Report and Recommendation of NYCLA’s Ethics Institute Regarding Proposed Amendment of Rule 1.10(e) of the Model Rules of Professional Conduct

This Report was approved by the Board of Directors of the New York County Lawyers’ Association at its regular meeting on November 17, 2008.

Introduction

This report will set forth the arguments in favor of and against the most recent proposal made to the American Bar Association to amend Rule 1.10(e) of the Model Rules of Professional Conduct (the “Model Rules”), as well as Comments [9] and [12] thereto (collectively, the “Proposed Amendment”).

The Proposed Amendment is authored by the ABA’s Standing Committee on Ethics and Professional Responsibility (“ABA Ethics Committee”). It is the most recent proposal by the ABA Ethics Committee to deal with the issue of screening attorneys moving laterally from one law firm to another and seeking to avoid the imputation of conflicts as a consequence of the application of Model Rule 1.10. As in previous proposals, the ABA Ethics Committee seeks to offer the firm to which the lateral partner moves the opportunity to employ an ethical screen (sometimes called a “Chinese Wall”) as a device to avoid the imputation of conflicts of interest by reason of Model Rules 1.9 and 1.10.

New York has not yet adopted the Model Rules as a basis for governance of the professional conduct of New York-licensed lawyers. However, the provisions of the Code of Professional Responsibility as it currently exists in New York are substantially similar to the Model Rules insofar as conflicts of interest and their imputation are concerned (See: Disciplinary Rules 5-105 and 5-108). The New York State Bar Association has, with the support of the NYCLA, among others, recommended the adoption of the Model Rules in place of the Code of Professional Responsibility, with certain adjustments suitable for New York practice. That recommendation includes adoption of Model Rules 1.7, 1.9, 1.10 and 1.11, which are the Model Rules most relevant to this subject.

The author of this report recommends that NYCLA support the ABA Ethics Committee’s Proposed Amendment with the qualifications set forth in the conclusion below.
The Proposed Amendment is as follows.

RESOLVED, that the American Bar Association adopts the following amendment to Model Rule of Professional Conduct 1.10:

Imputation of Conflicts of Interest: General Rule

* * *

(e) notwithstanding paragraph (a), and in the absence of a waiver under paragraph (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:

(1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice, including a description of the screened lawyer’s prior representation and of the screening procedures employed, and a statement that review may be available before a tribunal, is promptly given to any affected former client to enable the former client to ascertain compliance with the provision of this Rule.

* * *

Comment

* * *

[9] When the conditions of paragraph (e) are met, no imputation of a lawyer’s disqualification occurs, and consent to the new representation is therefore not required by these rules. Lawyers should be aware, however, that tribunals may impose more stringent obligations in ruling upon motions to disqualify a lawyer from pending litigation, and may disqualify counsel notwithstanding compliance with paragraph (e) if screening will not adequately protect client confidences or otherwise avert the harms against which paragraph (a) protects.

[10] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (e)(1) 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.

[11] Notice generally should be given as soon as practicable after the need for screening becomes apparent.

[12] “Tribunal,” defined in Rule 1.0(m), includes any adjudicative body. In matters pending before a tribunal, review of screening procedures may be available, whether or not the matter is pending before a tribunal, by filing an action in court or by complaint to a disciplinary authority.

1. Background and History

(a) The Current Proposed Amendment

On April 11, 2008, the ABA Ethics Committee circulated its proposal to amend Model Rule 1.10 by adding subdivision (e). The proposed subdivision was intended to permit screening of lateral lawyers to avoid imputation of conflicts of interest. That proposal was submitted to the ABA House of Delegates at its 2008 Annual Meeting. Notwithstanding the support it had received by the ABA Ethics Committee and local bar committees, consideration of the proposal was postponed by a vote of 192 to 191 of the Delegates. The Proposed Amendment, which is the revised version of the ABA Ethics Committee’s previous proposal, is intended to be presented at the 2009 Midyear Meeting of the ABA after further review and comments by interested parties such as NYCLA.

(b) The Model Rules Already Authorize Ethical Screens in Various Situations

In 1975, the ABA Ethics Committee confronted the question of imputed disqualification of former government attorneys who had moved laterally from their employment by a government agency to a law firm practicing in the private sector. ABA Formal Opinion 342 (1975) recognized that the use of ethical screens between such lawyers moving from government employment and the rest of the firm he or she joined would relieve the latter of imputed disqualification. The opinion was followed by Kesselhaut v. United States, 214 Ct. Cl. 124, 555 F.2d 791, 792-3 (Ct. Cl. 1977) and ultimately was embodied in Model Rule 1.11 See: Bateman, “Return to the Ethics Rules as a Standard for Attorney Disqualification: Attempting Consistency in Motions for Disqualification by the Use of Chinese Walls,” 33 Duq. L. Rev. 249, 258-260) (hereinafter “Bateman”); Fox and Martyn, Red Flags : A Lawyer’s Handbook on Legal Ethics (2005) 187 (hereinafter Fox and Martyn.)

The justification for Rule 1.11 and Opinion 342 was based on public policy as described in Fox and Martyn at 187:

Because we want to encourage lawyers to work in public service and not become so many Typhoid Marys when they look for post-government employment (employment which most
likely would be with the firms that most often appear before the
government) the rules craft this exception [i.e. Model Rule 1.11] to
the normal treatment of the side-switching lawyer.

In 1988, confronted with the relatively new practice of what came to be described as the
engagement by law firms of “temporary lawyers” (i.e., short-term hirings to fulfill specific
purposes), the ABA Ethics Committee in its Formal Opinion 88-356 (1988):

    . . . [A]cknowledged that the use of temporary
attorneys was growing rapidly. The opinion also
acknowledged that applying the ABA’s traditional view of
imputed disqualification meant that many firms would be
prohibited from using temporary attorneys. To resolve the
problem, the ABA opinion permitted [by screening] the
isolation of the temporary attorneys from the rest of the firm
to avoid conflicts. (Bateman at 260)

As Bateman also points out at 260:

    The acceptance of a screening defense [to a claim of conflict of
interest] for temporary attorneys has been significant. Unlike the
screening of former government attorneys . . . the screening of
temporary attorneys avoids the public policy argument upon which
the government relied. Instead, the opinion is based on the realities
of the legal profession. When viewed together, Formal Opinions
342 and 88-356 provide a good foundation for the argument that a
screening defense should be allowed for full time, nongovernment
attorneys, so long as the screen is effective.

That pattern of authorizing screening as a means of avoiding disqualification of law firms
has been more recently continued in the adoption of Model Rule 1.18 dealing with discussions
between prospective clients and lawyers as to the latter’s potential engagement. Again, effective
screening was declared appropriate to relieve a law firm of the consequences of what otherwise
would have been a conflict of interest under Model Rules 1.9 and 1.10.

2. The Rationale for Supporting the Proposed Amendment

   (a) Judicial Decisions

    The seminal judicial opinion holding that an attorney is conflicted from representing a
current client acting against the interests of a former client was Judge Weinfeld’s in T.C.Theatre
Corp. v. Warner Bros. Pictures, 113 F.Supp. 265, 268 (SDNY 1953) as summarized in Note,
[T]he attorney must be disqualified [for a conflict of interest with his or her former client] even though it has not been shown that the attorney was in fact privy to the former client’s confidences. Courts refuse to make a more direct inquiry into the lawyer’s knowledge because to do so would require the party moving for disqualification to reveal the very confidences it wishes to keep secret.”

Thus, it was presumed that if the “issues” in the two matters were “substantially related,” the lawyer suffered a conflict of interest rather than a required, feared disclosure. See: DR 5-108 and Model Rule 1.9 (a).

However, many courts, including the Second Circuit, came to conclude that such a presumption of knowledge was rebuttable and in the event of persuasive evidence that no such confidences, secrets or confidential information were disclosed to him or her, the lateral lawyer did not “infect” his or her new firm. The latter could therefore proceed, asserting its client’s adverse interest against that of the former client of the lateral attorney’s former firm. See: Silver Chrysler Plymouth Motors Inc. v. Chrysler Plymouth Corp. 518 F.2d 751, 756-757 (2d Cir 1975); Cheng v. GAF Corp., 631 F.2d 1052 (2d Cir. 1980) vacated on other grds, 450 U.S. 903 (1980); Moser, “Screening of Personally Disqualified Lawyers to Avoid Firm Disqualification Should Be More Widely Employed,” 1999 Professional Lawyer 159 et seq (hereinafter “Moser I”) (citing Silver Chrysler Plymouth Motors Inc. and Nemours Foundation v. Gilbane Aetna Fed. Ins. Co., 632 F. Supp. 418 (Del. 1986).) In Nemours Foundation, the United States District Court permitted screening of a lateral lawyer whose former firm represented the opposing client to avoid disqualification of the firm to which the lawyer had moved. That Court observed that the distinction between screening former government-employed lawyers and private practice lawyers in such cases was quixotic; the refusal to recognize the efficacy of such a screen was premised on the irrational view that “...privately employed attorneys are inherently incapable of being effectively screened as though they were less trustworthy or more vuluble than their ex-Government counterparts.” Moser I at 161

Once we recognize that the presumption of shared knowledge on the part of the lateral attorney is rebuttable, the use of effective ethical screens as a method of avoiding a claim of conflict of interest on the part of the moved-to firm “begins to have meaning.” 28 U. Pa. L. Rev. 684. Bateman at 267 fn 116 cites Schiessle v. Stevens, 717 F.2d 417 (2d Cir. 1983) as “... allowing the use of screening procedures and devices to rebut the presumption of shared information when an attorney moved from one private firm to another” and comments at 268:

...the majority of courts have moved away from an irrebuttable presumption and about half have formally approved the use of screening.

It is of interest that in the United Kingdom the use of ethical screens (there universally called “Chinese Walls”) is commonly employed in such situations where a “...solicitor who acted for the former client moves firms and the concern is that there is a risk there will be a misuse of that solicitor’s confidential information in the hands of the new firm which acts for a different client where the confidential information is or may be relevant.” Hollander and

Moser I at 164 notes that federal courts in the Second, Third, Sixth, Seventh and Eleventh Circuits, as well as numerous state courts, permit screening to avoid imputed disqualification.

Insofar as rules of professional responsibility are concerned, Fox and Martyn at § 6.34(c) of their handbook (179-185) chart the “State Lawyer Code Rules That Allow Screens to Prevent Imputed Disqualification” without regard to “judicial decisions which may allow screens in some circumstances.”

Screening to avoid conflicts of interest on the part of a firm to which a lawyer moves laterally is obviously not merely not uncommon but is currently a norm even to a limited extent in our own courts in New York State, See, Kassis v. Teachers Insurance & Annuity Association 93, NY 2d 611, 717 N.E.2d 674, 695 N.Y.S. 2d 515 (1999).¹

(b) Reasons for Supporting Screening as a Method of Avoiding What Fox and Martyn Describe as the “Typhoid Mary” Effect of a Lateral Attorney Joining a Firm Representing Interests Adverse to Her or His Former Client

Commentators for over 25 years have lamented the failure to rationally approach the problems presented by lawyers moving from one firm to another under the applicable professional rules.

“Law firms in the United States are expanding rapidly, both in numbers of lawyers and branch offices. Lawyers are also moving between law firms more frequently than ever before as they seek greater autonomy, more interesting work or higher compensation. Increasingly, law firms are brought into conflicts of interest solely because a newly hired lawyer, or the lawyer’s former firm, represented clients with interest opposed to those of the new firm’s current or future clients.” Moser; “Chinese Walls : A Means of Avoiding Law Firm Disqualification When a Personally Disqualified Lawyer Joins the Firm,” 3 Geo. J. of Legal Ethics 399 (1990) (hereinafter “Moser II”)

Mobility of lawyers is usually cited as a reason for developing a rule of professional ethics that will avoid the dire consequences of causing the firm to which the lawyer moves to be guilty of a conflict of interest. 28 U. Pa. L. Rev. 677; Bateman 250, 251; Moser I 159.

¹ Kassis permits screening to avoid disqualification even in the absence of the former client’s objection and is limited to cases where the migrating attorney has no material knowledge, an odd position since if there is no material knowledge of relevant confidential information, it is anomalous to require a screen. However, this is the same position taken by the Restatement (Third) of the Law of Lawyering, § 124.
The increased degree of lawyer mobility is described by Hillman in his treatise, Lawyer Mobility (2d ed 2008) at 1:21: “A recent NALP\(^2\) study shows that, on average, for every one hundred associates employed, fifteen will leave the firm each year.”

It is likewise contradictory for the rules of professional conduct on the one hand to discourage such mobility of lawyers by penalizing the firms that the laterally moving lawyer joins and on the other hand, prohibit law firms and lawyers from creating restrictions on lawyer mobility (Model Rule 5.6(a); DR 2-108(A)) See, e.g., Cohen v. Lord Day & Lord, 75 N.Y. 2d 95, 551 N.Y.S.2d 157, 550 N.E.2d 410 (1989); Ronald C. Minkoff, “Compilation of Cases Involving Restrictive Covenants Among Law Partners (MR 5.61 DR 2-108),” Course Book 33rd National Conference on Professional Responsibility (2007).

Given the prevalence of lawyer mobility among both partners and associates of law firms, it cannot seriously be questioned that the issue of imputed conflicts is a common obstacle to such mobility. Nor are the problems of imputed conflicts caused by such mobility confined to larger law firms. Lawyers in the United States regularly move from large firms to smaller ones and vice versa. In addition, many smaller firms find it necessary for financial, as well as reasons of professional practice, to seek associations with larger firms. In all of these instances, discouragement of such mobility by the current Model Rule 1.10 is a barrier of sometimes insurmountable proportions.

Moser points out: “Slavish adherence to standards of imputed disqualification has, however, encouraged the use of motions to disqualify as a tactical lever. Disqualification motions are now used to drive up litigation costs, cause delay and embarrassment to lawyers and their clients, create conflicts between clients and their lawyers, force unfair settlements, and deprive clients of counsel who are best suited to handle their matters, even though the former clients’ confidences readily could be protected through less stringent means [i.e. ethical screens].” (Moser I at 158)

Moser goes on to comment that

“...[W]hen a new lawyer with a conflict of interest resulting from a former representation enters a firm, the conflict is not likely to be discovered in a routine conflicts check before the new client matter is accepted. Rarely, if ever, can a laterally-hired lawyer list in the new firm’s records all of the former firm’s clients on whose matters the lawyer may have worked. Circulating lists of newly opened files within the new firm will uncover these conflicts only if the new lawyer, upon reviewing the lists, recalls that she has worked while in an earlier association on a listed matter for a client with adverse interest. Even then, the conflict could be recognized only if all parties related to the new matter are correctly listed, entity clients’ names are unchanged, and the nature of the new client

\(^2\) National Association for Law Placement.
matter is fully described. In fact, a conflict of interest created because of a lawyer’s work for a client in a former association is often discovered by sheer chance in larger firms that implement elaborate conflicts and checking mechanisms. More often, conflicts are discovered only when a former client raises the issue. (Moser I at 162) (emphasis added)

Finally the attitude of the courts in so frequently accepting screens as a alternate to disqualification, as well as the ever increasing number of state bar rules authorizing screens, is strong evidence of the need for a universal rule to the same effect.

3. The Rationale and Reasons for Rejecting Screening as a Method of Dealing with Imputed Conflicts of Interest Caused by the Movement of Lateral Attorneys to Other Firms

The classic opposition to screening in any form is set forth in Wolfram’s Legal Ethics (1986) at 402 (hereinafter, “Wolfram”):

“In the end there is little but the self-serving assurance of the screening-lawyer foxes that they will carefully guard the screened-lawyer chickens. Whether the screen is breached will be virtually impossible to ascertain from outside the firm. On the inside, lawyers whose interests would all be served by creating leaks in the screen and not revealing the leaks would not regularly be chosen as guardians by anyone truly interested in assuming that leaks did not occur. [sic] The most porous part of the screen is that which purports to assure courts that the screened lawyer will not share in any fees associated with the disabbling client’s representation. The opinions accepting screens never recite the lawyer’s initial salary relative to comparable lawyers in the firm, nor is any attempt made at later points to determine whether the screened lawyer’s fortunes within the firm rose more sharply than otherwise might be expected. Another important and, typically, missing datum is the answer to the question whether the lawyer would have been hired at all except for what the lawyer could bring to the firm or what the lawyer was able to accomplish before joining the firm. Also routinely ignored is the fact that every firm lawyer is keenly interested in the overall financial success of the firm, whether the lawyer directly shares in each financial component of that success or not.” (Wolfram 402-403)

This skeptical attitude toward the honesty of the lawyers who screen and are screened is
hardly justifiable. Dean Wolfram’s comments do not purport to be based on any empirical basis for that degree of skepticism, indeed, what one would regard as sheer and unjustified cynicism. To the contrary, no evidence has been presented to support such an attitude.

It reminds us of the following “exchange” in 28 U. Pa. Rev at 678-679 between the editors and Professor Hazard:

A typically glib, though wickedly funny, example is Professor Hazard’s remark that ‘[w]alling off’ is thus like the alleged New England practice of bundling, having neither the credibility of real prophylaxis, nor the dignity of real self control.

To which the editors responded at footnote 10:

Contrary to the impact of Professor Hazard’s assertion, lawyers are neither scoundrels for whom nothing short of ‘real prophylaxis’ is needed, nor are they morally superior patricians, to whom nothing less than real self control is an affront to dignity. Indeed, if either of these extreme characterizations were correct a code of ethics would be superfluous. As ordinary, fallible human beings, conscientious lawyers may well draw strength both from the reduced opportunity for ethical error that walling attempts to achieve and from the Wall’s function as a constant reminder of the lawyer’s professional responsibility.

Ultimately, whether an ethical screen is justifiable is a consequence of its effectiveness. There is no reason to believe that if an effective screening procedure, open to inspection, is provided, that lawyers will not act consistently therewith. It would be ironic indeed if the organized bar took a dimmer view of attorney integrity than do the courts or those local regulators who have already recognized the efficacy of screens.

4. So Long as a Client and Present Counsel May Be Assured of the Efficacy of a Screening Procedure, There Should Be No Objection to the Hiring of the Former Lawyer of that Client

Screens have been well established over the years, both with respect to former government lawyers and those in private practice who have moved to other firms. Moser II at 410-411 suggests the following:

**REQUIREMENTS FOR EFFECTIVE SCREENING**

In situations where a screen is permissible or is demanded by a former client in return for consent to the conflicting representation, the following measure should be adopted by the firm
immediately upon discovery of the conflict of interest:

1. The screened lawyer must not discuss the current matter or any information relating to the representation of the former client with anyone else in the new firm.

* * *

5. The lawyer with tainted information should not participate in the fees generated by the current client matter.

6. The former client or the former client’s counsel must be informed of the situation and the measures adopted by the firm to assure there will be no misuse of the confidential information.

7. The lawyer possessing the confidential information regarding the former client should use associates and support personnel different from those working on the client matter in the current form.

8. The lawyer’s office should be located away from the offices of those working on the matter, even if the lawyer is in the same department or the firm has no departmental structure.

9. The files of the current client matter should be physically segregated from the regular filing system, specifically tagged and accessed only by those lawyers and support personnel in the firm who are working on the matter or need access for other reasons.

10. The current client matter should be discussed only within the limited group who are working on it in order to avoid inadvertent disclosures to the screened lawyer by someone not directly involved with the current matter.

11. These measures should be stated in a written policy explained to all lawyers and support personnel within the firm with an admonition that violations of the policy will result in sanctions.

In a litigated matter, the court should be informed that a screen is in place, even where both clients have consented to the arrangement. It may also be desirable to obtain court approval, if possible. Where both clients consent, the consents should be obtained or confirmed in writing after a full explanation of the foreseeable adverse consequences. Where the matter does not involve litigation, but the former client will not consent to the firm representing the new client, a ruling of a state bar ethics committee is necessary.

If a material breach of the screen occurs, the law firm must be prepared to inform opposing counsel of the breach and, in litigated matters, the court. The result ordinarily will be that the firm is disqualified from any longer representing the current client in the matter. Accordingly, at the time when the screen is created the current client must be fully informed of
this risk as well as other details of the arrangement, and the consent of the current client obtained, preferably in writing.

Similar “rules” for screening are regarded as appropriate under like circumstances in the United Kingdom. See Hollander at 6-27 et seq.

5. Analysis of the Proposed Amendment

There are two subdivisions set forth in proposed Rule 1.10(e).

Subdivision (1) of proposed Rule 1.10(e) permits a firm to avoid a claim of conflict of interest if the lawyer who otherwise is herself or himself conflicted on account of his or her former association is “timely screened” from any participation in the matter and is apportioned no part of the fee arising from the new firm’s representation adverse to that lawyer’s former client.

Notwithstanding the merits of screening as set forth above by advocates thereof, there are two objections to this provision. “Timely screened” is ambiguous since it is arguable and open to dispute what constitutes “timely” screening. If it is to merit confidence that no confidential information of the former client is to be available to the new firm, screening should commence not just in a “timely” fashion, but as promptly as possible after knowledge of the conflict is first revealed to the firm or the lawyer.

We have quoted Moser I at 162 (supra at 13) to demonstrate the difficulty many firms, particularly large ones, may have in identifying such conflicts. However, there is no reason that a proposed rule should not provide explicitly for the screen to be installed when the conflict is perceived, either by the lateral attorney or another lawyer at the firm to which she or he has moved, whichever comes first. In any event, the characterization of the installation of the screen as being “timely” to be effective is probably adequate to assure that it will indeed be placed before the lateral lawyer has had an opportunity to make disclosures that would be inconsistent with his or her obligations to the former client or injure the client.

Another objection to the language of subdivision (1) is the use of the word “participation.” It is not merely “participation” that is feared; it is primarily the making of any disclosure to others in the laterally moved-to firm that is of concern. “Participation” would appear to mean actually providing services or advice in the matter that is adverse to the former client. The language of the subdivision ought to be changed to specifically prohibit the making of any disclosures, directly or indirectly, concerning the matter at any time.

A further objection to subdivision (1) is the prohibition on “apportionment” to the otherwise disqualified attorney of any part of the fee earned. In many larger firms, the impracticability of denying a portion of the fee is undeniable. Nor is it clear how that “apportionment” applies to salaried attorneys, whether so called “contract partners” or associates.

The foregoing criticisms of the language of subdivision (1) of proposed Rule 1.10 do not consider that the language is identical to the language used in current Model Rule 1.11(b)(1) dealing with former government lawyers and the screening by which their firms avoid a claim of
conflict of interest. That language has been in place for some time and it is unlikely that different language would now be used in a new Model Rule when the purpose is to accomplish a similar result.

Subdivision (2) of Proposed Rule 1.10(e) provides (as presently does Rule 1.11(b)(2)) for notice in writing to be given to the former client setting forth screening procedures to be put in place. It also requires, unlike Rule 1.11, that the former client be alerted as to his or her right to obtain review by a “tribunal” to assure compliance by the laterally moved attorney and his or her firm. This subdivision is unobjectionable and does at least give notice of the procedures that are to be adopted to safeguard the confidential information of the former client, as well as notice that review is possible. It is understandable that many former clients may not have the sophistication of a government agency so as to be aware of the right to contest the effectiveness of the screen.

Indeed, a commonly stated fear, not necessarily true and probably specious, is that a lawyer familiar with the issues and facts of a litigation or hostile transaction “switches sides” and joins the firm of lawyers representing the client that was the adversary of the client that the “side-switching lawyer” formerly represented. The notice and opportunity to be heard provided by subdivision (2) of Proposed Rule 1.10(e) would afford the client and client’s counsel the means for determining that a screen is and was efficacious. See, e.g., James v. Teleflex, 1999 U.S. Dist. LEXIS 1961 at *16 (E.D. Pa. 1999); Egan Transdermal v. Cygnus Therapeutic Sys., 809 F.Supp. 1383, 1392 (N.D. Cal. 1992); Porter v. Bd. Of Educ., 1992 U.S. Dist. LEXIS 9617 (N.D. Ill. 1992), cited at 559 fn. 3 of Flamm, Lawyer Disqualifications Conflicts of Interest and Other Bases (2003).

The two proposed annotations, as amended, add clarifications. They are obvious but not harmful. In addition to confirming that if the conditions set forth in proposed Rule 1.10 (1) and (2) are met, proposed Annotation [9] provides that informed consent of the former client is unnecessary to clear the claimed conflict. It also admonishes the parties that a tribunal, whether judicial, arbitral or administrative, may hold the lawyer to more rigorous standards than the Proposed Amendment.

Finally, proposed Comment[12] does no more than define what is considered a “Tribunal,” as well as alerting all that a plenary action (presumably for injunction) may be commenced even in the absence of a pending action. Of course, this new comment is advisory only and not binding on any such tribunal and does not afford the former client any right of action other than what would independently exist in law or equity.

6. Conclusion: NYCLA Should Support the Adoption by the ABA of Proposed Rule 1.10(e) and Annotations [9] and [12] thereto.

Screening of lawyers as a method of protecting client confidences, secrets and other confidential information of clients and former clients is well established under both the Model Rules of Professional Conduct and the Code of Professional Responsibility. As far as the Model Rules are concerned, screening as used in connection with “temporary” lawyers is specifically authorized under Rule 1.11(b)(1) with respect to former government lawyers; under Rule 1.12(c) with respect to former judges or other neutrals; under Rule 1.18(2) with respect to prospective clients; and under 1.10 (Comment [4]) with respect to non-lawyer assistants. Screening is similarly specifically authorized by the New York Code of Professional
Responsibility in Disciplinary Rule 9-101(B)(1) with respect to former government lawyers, See also the discussion at 961 et seq. in Simon’s New York Code of Professional Responsibility Annotated (2008 Edition).

We have also observed that numerous courts, particularly in the federal system, have endorsed screening as a defense to a motion to disqualify a law firm joined by a lawyer whose prior association personally disqualified him or her under either Model Rule 1.9 or DR 5-108 in the matter. (supra at 10; and See, e.g., Hempstead Video v. Village of Valley Stream, 409 F 3d 127 (2d Cir 2005).

The increased mobility of lawyers, both associates and partners, make traditional application of the imputation of conflicts of the laterally moving lawyer to the firm to which the lawyer moves a trap for the unwary, a burden on clients and an unnecessary attraction to opponents to make motions to disqualify. As we have noted above, that trap for the unwary applies as much to lawyers moving from smaller to larger firms as well as to the reverse. It is a barrier to associations between law firms of all sizes.

Finally, there is no reason to believe that lawyers in private practice are less honorable than those who formerly worked for the government, former neutrals, temporary lawyers or legal assistants, for each of whom screening provides a method of avoiding the imputation rules.

All of the foregoing favors NYCLA’s supporting the Proposed Amendment.

However, when the time comes for a similar rule to be promulgated as part of either the New York Code of Professional Responsibility or the proposed New York version of the Model Rules of Professional Conduct, consideration should be given to a more precise wording than that now proposed for Model Rule 1.10(e) by the ABA Ethics Committee.

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