Lateral Screening after Ethics 2000

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In August 2001, the American Bar Association House of Delegates considered several proposals of the ABA Commission on Evaluation of the Model Rules of Professional Conduct, better known as the Ethics 2000 Commission, to revise the 1983 version of the Model Rules. One of the few proposals rejected by the House at that time was an amendment to Model Rule 1.10 to permit "screening" of private lawyers moving between law firms. (Screening of former government lawyers was already allowed by Model Rule 1.11.) The proposed screening provision would have provided a method to avoid the vicarious disqualification of a lateral lawyer's new firm from a representation adverse to a client of the lawyer's former firm.

The Ethics 2000 Commission Recommendation

During its deliberations, the Commission heard the testimony of lawyers from private law firms about how lateral screening had worked successfully in states like Illinois, Oregon, and Washington that already allowed it, and about the difficulties for clients, lawyers, and law firms in states that did not allow it. The Commission also received evidence from disciplinary authorities in lateral screening states that screening had not produced charges of abuse from clients whose former lawyers were screened from related matters when they joined new firms.

As a result, the Ethics 2000 Commission included the following lateral screening provision in the Model Rule 1.10 it recommended to the House in June 2001:

> (c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:
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> > (1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
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> > (2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

Despite the Commission's recommendation, the House voted 176 to 130 to remove the screening provision from revised Model Rule 1.10. (The total membership of the House at that time was approximately 530. The vote on screening was taken near the end of the last day of the 2001 Annual Meeting in Chicago,

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when many members were on the way to O'Hare.) From the debate before the House, it appeared that most of the opposition to screening of private lawyers moving between law firms was based upon three often repeated assertions: screening allows private lawyers to "switch sides" and harm their former clients; screened private lawyers cannot be trusted; and the courts do not like screening. Upon closer examination, these assertions are simply myths. And, like many myths, the opposite is true.

The Three Myths

Screening Harms Former Clients. The opponents of screening, including the authors of the Commission's Minority Report, take care to label all laterals changing firms as "side-switching" lawyers, implying some unspecified harm to their former firm's clients. That sly characterization is both inaccurate and unfair. With or without screening, the lateral lawyer cannot be personally involved in matters adverse to former clients.

If the lateral lawyer was personally involved in representing a client in a matter at the lateral's former firm, Model Rule 1.9(a) prohibits the lateral from representing another person in the same or a substantially related matter without the former client's informed consent. Even if the lateral was *not* personally involved in a matter for a client of the former firm, Model Rule 1.9(b) prohibits the lateral from being adverse to a client of the former firm in the same matter the former firm handled for that client or in a substantially related matter if the lateral acquired any protected client information material to that matter while at the former firm, again unless the client of the former firm gives informed consent. Finally, Model Rule 1.9(c) prohibits any lawyer, lateral or otherwise, from using protected information to the former client's disadvantage or revealing any protected information learned about a former client of the lawyer or a client of the lawyer's former firm. Thus, the lateral lawyer not only cannot "switch sides," but is expressly prohibited from using or revealing any confidential information learned about any matter handled by the lateral's prior firm.

The opponents of lateral screening know well the prohibitions on personal participation by a lateral lawyer in a matter that either the lawyer was previously involved in or about which the lateral had learned protected confidential information while at the former firm. Yet, they continue to argue misleadingly about "side-switching" lawyers as if the existing rules provided no protection for former clients from such conduct. For example, the Minority Report referred to "side switching" no less than twelve times. But nothing in the Commission's proposal for lateral screening would have changed the existing prohibitions under the Model Rules on a lateral lawyer actually "switching sides."

Lateral screening merely gives the lateral's new firm a way to rebut two traditional presumptions that *impute* the lateral's personal disqualification to *all other lawyers* in the lateral's new firm. The first presumption is that every lawyer in a law firm always knows everything about every matter in which every other

firm lawyer may be involved. This sweeping generalization may have had some basis in fact in the nineteenth century when the presumption first arose, but it makes little sense in the contemporary law firm environment. The second presumption is that lateral lawyers will inevitably disclose damaging confidential information about their former clients to the new firm despite the obligation under every jurisdiction's version of Model Rules 1.6 and 1.9 to protect such information. This presumption is equally unrealistic. Yet the mandatory application of these anachronistic presumptions to all lateral lawyers requires the disqualification of the lateral's new firm from virtually any matter adverse to a client of the former firm regardless of the circumstances.

In the real world, as the Commission learned, actual cases of lateral lawyers disclosing confidential information about former clients to their new firms are nonexistent. While some clients may be upset to learn that "their lawyer," or more commonly a lawyer who formerly worked on a matter handled by the firm that represents the client, has joined a law firm that represents an adverse party, there is no hard evidence that such clients have suffered any real harm. In fact, the evidence presented to the Commission from lawyer disciplinary authorities in states that have long permitted lateral screening confirmed that there have been virtually no complaints of harm to former clients of lateral lawyers who have been screened.

On the other hand, the prohibition of screening causes real harm to the interests of other clients. This point is usually overlooked in the debate over lateral screening. Most of the discussion is focused on the concerns of the clients of the lateral's former firm. While concerns of such clients must surely be considered, those clients are not the only clients involved.

For every imputed disqualification based on the rejection of screening, there is a client that loses its lawyer of choice. And the harm to *this* client is real, not theoretical. Often the disqualification occurs after a matter is well under way and the client has spent substantial sums in fees. Typically, the affected client has played no part in the circumstances that led to the disqualification. Yet the innocent client suffers the cost, disruption, and delay resulting from imputed disqualification.

This myth exalts the alleged anxiety of the former client, imputed on the basis of questionable assumptions, over the real and tangible harm to the innocent second client. This approach is inverted. Lateral screening would provide protection for the legitimate concerns of the clients of the lateral's former firm without inflicting the undeserved punishment of imputed disqualification on the innocent second client.

Lawyers Cannot Be Trusted. A central tenet of the opposition to screening is that lateral lawyers cannot be trusted to preserve the confidences of their former firm's clients. This is an ironic pronouncement from those who claim to be protectors of the profession's probity. Fortunately, their negative opinion of their fellow lawyers has not been reflected in actual experience.

As noted above, the Commission received evidence on screening from practicing lawyers as well as disciplinary authorities in Illinois, Oregon, and Washington, states that had permitted non-consensual screening for approximately a decade. That evidence demonstrated that there was no surge of disciplinary complaints or civil cases against lawyers in those jurisdictions that have permitted screening for many years. In fact, there were virtually no complaints anywhere arising out of the various state screening regimes.

The Minority Report conveniently ignored the experience of the disciplinary agencies and the other evidence received by the Commission. To support its assertion that lateral lawyers cannot be trusted, the Minority Report cited a handful of cases where courts had ordered disqualification of a lateral's new firm in spite of a screen. Ironically, none of those cases involved a finding that a screen was actually breached. Rather, the firms in those cases were disqualified by imposition of the "appearance of impropriety" standard, a concept long abandoned by the Model Rules and most jurisdictions.

The decision in *Clinard v. Blackwood*[1] is typical. In *Clinard*, the Tennessee Supreme Court found that the screening procedure utilized by the firm in question had overcome the presumption of shared confidences, but nevertheless concluded that an "appearance of impropriety" under the Tennessee Code of Professional Responsibility required disqualification under the facts presented.[2] Most important, the Court did not reject lateral screening *per se*, but expressly left "open the possibility that in a particular case, screening procedures may be so effective that even the appearance of impropriety has been eliminated."

The Minority Report also touted the decision in *Maritrans GP Inc. v. Pepper, Hamilton & Sheetz*,[3] a situation where a screen apparently leaked, as additional evidence that screened lateral lawyers should not be trusted. But *Maritrans* is simply not on point. It was not a lateral lawyer situation, but the attempt by a Pennsylvania firm to use a screen to justify the simultaneous representation of two groups of fierce business competitors over the objection of one of the clients.

Indeed, the *Maritrans* situation is remarkable for its rarity. It is also remarkable because, even after *Maritrans*, the Pennsylvania Supreme Court continued to permit lateral screening pursuant to Rule 1.10(b) of the Pennsylvania Rules of Professional Conduct, which the Court first adopted in 1988, and retained when it approved revised ethics rules in January 2005. Unlike the authors of the Minority Report, the *Maritrans* Court obviously was not persuaded by this isolated 1992 case that screened lateral lawyers cannot be trusted.

The Courts Do Not Like Screening. The Commission's Minority Report confidently asserted that the proposed lateral screening rule would be "contrary to

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1. 46 S.W.3d 177 (Tenn. 2001).

2. The "appearance of impropriety" rubric of the 1969 Model Code has never been part of the Model Rules. *See* Comment [5] to 1983 Model Rule 1.9.

3. 602 A.2d 1277 (Pa. 1992).

nearly every case on point." Again, the opposite is true. In fact, the courts have led the way. For example, Peter Moser reported as early as 1999 that the trial and appellate courts in the Second, Third, Sixth, Seventh, Eleventh, and Federal Circuits had recognized and accepted lateral screening in appropriate situations even when otherwise applicable state ethics rules would not have allowed lateral screening.[4]

The Seventh Circuit suggested elements of an acceptable screen more than 20 years ago in *LaSalle National Bank v. County of Lake*,[5] seven years before the Illinois screening rule was adopted. Other examples where district courts recognized screening of laterals with material information without an express state rule include: *Hunter Douglas, Inc. v. Home Fashions, Inc.*[6] (firm not disqualified even though lateral lawyer had formerly represented plaintiff with respect to patent involved in litigation where lateral had been effectively screened from case); *Chapman v. Chrysler Corp.*[7] (firm that hired associate who had worked on plaintiff's employment claim that was subject of pending action not disqualified where firm had adopted timely screening mechanisms); and *Nemours Foundation v. Gilbane*[8] (appropriate screening procedure rebuts presumption of shared confidences). Thus, neither *Clinard* nor the other cases offered by the Minority Report support the assertion that "nearly every case" is opposed to lateral screening.

The Need for Lateral Screening

Disproving the anti-screening mythology is only part of the case for lateral screening. There are other substantial reasons for permitting lateral screening, reasons that have caused at least 18 states to adopt some form of lateral screening rule [*see* Attachment A]. Briefly, these reasons include: avoiding undue and unnecessary restrictions on the mobility of lawyers; ending unfair discrimination against private lawyers; and avoiding undue and unnecessary delay and expense to the courts and uninvolved parties.

Lawyer Mobility. Most authorities agree that lawyers of all ages are now changing affiliations more often than in the past. There appear to be many reasons for this phenomenon, including lawyers who are seeking greater autonomy, more career opportunity, and even higher compensation. Other factors might be family relocations in two-worker households or a desire for more flexible hours. But not all the migration has been voluntary.

In the past decade, the nation's legal profession has experienced a steady stream of law firm downsizings and dissolutions in every region. These events have forced the relocation of thousands of lawyers. In addition, there are always

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4. *See* M. Peter Moser, *Screening of Personally Disqualified Lawyers to Avoid Law Firm Disqualification Should Be More Widely Employed*, 1999 SYMPOSIUM ISSUE OF THE PROFESSIONAL LAWYER 159 (1999).

5. 703 F.2d 252, 259 (7th Cir. 1983) (an appeal from a district court in Illinois).

6. 811 F.Supp. 566 (D. Colo. 1992).

7. 1999 U.S. Dist. LEXIS 9768, 1999 WL 444507 (S.D. Ind. April 28, 1999).

8. 632 F. Supp. 418 (D. Del. 1986).

a certain number of involuntary separations that cause lateral moves among law firms. Whatever the causes of the migration, the inflexible application of the rules of imputed disqualification without recognition of appropriate screening unduly restricts the ability of this large group of private lawyers to find new positions. As discussed above, this restriction is based primarily on a concern for "appearances," rather than any real evidence that lateral private lawyers cannot be trusted or former clients will be harmed.

Unfair Discrimination. Model Rule 1.11 expressly approves screening for former government lawyers. There is no principled reason for restricting lateral screening to former government lawyers. The usual justification for permitting screening in this context is given in Comment [4] to Model Rule 1.11, which states that the screening provision is "necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service." While the opponents of lateral screening appear willing to tolerate screening to encourage mobility between public and private employment, they are not similarly concerned for the livelihood of private lawyers. Handicapping the ethics rules to encourage or favor one type of practice, however noble, is simply unfair.

This discrimination is also illogical. It has never been suggested that government lawyers are any more (or any less) virtuous than private lawyers. If private lawyers and government lawyers are equally trustworthy, then they should be trusted equally. If government lawyers can be trusted to comply with screening rules, then private lawyers can be trusted to do so as well.

The discrimination does not stop with former government lawyers. Like Model Rule 1.11, Model Rule 1.12 provides for the screening of lawyers who are former judges, arbitrators, mediators, and law clerks to prevent imputed disqualification of their new law firms in matters in which they participated personally and substantially. Unlike Model Rule 1.11, the comments to this rule do not offer the rationale for allowing screening of former judges, arbitrators, mediators, and law clerks. In addition, temporary or "contract" lawyers may be screened to prevent vicarious disqualification of the next firm when such lawyers move among firms, according to ABA Formal Opinion 88-356 (December 16, 1988).

Even less logical is the discrimination between lateral lawyers and nonlawyers. All authorities appear to agree that nonlawyer law firm employees who possess protected client information and change firms can cause the second firm to be disqualified. Unlike lawyers, nonlawyer employees have no personal professional duty to protect confidential client information. Nevertheless, Comment [4] to Model Rule provides that such persons may be screened to prevent the disqualification of the second firm. And a substantial majority of states, including many that do not recognize lateral lawyer screening, nevertheless allow screening of nonlawyers to prevent disqualification. For example, the new Nebraska rules provide that a nonlawyer "support person" may be screened to prevent imputed disqualification of the support person's new firm,[9] but Nebraska does not permit screening of lateral lawyers.

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9. *See* Nebraska Rules of Professional Conduct, R. 1.9(e).

If screening is acceptable for former government lawyers, former judges, law clerks, arbitrators, mediators, contract lawyers, paralegals, and secretaries, it should be acceptable in typical private lawyer lateral movement situations.

Unnecessary Delay and Expense. As noted above, for every vicarious disqualification resulting from the rejection of lateral screening, there is another client that loses its lawyer of choice. Although the other client usually had nothing to do with the circumstances causing the disqualification, the innocent other client must then replace its chosen counsel who may have worked months or even years on the matter before the disqualification. Even if the disqualified firm is allowed to share all or part of its work product with successor counsel, there will be significant disruption and additional expense to the other client, as well as delay for all litigants and the court.

Tactical disqualification motions also put a heavy burden on the courts. Enormous amounts of lawyer and judicial time and energy are expended in resolving disqualification motions that usually have nothing to do with the merits of the case; and clients must bear these additional costs. The necessity of dealing with such motions also inevitably delays the resolution of pending matters. The cost and burden of dealing with such motions may well be the reason that the Seventh Circuit and other courts proposed, more than 20 years ago, lateral screening as a sensible solution for the wasteful practice of tactical disqualification motions.

The Future of Lateral Screening

Attachment A to this paper is a chart adapted from the 2006 edition of the ALAS Loss Prevention Manual that shows the status of screening rules in the 50 states and the District of Columbia as of May 2006. Eleven states (Delaware, Illinois, Kentucky, Maryland, Michigan, Montana, North Carolina, Oregon, Pennsylvania, Utah, and Washington) currently have rules that permit the screening of lateral lawyers regardless of the screened lawyer's level of knowledge or degree of involvement in the matter at the former firm. Most, but not all, of these rules require some form of notice to the former client, and most also require that no portion of the fee generated by the matter in question be paid to the screened lawyer.

At least eight other states have rules that limit the lateral lawyers who may be screened. Some of these limitations are based on the lateral lawyer's presumed level of knowledge. Massachusetts, for example, provides that a lateral may be screened only if the lawyer "had neither substantial involvement nor substantial material information relating to the matter."[10] In Minnesota, lateral screening is not available unless "any confidential information communicated to the lawyer [about the matter at the former firm] is unlikely to be significant in the subsequent matter."[11] Because the rules give no useful guidance to law firms, case law is developing in both Massachusetts and Minnesota on what constitutes "substantial information" and what information is "unlikely to be significant" in actual practice.

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10. *See* Massachusetts Rules of Professional Conduct, R. 1.10(d).
11. *See* Minnesota Rules of Professional Conduct, R. 1.10(b).

Other states attempt to define the limitation by the lateral lawyer's level of involvement in the prior matter. In Arizona, for example, lateral screening is unavailable only if "the personally disqualified lawyer had a substantial role" in the matter at the former firm.[12] In Nevada, lateral screening is not available if the personally disqualified lawyer had either "a substantial role in or primary responsibility for" the matter in question.[13] Tennessee imposes a tri-partite test that disallows lateral screening if (1) the lateral "was substantially involved in the representation of a former client," (2) the prior representation was a litigation matter directly adverse to a current client of the hiring firm, and (3) that litigation matter is still pending.[14]

Overall, the states appear to be moving gradually toward a greater acceptance of lateral screening, but the power of myth remains strong. Of the 24 states that have, as of May 2006, adopted new or revised rules since the publication of the report of the Ethics 2000 Commission, only four states (Delaware, Montana, North Carolina, and Utah) that did not already have a screening rule followed the Commission's original proposal. Four other states (Arizona, Indiana, Nevada, and New Jersey) adopted a limited screening rule. But 11 states that adopted new or revised rules since Ethics 2000 (Arkansas, Florida, Idaho, Iowa, Louisiana, Mississippi, Nebraska, South Carolina, South Dakota, Virginia, and Wyoming), and did not already have a lateral screening rule, rejected the concept of screening entirely. However, the revision process is still in progress in more than half the jurisdictions, so there is still opportunity for meaningful change.

Conclusion

The three myths involved in the defeat of the Ethics 2000 Commission lateral screening proposal in the ABA House of Delegates do not survive real-world scrutiny. Regrettably, however, the inordinate concern for keeping up appearances seems to have kept several states that were revising their rules in light of Ethics 2000 from adopting sensible lateral screening rules. The lack of meaningful lateral screening has caused real harm to innocent clients, needlessly impaired the professional mobility of countless lawyers, and continues to burden the courts with pointless posturing. If the states that are still considering amendments to their ethics rules are guided by reality rather than myth, they will conclude that the Commission got it right on lateral screening.

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12. *See* Arizona Rules of Professional Conduct, R. 1.10(d).
13. *See* Nevada Rules of Professional Conduct, R. 1.10(e).
14. *See* Tennessee Rules of Professional Conduct, R. 1.10(d).

Attachment A

ALAS Chart on Lateral Lawyer Screening

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The following chart analyzes in summary form the provisions of the various state versions of the ABA Model Code of Professional Responsibility and the ABA Model Rules of Professional Conduct on the issue of imputed disqualification and the efficacy of an "ethical wall" without client consent.

The chart indicates, with appropriate citations, whether, in the case of movement from one law firm to another by a lawyer who is personally disqualified from a matter because of his or her participation in it at the previous firm, the second firm can avoid the general imputed disqualification rule by constructing an "ethical wall" or similar screening device. A "No" answer to that question on the chart means that the "ethical wall" or screening device is not sufficient by itself, and that, in addition to the ethical wall, the firm to which the lawyer is moving must seek and obtain the consent of the previous firm's client if the second firm is acting as counsel in the matter adverse to the previous firm's client. This must be done before the disqualified lawyer begins work at the new firm. Failure to recognize this rule and obtain consent of the previous firm's client ordinarily will subject the second firm to immediate disqualification. If that happens, a malpractice claim by the second firm's client is likely.

We emphasize that this chart and the subsequent notes deal only with movement from one private firm to another. In the case of a new lawyer who is a former member of the executive or judicial branch of government, some form of effective screening device is usually acceptable.

Jurisdiction	Applicable Rules	Screening by Rule?	Rule Provision
AL	Rules of Professional Conduct	No	1.10(b)
AK	Rules of Professional Conduct	No	1.9(b) and 1.10(a)
AZ	Rules of Professional Conduct	Limited	1.10(d)
AR	Rules of Professional Conduct	No	1.9(b) and 1.10(a)
CA	Rules of Professional Conduct	No	
CO	Rules of Professional Conduct	No	1.9(b) and 1.10(a)
CT	Rules of Professional Conduct	No	1.10(b)
DE	Lawyers' Rules of Professional Conduct	Yes	1.10(c)
DC	Rules of Professional Conduct	No	1.10(b)
FL	Rules of Professional Conduct	No	4-1.10(b)
GA	Rules of Professional Conduct	No	1.9(b) and 1.10(a)
HI	Rules of Professional Conduct	No	1.9(b) and 1.10(a)
ID	Rules of Professional Conduct	No	1.10(b)
IL	Rules of Professional Conduct	Yes	1.10(b)(2) and 1.10(e)
IN	Rules of Professional Conduct	Limited	1.10(c)
IA	Rules of Professional Conduct	No	32:1.10
KS	Rules of Professional Conduct	No	1.10(b)
KY	Rules of Professional Conduct	Yes	1.10(d)

LA	Rules of Professional Conduct	No	1.10(b)
ME	Code of Professional Responsibility	No	3.4(k)
MD	Rules of Professional Conduct	Yes	1.10(c)
MA	Rules of Professional Conduct	Limited	1.10(d)(2)
MI	Rules of Professional Conduct	Yes	1.10(b)(1)
MN	Rules of Professional Conduct	Limited	1.10(b)
MS	Rules of Professional Conduct	No	1.10(b)
MO	Rules of Professional Conduct	No	1.10(b)
MT	Rules of Professional Conduct	Yes	1.10(c)(1)
NE	Rules of Professional Conduct	No	1.10(a)
NV	Rules of Professional Conduct	Limited	1.10(e)
NH	Rules of Professional Conduct	No	1.10(b)
NJ	Rules of Professional Conduct	Limited	1.10(c)
NM	Rules of Professional Conduct	No	16-110(B)
NY	Code of Professional Responsibility	No	5-105(D) and 5-108
NC	Rules of Professional Conduct	Yes	1.10(c)
ND	Rules of Professional Conduct	Limited	1.10(b)
OH	Code of Professional Responsibility	No	5-105(D)
OK	Rules of Professional Conduct	No	1.10(b)
OR	Rules of Professional Conduct	Yes	1.10(c)
PA	Rules of Professional Conduct	Yes	1.10(b)(1) and (2)
RI	Rules of Professional Conduct	No	1.10(b)
SC	Rules of Professional Conduct	No	1.9(b) and 1.10(a)

SD	Rules of Professional Conduct	No	1.9(b) and 1.10(a)
TN	Rules of Professional Conduct	Limited	1.10(c) and (d)
TX	Disciplinary Rules of Professional Conduct	No	1.09(b)
UT	Rules of Professional Conduct	Yes	1.10(c)
VT	Rules of Professional Conduct	No	1.9(b) and 1.10(a)
VA	Rules of Professional Conduct	No	1.9(b)
WA	Rules of Professional Conduct	Yes	1.10(b)
WV	Rules of Professional Conduct	No	1.10(b)
WI	Rules of Professional Conduct for Attorneys	No	20:1.10(b)
WY	Rules of Professional Conduct	No	1.10(b)