January 19, 2009

Lucian T. Pera
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Dear Lucian:

I strongly support the proposed Amendment to Model Rule 1.10, limiting the scope of imputed disqualification for lawyers moving from one practice setting to another. The proposed Amendment has abundant safeguards for former clients, if anything ones more complicated than necessary. I respect the concerns of those opposing the change, particularly Larry Fox. However, in the structure of law practice as it has become and will evolve, in my judgment change in the Rule is well advised.

Today lawyers during their careers, as everyone knows, move between practice settings, typically three or more times in their first 10 years of practice and often once or twice thereafter. Sometimes a lawyer's move is by himself or herself, sometimes in a group, for example breaking off to form another firm or moving to another. Other movements are in and out of corporate law departments and government.

Some of the strictures of the present conflict rules, not only Rule 1.10 but also 1.7, are routinely eliminated or reduced by "contract." Thus, lawyers will take on X Company as a client only if it is agreed in advance that future representations will be precluded only in related matters, or only concerning the immediately involved lawyers, or concerning identified categories of matters. These arrangements have had generally satisfactory results as far as I know. (Vague or sweeping "Advance Waivers" are more troublesome, and I counsel against them.) The movements in and out of government, under Rule 1.11 and 1.12, have enjoyed greater latitude, again with generally satisfactory results as far as I know.

General economic conditions and continuing rapid change in practice contours will almost certainly impel even more frequent "lawyer movement." The profession has adjusted to other changes in conditions and can handle the one in the proposed Amendment. Fifty years ago, when I entered law practice, many of my cohorts and I tacitly assumed we would be permanent in our initial practice settings. The firm's seniors made the same assumption, allowing for change on account of an associate's unsatisfactory performance or unhappiness. Even then, however, permanent affiliation was an illusion. Of the six or eight juniors I can remember in that firm, I think only three stayed to partnership.

Going back further, young aspirants to our profession became lawyers through apprenticeship, not law school. Upon admission most were junior associates with established practitioners. Those affiliations were then generally indulged except case-by-case, but they would have disqualifying effect today. The definite concept of "imputation" now codified in Rule 1.10 is a development since 1900. The initial 1969 draft of the Model Rules of Professional Conduct did not address the subject. See Wolfram, Modern Legal Ethics §7.6.

In my judgment further adjustment is called for.

Best wishes.

Geoffrey C. Hazard, Jr.,
Distinguished Professor of Law
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