lateral lawyer to join the new firm if an effective screen is promptly instituted. Because the lateral lawyer has a personal obligation under the Rules not to reveal any information relating to the former client's representation, screening will assure the former client that confidential information will not be disclosed or used and that the lawyer will not appear in the matter. Under those circumstances, it is not necessary to impute the lateral lawyer's personal conflict to all the lawyers in the new firm.
- Screening should be effective to address the former client's concerns because both the lateral lawyer and the new firm will be required to certify when the screen is established, at reasonable intervals thereafter, and when the screen is terminated, that they have complied with the Rules and with the screen.
- Screens are neither new nor uncommon:
 - They are used to remove imputation when government lawyers transfer into the private sector (Model Rule 1.11);
 - They are used to remove imputation when judges, judicial clerks and arbitrators go into private practice (Model Rule 1.12);
 - They are used to remove imputation when a lawyer has received material confidential information from a prospective client (Model Rule 1.18);
 - They are used to remove imputation when lawyers obtain consent from clients (Model Rules 1.10(c) and 1.0(k));
 - They are used to remove imputation when temporary or "contract" lawyers are employed (ABA Formal Opinion 88-356); and
 - They are used to remove imputation when nonlawyer personnel change law firms (Comment [4] to Model Rule 1.10).
- Screens apply to all firms regardless of size, whether in rural or city settings.
- Screens apply to corporate law offices that fall within the definition of a "firm."
- Strong policy reasons for adopting the recommended amendment:
 - Protects former client's expectations of confidentiality;
 - Protects the new firm's client's interest in retaining the firm of its choice;
 - Protects lawyer career choices in an era where an increasing number of lawyers must change firms at some time (lack of a rule has had a particular impact on more junior lawyers);

- Opportunity for mobility tends to improve service to clients of both the former and the new firms;
- Screening is critical to mobilizing private lawyers for temporary work in public interest firms and organizations; and
- Screening furthers law firms' interest in hiring the lateral lawyers they need and want to serve their clients, provided they protect the confidentiality interests of clients formerly represented by the lateral lawyers

History and national experience:

- The Ethics 2000 Commission made similar proposal in 2001, which was rejected by a narrowly divided House (176 to 130).
- Articulated opposition (decrying “side-switching” and valuing lawyer mobility over client loyalty) didn’t explain treating private moves different from public moves.
- Despite the current ABA position, screening has gained acceptance among almost half the states.
 - 12 states have rules substantially similar to the recommended amendment (DE, IL, KY, MD, MI, MT, NC, OR, PA, RI, UT, WA)
 - 24 states have adopted rules permitting lateral screening with various conditions
 - AZ, CO, DE, IL, IN, KY, MD, MA, MI, MN, MT, NM, NV, NC, ND, NJ, OH, OR, PA, RI, TN, UT, WA, WI
 - Of the 24 state screening rules, 11 were adopted since the 2001 House vote
 - AZ (2003), DE (2003), NC (2003), TN (2003), MT (2004), IN (2005), NJ (2004), NV (2005), UT (2005), RI (2007), NM (2008)
- No evidence suggests screening is less effective in private moves than in public moves.
- The ABA’s posture is fast getting out of step with the majority of the states it wishes to lead, significantly undermining uniformity.
- No evidence of bar complaints from states like IL and OR where screening of laterals in private firms has been allowed for almost 20 years, or from the other screening states.
- Many federal trial and appellate courts have accepted lateral screening in appropriate cases even absent state rules supporting it.

Comparison to Litigation Section Proposal:

- The Litigation Section starts with the Massachusetts rule, the most restrictive state screening rule, which requires that screening be limited to cases where the personally disqualified lawyer had no “substantial involvement” in the prior matter and that lawyer had no “substantial material information” relating to the matter.
- But the Litigation proposal would further limit screening to lateral lawyers who had **no** material information at all, rather than no “substantial” material information.—
- In short, Litigation’s screening proposal would limit screening to lateral lawyers who had only a minor involvement with a matter and who had acquired no material information relating to the matter, thus allowing screening **only in situations where screening would protect only immaterial information** from disclosure.