

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
SECTION OF LITIGATION
STANDING COMMITTEE ON PROFESSIONALISM

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED, That the American Bar Association amend Model Rule of Professional
2 Conduct 1.10(a) to read as follows:

3
4 Rule 1.10 Imputation of Conflicts of Interest: General Rule

5
6 * * *

7
8 (a) While lawyers are associated in a firm, none of them shall knowingly
9 represent a client when any one of them practicing alone would be
10 prohibited from doing so by Rules 1.7 or 1.9, unless

11
12 (1) the prohibition is based upon a personal interest of the ~~prohibited~~
13 disqualified lawyer and does not present a significant risk of
14 materially limiting the representation of the client by the remaining
15 lawyers in the firm; or

16 (2) the prohibition is based upon Rule 1.9(a) or (b), and arises out of the
17 disqualified lawyer's association with a prior firm, and...

18
19 * * *

20

REPORT

Model Rule 1.10 of the ABA Model Rules of Professional Conduct, “Imputation of Conflicts of Interest: General Rule,” was amended by the ABA House of Delegates in February 2009 through adoption of Report 109, submitted to the House on behalf of the Standing Committee on Ethics and Professional Responsibility, to permit the screening of lawyers when they move from one firm to another so that, as long as all the procedural requirements of the Rule are fulfilled, the moving lawyers’ new colleagues would not be subject to discipline for representing clients in matters that the moving lawyer would be prohibited from handling.

In opening remarks to the House, Ethics Committee Chairman Robert Mundheim stated that “Report 109 addresses only the situation in which a lawyer moves from private practice or corporate practice to another private practice or corporate practice.” The House approved Report 109 by a vote of 219-183.

Several commentators have noted that the language of the amended Rule might be interpreted to allow screening not consented to by the former client even where a lawyer never left the firm in which he acquired the disqualification. It was never the intent of the entities or those opposed to the recommendation to do that. To ensure that the Model Rule unambiguously establishes that screening is permitted only in situations where a lawyer moves from one firm to another, the Standing Committee on Ethics proposes the clarifying language contained in the attached Recommendation.

In addition, the sponsors of this Report with Recommendations propose that the phrase “prohibited lawyer” appearing in Rule 1.10(a)(1) be changed, for consistency, to read “disqualified lawyer,” a more grammatically precise term used in section (a)(2)(ii) to describe a lawyer who is prohibited from undertaking a representation.

The Section of Litigation and the Standing Committee on Professionalism are cosponsoring this Report and Recommendation, notwithstanding the fact that both entities opposed the original Report 109. They do so for two reasons. First, they want to communicate that in their view the making of this amendment should not be an invitation to reopen last year's debate. Second, they believe it is critical that new Rule 1.10 make it abundantly clear that it only applies to the laterally moving lawyer.

The amended black-letter of the Model Rule in its entirety would read as follows:

RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and

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

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Respectfully submitted,

Robert Mundheim, Chair, Standing Committee on Ethics and Professional
Responsibility

August, 2009

GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Ethics and Professional Responsibility

Submitted By: Robert Mundheim, Chair

1. Summary of Recommendation(s). Amend Model Rule of Professional Conduct 1.10 (“Imputation of Conflicts: General Rule”) to explicitly state that the screening procedures permitted under the Rule apply only when a lawyer has moved laterally from one practice situation to another. Substitute the term “disqualified lawyer” for the term “prohibited lawyer” at line 21.
2. Approval by Submitting Entity. The Standing Committee on Ethics and Professional Responsibility approved the Report with Recommendations effective May 12, 2009.
3. Has this or a similar recommendation been submitted to the House or Board previously? The Chair of the Standing Committee, in addressing the House of Delegates as he presented Model Rule 1.10 for debate at the Midyear 2009 Boston meeting, stated that “this Rule applies only where a lawyer moves from one private practice or corporate practice to another private practice or corporate practice.” However, at that time, the language of the proposed Model Rule did not so state.
4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption? The only effect of this amendment will be to clarify existing Model Rule 1.10.
5. What urgency exists which requires action at this meeting of the House? The Association supports implementation of its model policies for legal ethics in every jurisdiction. The likelihood of adoption of recently-adopted Model Rule 1.10 will be enhanced by adding this clarification to the Rule.
6. Status of Legislation. (If applicable.) N/A
7. Cost to the Association. (Both direct and indirect costs.) None
8. Disclosure of Interest. (If applicable.) None

9. Referrals. The Report with Recommendations was submitted to the ABA Section of Litigation and the Standing Committee on Professionalism on May 11, 2009. Both entities have agreed to cosponsor the proposal.

10. Contact Person. (Prior to the meeting.) George Kuhlman, Ethics Counsel 312-988-5300 or gkuhlman@staff.abanet.org

11. Contact Person. (Who will present the report to the House.) Robert Mundheim, Chair, Standing Committee on Ethics and Professional Responsibility 212-848-7738 or rmundheim@shearman.com

EXECUTIVE SUMMARY

Summary of the Recommendation

A phrase is to be added to Model Rule of Professional Conduct 1.10 (“Imputation of Conflicts: General Rule”) to identify that the screening procedures permitted under the Rule are allowed only when a lawyer moves laterally from one practice situation to another.

Summary of issue that the recommendation addresses

The intention of the House of Delegates in adopting Model Rule 1.10 amendments at the 2009 Midyear Meeting was to permit screening in the circumstance in which a lawyer moves from one private firm or corporate practice to another private firm or corporate practice.

Explanation of how the proposed policy position will address the issue

The language explicitly limits screening to those situations in which a lawyer moves laterally from one practice situation to another.

Minority views or opposition

None