

COMMENTS ON THE
ABA STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
RECOMMENDATION TO AMEND MODEL RULES OF PROFESSIONAL CONDUCT 1.10 TO
PERMIT SCREENING OF LAWYERS PROHIBITED FROM REPRESENTATION BY MODEL RULE 1.9(a)

Professor Thomas D. Morgan
George Washington University Law School

Mover has left her partnership at the Shaker firm and has become your partner. While at Shaker, Mover advised Fineco on a series of transactions with Goodco that are now in litigation. Your firm represents Goodco. Does Mover's arrival give your firm a problem?

Loyalty to each client a lawyer serves is one of the lawyer's highest duties. ABA Model Rule 1.7 declares that a lawyer may not let the interest of one current client interfere with work for another client. Model Rule 1.8 forbids a lawyer's letting personal interests get in the way of client service, while Model Rule 1.9 requires that the lawyer not take the opposing side in a matter that is the same as or substantially related to representation of a former client. Each of those rules applies to individual lawyers and each is a fiduciary principle that courts had laid down before the ABA and state supreme courts included them in disciplinary standards.

No one thinks that Mover may represent Goodco in the litigation against her former client involving matters on which Mover gave advice. As the ABA House of Delegates considers the Standing Committee on Ethics and Professional Responsibility's proposal to amend Model Rule 1.10, it is important to understand that the proposal does not change that fiduciary standard.

The rule the House of Delegates will consider is Model Rule 1.10, which deals only with imputation to your firm of duties Mover has to her former client. You have no personal duty to Mover's former clients other than that created by Rule 1.10. For example, Model Rule 1.10 says that Mover's personal conflicts of interest – perhaps her abhorrence of one of your other clients that would prevent her from being able to represent that client zealously – ordinarily is not imputed to your firm at all.

Any imputation of Model Rule 1.9(a) to your firm – the only subject of the Standing Committee's proposal – is made solely to help assure that Mover complies with her own duty not to reveal confidential information of Fineco or to oppose Fineco in the current litigation. Model Rule 1.10 provides only two ways to provide that assurance today – forbidding your firm from continuing to represent Goodco in the litigation or failing to allow Mover to join your firm.

That lack of options is largely a matter of history. It is hard to remember now, but 40 years ago when the ABA adopted the Model Code of Professional Responsibility and DR 5-105(D) on which Model Rule 1.10 is based, a majority of U.S. lawyers were solo practitioners. Only twenty U.S. law firms had as many as 100 lawyers. Indeed, all the lawyers in the firm with which I was associated regularly had lunch together and talked freely about cases.

Interestingly, in 1969, the ABA Model Code of Professional Responsibility did not even

adopt a provision comparable to Model Rule 1.9. A lawyer's duties to a former client were enforced by courts that disqualified the former lawyers, but the ABA did not even focus on former client conflicts or their imputation until the late 1970s and early 80s when it adopted the Model Rules of Professional Conduct under which we now function.

I was among those at that time who argued against permitting screening. In the law firm world I remembered, it was natural to fear that Mover might hear or convey things at all-firm lunches or over the water cooler without appreciating how that might undercut the duties she owed her former client. A prophylactic rule requiring imputation seemed wise.

Everyone knows that the law firm world has changed radically since 1969, and the Standing Committee's proposal would simply add an additional way to assure compliance with Mover's obligation to Fineco. Instead of requiring Goodco to get other counsel, your firm could screen Mover from participation in the Goodco-Fineco litigation after giving notice to Fineco of the screening procedures to be employed, your undertaking to comply with them, and providing certificates of compliance with the procedures periodically thereafter.

The ABA Model Rules already provide for screening in three other situations. Rule 1.11 allows screening of former government lawyers and Rule 1.12 permits firms to screen former judges. Rule 1.18 provides for screening lawyers who talked to a prospective client. Screening is recognized and described in Model Rule 1.0(k). Further, 23 states already permit screening in cases under Rule 1.9, so the Standing Committee proposal is anything but radical.

Furthermore, the only direct effect of the Standing Committee proposal would be to protect you and others in your firm against a professional discipline prosecution. In any case in which a judge concludes that screening is inadequate to protect the former client, the remedy of disqualification still exists and is expressly acknowledged by proposed Comment [7].

One thing I have learned over 35 years of teaching legal ethics is that the ABA House of Delegates regularly and appropriately changes ethical standards to keep up with new realities. That was the message of the Model Code in 1969, the Model Rules in 1983, the Ethics 2000 changes to the Model Rules, the 2003 changes to the Ethics 2000 changes, and the additional changes to the duties of prosecutors in 2008.

The Section of Litigation has proposed a "compromise" that as a practical matter makes no change at all in the rules of imputation. The real compromise proposal is that of the Standing Committee on Ethics and Professional Responsibility. In a modest and carefully qualified way, it takes your firm out of the dilemma of firing Mover or firing Goodco. And it does so in a way that will protect Fineco's justifiable concern that Mover not compromise Fineco's interests.

Adoption of the Standing Committee proposal would clearly be appropriate and desirable.