

## **The Proposed Amendment to Model Rule 1.10 Is Balanced and Important; The Arguments of the Opponents are Stale and Hollow**

The proposal of the Standing Committee on Ethics and Professional Responsibility to amend Model Rule 1.10 in the manner set forth in Recommendation and Report 109 is an important and realistic step forward, while preserving professional integrity and ethics. It is an improvement over the recommendation of Ethics 2000 that did not pass this House in 2002, in that the proposed new detailed notice provisions would enhance the clarity, transparency, effectiveness and uniformity of the screening procedures when a lawyer moves laterally from one private firm (“Former Firm”) to another (“New Firm”).

That lawyer would not only be isolated in New Firm from matters she would be prohibited by Model Rule 1.9 from handling or discussing with her new colleagues but also the client of Former Firm would be protected by the detailed notice requirements. Current Model Rule 1.10—a “one-size-fits-all,” automatic veto rule—needs to be amended surgically to conform to modern times while not breaching client loyalty or trust. The proposed amendment represents that discrete change, not only because of the safeguards embedded in the proposed rule but also because there is a recognized remedy: concrete information on which the client of Former Firm may seek court disqualification in cases of specific concern.

The time has past when ethics rulemakers should be perpetrating the current, outmoded rule which presumes the likelihood of lawyer dishonesty or negligence in violating a screen, while giving the client of Former Firm the sword of an absolute veto

over his adversary's choice of law firm, simply by withholding consent, often solely for unfair tactical advantage without any substantive basis in fairness.

Take the case of Mary, the migrating lawyer. The client of Mary's New Firm, Charlie Client, in all cases under the current rule, is deprived of the firm of his choice by the client of Mary's old firm, Victor Veto, even though Mary will be isolated by an effective screen, the details of which are spelled out in the proposed amendment. What are those details? The proposed amendment specifically provides:

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

What is a "screen?" The definitional Model Rule 1.0 (k) makes that clear:

- (k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

In spite of the fact that screens have worked in other Model Rules (1.11, 1.12 and 1.18) and in 23 states in the private firm lateral-move cases, the opponents cling to the same stale arguments of old. What are the arguments of those who would perpetuate the old rule? Here are some examples:

***The “Side-switching” argument.***

Opponents carried the day in the 2002 debate on the Ethics 2000 screening proposal by shouting the old shibboleth that the ABA would condone a practice of “side-switching lawyers” if that proposal had been adopted. That slogan was not only demonstrably false then, but also it is now the red herring flagship that opponents are currently sailing into the winds of the reasonable change put forth in the proposed amendment.<sup>1</sup>

There is no basis for any claim that the amendment would permit lawyer “side-switching.” Lawyers are switching *firms*, not switching *sides*. In the New Firm, Mary, the moving lawyer, is quarantined from taking any *side*. Lawyers move from firm to firm much more today than in the past. The economic meltdown this nation has been experiencing, and is currently enduring, has exacerbated that trend, as media reports have noted law firm economic problems and layoffs. The absolute veto granted to the client of Mary’s Former Firm can exacerbate the unfairness to clients as well as lawyers seeking a new firm.

***The argument that the amendment “represents a monumental frontal assault on our fiduciary obligations to clients.”<sup>2</sup>***

Opponents argue that when Mary moves from Former Firm to New Firm, the client of Former Firm, who has litigation against a client of New Firm, should have the unilateral power to disqualify the entirety of New Firm from representing its client, even

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<sup>1</sup> See Susan R. Martyn and Lawrence J. Fox, “Screening? Consider the Clients: Making The World Safe for Side-Switching Lawyers is an Idea Whose Time Should Never Come,” 4 *The Practical Litigator*, 47 (July 2008) (hereafter, “Martyn & Fox”).

<sup>2</sup> *Id.*

though Mary is effectively screened, and notice is given in the manner set forth above. The argument is a non sequitur and turns the presumption that lawyers are obliged to follow rules of confidentiality and client loyalty on its head by restating the presumption as one of lawyer venality or negligence.

***The argument that the client of the Former Firm “must accept” the screen as a safeguard “whether the client likes it or not.”***<sup>3</sup>

This argument conflates the correct point of the amendment that there should be no “one-size-fits-all” absolute veto with the incorrect argument that there is no avenue of relief for the client of the Former Firm. Comment [7] to the proposed amended rule expressly recognizes that the court in Victor Veto’s case against Charlie Client has the absolute discretion, if the circumstances warrant, to disqualify the New Firm:

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.

Yet, opponents argue that “... no court considering a side-switching case has ever upheld an involuntary screen in the context of a disqualification motion.”<sup>4</sup> But the examples given demonstrate only some special circumstances when a disqualification order will “trump” the screen, and the Standing Committee’s Report effectively answers this argument.<sup>5</sup>

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<sup>3</sup> *Id.* at 49.

<sup>4</sup> *Id.*

<sup>5</sup> Standing Committee Report at 161.

***The argument that “screens fight the presumption inherent in imputed disqualification: that firm lawyers do and should consult with each other.”***<sup>6</sup>

Here we see again the subtle effort by opponents to turn on its head the correct presumption that lawyers will comply with the rules of ethics. If Mary, the personally disqualified and screened lawyer, were to leak, intentionally or inadvertently, Victor Veto’s confidential information to her new colleagues, she would be subject to professional discipline, just as she would have been if she were still at Former Firm, representing Victor Veto, and intentionally or inadvertently leaked Victor’s information. Even the dissenters to the Standing Committee’s proposed amendment “do not dispute the good will of most lawyers who believe that they can establish and maintain effective screens ... But ... law firm systems can break down.”<sup>7</sup> The possibility of systems breaking down in an atmosphere of presumptive trust and good faith of the licensed and regulated lawyer is no basis to turn the presumption around and cynically assume that lawyers will be tempted to violate their oaths.

***The argument that “clients, not lawyers, deserve the right to decide when they will accept screens.”***<sup>8</sup>

This argument proceeds from the erroneous premise that it is always appropriate that the client of Mary’s Former Firm should have an absolute veto. That may be an expedient litigating tactic to get rid of litigators as formidable adversaries and to inconvenience the client of Mary’s New Firm. But what of Charlie, the client of the New Firm? Doesn’t he have the right to the lawyer of his choosing in spite of the

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<sup>6</sup> Martyn & Fox at 51

<sup>7</sup> Report 109 at 166 (Martyn and McCauley, dissenting).

<sup>8</sup> Martyn & Fox at 52

happenstance of Mary’s lateral move, which had nothing to do with the case and despite the fact that Mary will be isolated from the matter? As for Victor Veto, he is protected because the proposed amendment, with its detailed notice requirements, provides him the ammunition to go to court for a judicial disqualification in cases of concern. There is no rational basis for the ethics rules to convert Mary, the presumptively honorable moving lawyer, into “Typhoid Mary,” infecting all of the New Firm lawyers in Charlie’s case.

Opponents argue that the “proposed revision allows law firms to control the free migration of lawyers, *solely* in the interests of lawyers.”<sup>9</sup> That argument is simply dead wrong and should be rejected by the House. The proposed amendment is balanced and fair. I respectfully suggest that it should be adopted.

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<sup>9</sup> *Id.* at 51 (emphasis added)