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. 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.

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 emendations. 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 114 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.

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