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AMERICAN BAR ASSOCIATION

SECTION OF LITIGATION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, That the American Bar Association amends Model Rule of Professional Conduct 1.10 and its related Comments to add new subsections (e) and (f) to read as follows:

Rule 1.10 Imputation of Conflicts of Interest: General Rule

(e) When a lawyer becomes associated with a firm, the firm may not undertake to or continue to represent a person in a matter that the firm knows or reasonably should know is the same or substantially related to a matter in which the newly associated lawyer (the "personally disqualified lawyer"), or a firm with which that lawyer was associated, had previously represented a client whose interests are materially adverse to that person unless:

(1) the personally disqualified lawyer has no information protected by Rule 1.6 or Rule 1.9 that is material to the matter ("material information"); or

(2) the personally disqualified lawyer (i) had neither substantial involvement nor material information relating to the matter and (ii) is screened immediately from any participation in the matter in accordance with paragraph (f) of this Rule and is apportioned no part of the fee therefrom.

(f) For the purposes of paragraph (e) of this Rule, a personally disqualified lawyer in a firm will be deemed to have been screened from any participation in a matter if:

(1) all material client information possessed by the personally disqualified lawyer has been isolated from the firm;

(2) the personally disqualified lawyer has been isolated from all contact relating to the matter with the client and any witness for or against the client;

(3) the personally disqualified lawyer and others in the firm have been instructed not to discuss the matter with each other;

(4) the former client of the personally disqualified lawyer or of the firm with which the personally disqualified lawyer was associated receives notice of the conflict and an affidavit of the personally disqualified lawyer and the firm describing the procedures being used effectively to screen the personally disqualified lawyer, and attesting that (i) the personally disqualified lawyer will not participate in the matter and will not discuss the matter or the representation with any other lawyer or employee of his or her current firm, (ii) no material information was transmitted by the personally disqualified lawyer before implementation of the screening procedures and notice to the former client; and (iii) during the period of the lawyer's personal disqualification those lawyers or employees who do participate in the matter will be apprised as they become involved in the matter and on a periodic basis thereafter that the personally disqualified lawyer is screened from participating in or discussing the matter; and

(5) the personally disqualified lawyer and the firm with which he is associated reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the firm and its client.

(g) In any matter in which the former client and the person or entity being represented by the firm with which the personally disqualified lawyer is now associated are not before a tribunal, the firm, the personally disqualified lawyer, or the former client may seek judicial inquiry of the screening procedures used, or may seek court supervision to ensure that implementation of the screening procedures has occurred and that effective actual compliance has been achieved.

Comment

[8] Paragraphs (e) and (f) of Rule 1.10 apply when a lawyer moves from a private firm to another firm and those paragraphs are intended to create procedures similar in some cases to those under Rule 1.11(b) for lawyers moving from a government agency to a private firm. Paragraphs (e) and (f) of Rule 1.10, unlike the provisions of Rule 1.11, do not permit a firm, without the consent of the former client of the disqualified lawyer or of the disqualified lawyer's firm, to handle a matter with respect to which the disqualified lawyer was personally and substantially involved, or had material information, as noted in Comment 11 below. Like Rule 1.11, however, Rule 1.10(e) can only apply if the lawyer no longer represents the client of the former firm after the lawyer arrives at the lawyer's new firm.

[9] If the lawyer has no confidential information about the representation of the former client, the new firm is not disqualified and no screening procedures are required. This would ordinarily be the case if the lawyer did no work on the matter and the matter was not the subject of discussion with the lawyer generally, for example at firm or working group meetings. The lawyer must search his or her files and recollections carefully to determine whether he or she has confidential information. The fact that the lawyer does not immediately remember any details of the former client's representation does not mean that he or she does not in fact possess confidential information material to the matter.

[10] If the lawyer does have material information about the representation of the client of his former firm, the firm with which he or she is associated may represent a client with interests adverse to the former client of the newly associated lawyer only if the personally disqualified lawyer had no substantial involvement with the matter and received no substantial material information about the matter, the personally disqualified lawyer is apportioned no part of the fee, and all of the screening procedures are followed, including the requirement that the personally disqualified lawyer and the new firm reasonably believe that the screening procedures will be effective.

[11] In situations where the personally disqualified lawyer was substantially involved in a matter, or had material information, the new firm will only be allowed to handle the matter if the former client of the personally disqualified lawyer or of the law firm provides informed consent and the firm reasonably believes that the representation will not be adversely affected, all as required by Rule 1.7.

[12] The former client is entitled to review of the screening procedures if the former client believes that the procedures will not be or have not been effective. If the matter involves litigation, the court before which the litigation is pending would be able to decide motions to disqualify or to enter appropriate orders relating to the screening. If the matter does not involve litigation, the former client can seek judicial review of the screening procedures from a trial court.

[13] Paragraph (e) (2) 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.

RULE 1.10 REPORT

The fiduciary duties of loyalty and confidentiality are not mere artifacts of history, but rather define as enduring values the very heart of the lawyer-client relationship. And there is no more important guarantor that these fiduciary duties are fulfilled than the principle that the profession imputes conflicts of interest from one lawyer to every other lawyer in that lawyer's law firm or practice setting. That principle protects clients – the very purpose of our rules – in two respects. First, it assures clients they do not have to worry that their confidential information will be used against them, for example, when the client's lawyer leaves the client's firm and goes to work for the law firm adverse to the client. Second, it gives the client, on whose behalf the lawyer acts, the right to decide whether to provide informed consent to waive the conflict of interest. In other words, the client has the sole discretion to weigh factors such as trust in the former lawyer and trust in the former lawyer's new law firm.

These principles are enshrined in Model Rule of Professional Conduct 1.10, a rule that fosters client confidence, client autonomy, and, for lawyers, the fulfillment of their fiduciary duty of loyalty.

Last August, the Standing Committee on Ethics and Professional Responsibility ("Ethics Committee") brought a Report and Recommendation to the ABA House of Delegates that would have undermined these principles. Report 114, ABA Annual Meeting, (2008). That proposal went so far as to allow the client's principal lawyer to withdraw from the representation midstream and go to work for the firm adverse to the client. The lawyer would not be required to consult at all with the former client, but merely to inform the client that the client did not have a thing to worry about because there was a screen. The rule provided neither for the seeking of a waiver nor for the informed consent of the client. The rule simply gave the client no choice but to accept screening as a fait accompli. The result would have been an assault on client loyalty that, on the 100th anniversary of the ABA's adoption of the first canons of ethics, appeared to the Section of Litigation as an inexplicable and unacceptable compromise of these fiduciary duties, as they are implemented by our rules.

That August proposal was deferred by the House on a motion by the Section of Litigation, a motion not on the merits, but rather offered because the House was being asked to approve amendments to the Report and Recommendation that delegates only received the morning of the vote and, then, not in writing. Since then, the Section of Litigation hoped that the Standing Committee would have reconsidered its approach, persuaded by the testimony of the witnesses who appeared at the Committee's public hearings on this topic to testify about the need to protect clients consistent with present Model Rule 1.10. Nonetheless, the Committee is bringing back to the House a nearly-identical Report and Recommendation that retains the key provisions permitting wholesale involuntary screening.

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Under the proposal submitted by the Standing Committee on Ethics and Professional Responsibility, a lawyer who could well be the lead lawyer, the most well-informed associate, the lawyer who sat in on the key strategy sessions or participated in the preparation of the client for his or her deposition, the lawyer who knows the client's bottom line, greatest fears and fondest hopes, can go to work for the firm representing the client's adversary. This could happen even in situations where the client heard the lawyer, or others in the firm, characterize the opposing counsel during the representation as unethical or untrustworthy, or the client was forced to pay for motions to compel production of documents, motions for violations of Rule 11, or motions for sanctions for failure to comply with court orders. Yet that new firm, with the client's former lawyer now on board but behind a "screen" that the client neither understands nor has any reason to trust, may continue the representation adverse to the firm-switching lawyer's former client!

It is true the new proposal from the Ethics Committee (unlike the original) attempts to add some procedural requirements to involuntary screening (procedural requirements this Recommendation also adopts). But the result is the same: the client is presented with a side-switching lawyer and told, "Don't worry; there's a screen."

The Litigation Section opposed the Ethics Committee's August 2008 Report and Recommendation. And it was prepared to oppose this one. But it is the sense of the Litigation Section that the House would welcome an opportunity to strike a middle ground, to provide some relief from the rule of imputation for those lateral moving lawyers, but only those lawyers whose involvement in the matter and access to confidential client information was not, respectively, significant or material. Indeed, when the Ethics Committee offered its August 2008 proposal, it relied in large part on the fact that there were at least ten jurisdictions that permitted involuntary screening, but only if the lawyer's prior role on behalf of the client was significantly limited.

With this background, the Litigation Section surveyed the current landscape of Rule 1.10 alternatives that provide more protection for former clients absent providing the client with an opportunity for informed consent to the screen. That review led to the conclusion that the best formulation of an alternative – if one there need be – was that adopted in 1998 by the Supreme Judicial Court of the Commonwealth of Massachusetts, with some very slight changes. Massachusetts Rule of Professional Conduct 1.10 specifically recognizes that some lesser level of participation and, equally important, lesser exposure to confidential information, could create conditions where the compromise of client loyalty in the name of lawyer convenience would be appropriate if certain other modest procedural safeguards – notices to the former client, affidavits from the affected lawyers – were put in place.

Accordingly, the Section of Litigation urges the ABA House of Delegates to amend Model Rule 1.10, as provided in the Recommendation set forth above. This new rule will preserve the client's autonomy in those situations in which the client might experience high anxiety as a result of the client's former lawyer going to work for the firm on the other side. The

client will have to be consulted. The client will have to be informed. And the client will be asked, at the client's discretion, to provide or withhold the client's informed consent. Client peace of mind will still trump lawyer mobility.

This rule, however, will also capture the examples proponents of Report 109, ABA Mid-Year Meeting, (2009), always use to support adoption of their proposal. For the lawyer whose role was marginal (think the associate who researched a discovery motion), whose participation was very limited (think the summer associate with a minor research memorandum), whose exposure to confidential information was immaterial (think a guru partner consulted on her view of the judge), this rule would provide that the lawyer could go to work for the law firm on the other side without regard to client consent. In this way the proposed rule strikes the proper balance between client loyalty and lawyer mobility in the one area where the profession can honestly say that the respective interests do fairly compete.

We hope the ABA House of Delegates will adopt this alternative Rule 1.10 in the spirit it is offered.

Robert Rothman
Chair
Section of Litigation
February 2009

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General Information Form

1. Briefly summarize the Recommendation.

This Recommendation would amend Model Rule of Professional Conduct 1.10 to permit certain lawyers whose participation was not significant and who did not learn material confidential information to go to work for an adversary law firm without client consent so long as the transferring lawyer is screened and provides appropriate certification of compliance with the screen.

2. Indicate whether the Recommendation was approved or when it will be considered by the governing body of the submitting entity, which has or will approve, and the date of such action. If the vote was taken other than at a regularly scheduled meeting of the governing body, describe the procedure.

The Recommendation was approved by the Section of Litigation Council on November 17, 2008 at a duly scheduled telephonic meeting.

3. If this or a similar Recommendation has been submitted previously to the House of Delegates or the Board of Governors, please include all relevant information – summary of the Recommendation, when and before what group the Recommendation was considered, and what action or position was taken on the matter.

Recommendations proposing a much more expansive use of involuntary screening without client consent were submitted to the House of Delegates by the American Bar Association Commission for the Evaluation of Rules of Professional Conduct in 2001 and by the American Bar Association Standing Committee on Ethics and Professional Responsibility in August 2008. The August 2008 proposal was tabled on motion of the Section of Litigation.

4. Are there any existing Association policies which are relevant to this Recommendation, and if so, how would they be affected by the adoption of this Recommendation?

Existing American Bar Association policy is found in current Rule 1.10 of the Model Rules of Professional Conduct. This Recommendation would substitute a new rule for the existing rule.

5. Explain what urgency exists which requires that action on this matter be taken at this meeting. If deferral is acceptable, note the time by which action is necessary.

No urgency exists with respect to the Recommendation, so long as this Report and Recommendation is considered contemporaneously with any other proposed change to Rule 1.10.

6. If the Recommendation is a legislative resolve, indicate the current status in the Congress.

Not applicable.

7. If adoption of the Recommendation would result in expenditures, estimate the funds necessary, suggest the anticipated source for funding, and list proposed direct and indirect costs. Indirect costs include those such as staff time or administrative overhead.

Not applicable.

8. Review the background of the proponents of the Recommendation to determine if there are potential conflicts of interest. If one is found, list by name those proponents who have a material interest in the subject matter of the Recommendation because of specific employment or representation of clients. Note all individuals who abstained from discussing or voting on the Recommendation because of a conflict of interest.

None.

9. List the sections, committees, bar associations or affiliated entities to which the Recommendation has been referred, the date of the referral, and the response of each group, if known.

On December 2, 2008, the Section of Litigation's Delegates to the ABA House of Delegates sent Report and Recommendation 110 to all other Section Delegates through the SOC Delegates listserv, and discussed this Report on a SOC Delegates call. Further, on December 3, 2008, the Chair of the Section of Litigation, Robert Rothman, sent a copy of Report and Recommendations 110 to the Chair of the Standing Committee on Ethics and Professional Responsibility. On December 10, 2008, the Director of the Section of Litigation forwarded an electronic copy of Report and Recommendations 110 to the Directors of all ABA Sections and Divisions notifying them of the Section's Report and Recommendation 110, and soliciting support for this Report.

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10. Indicate the name, address and telephone number of the person who should be contacted prior to the meeting concerning questions about the report.

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11. Indicate the name of the person who will present the report to the House and who should be contacted at the meeting when questions arise concerning its presentation and debate. Please be sure to include email addresses and cell phone numbers for your on-site contacts.

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Executive Summary

1. Summary of the Recommendation;

This Recommendation would amend Model Rule of Professional Conduct 1.10 to permit certain lawyers whose participation was not significant and who did not learn material confidential information to go to work for an adversary law firm without client consent so long as the transferring lawyer is screened and provides appropriate certification of compliance with the screen.

2. Summary of the issue which the Recommendation addresses;

The issue addressed by this Recommendation is the extent to which the normal rule of imputation of conflicts of interest to all lawyers in a law firm should be relaxed for certain lawyers who transfer from one firm to another without seeking a client consent to what otherwise would be a disqualifying conflict of interest.

3. An explanation of how the proposed policy position will address the issue; and

This Recommendation would permit such transfers without client consent so long as the transferring lawyer is screened and the transferring lawyer did not play a significant role in the matter and does not possess material client confidential information.

4. A summary of any minority views or opposition which have been identified.

The Standing Committee on Ethics and Professional Responsibility will offer a Report and Recommendation that would permit such a transferring lawyer to switch firms without client consent and without regard to the role of that lawyer in the matter or quantum of confidential information that lawyer possesses.