Rule 1.10 of the Connecticut Rules of Professional Conduct Should be Amended to Permit Screening of Laterally Moving Attorneys[1]

At its February 2009 meeting, the American Bar Association's House of Delegates voted to amend Rule 1.10 of the Model Rules of Professional Conduct to provide a screening mechanism that would permit law firms to avoid imputed conflicts of interest triggered by attorneys making lateral moves from one law firm to another. At the ABA's next meeting, in August 2009, the House of Delegates voted to further amend Rule 1.10 to clarify that the screening provisions are available to prevent imputed disqualifications *only* in the case of lawyers moving from firm to firm.

This Committee recommends to the CBA House of Delegates and the Rules Committee of the Superior Court that Rule 1.10 of the Connecticut Rules of Professional Conduct be amended in accordance with Model Rule 1.10, as amended.

Proposed Amendment

Adoption of amended Model 1.10 would change the current Connecticut Rule 1.10, in pertinent part, as follows (deletions in brackets, additions underlined):

> RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE
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> (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
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> (1) the prohibition is based on a personal interest of the [prohibited] 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
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> (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

[1] At the request of the Chair of the Committee on Professional Ethics, Committee member Marcy Stovall prepared this memorandum for and submitted it to the CBA Committee on Professional Ethics at the Committee's January 2011 meeting.

(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.

A Brief History of Imputed Conflicts of Interest and Ethical Screens[2]

When the ABA adopted the Model Rules of Professional Conduct ("the Model Rules") in 1982, and when the Judges of the Superior Court followed suit and approved the adoption of the Connecticut Rules of Professional Conduct in 1986, lawyer mobility was not a primary concern for lawyers, judges or clients. Times have changed: the lateral transfer of an attorney from one firm to another, though once relatively rare, is now commonplace, and the rules and standards that govern attorney conduct are evolving to address that change in law practice.

With an increase in the number of attorneys moving from one firm to another has come an increase in the number of potential conflicts of interest between the moving attorney's former clients and clients of the new firm. It is generally well understood that when an attorney has formerly represented one party in a matter, Rule 1.9 of the Connecticut Rules of Professional Conduct ("Duties to Former Clients") prohibits the

attorney from undertaking representation of another party in that matter, or one that is "substantially related," where the new representation will be adverse to the former client's interests.

Similarly, if Rule 1.9 would disqualify an attorney from representing a party in a matter, and the attorney joins a new firm, under Connecticut's current version of Rule 1.10 ("Imputation of Conflicts of Interest") it is presumed that *every* attorney at the new firm, *and the firm itself*, must *also* be disqualified. Put another way, like a contagion, the moving lawyer's conflict of interest infects every attorney at the new firm whether it is a solo practice or a large firm and whether the firm has one office or dozens of branches around the globe. *See* Connecticut Rules of Professional Conduct, Rule 1.10 ("While lawyers are associated in a firm, none of them shall represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 . . .").

In an effort to address the restrictive impact on lawyer mobility, the ABA, in February 2009, amended Rule 1.10 of the Model Rules "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." American Bar Association, Standing Committee on Professional Responsibility, Section of Litigation, Standing Committee on Professionalism, Report to the House of Delegates, Recommendation on 109 Housekeeping Amendment (August 2009).

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[2] Ethical screens have also been called "Chinese walls," and courts frequently use that term. The Committee prefers the less colorful but more precise term "ethical screen."

The change in Model Rule 1.10 to permit screening came after a drawn out and contentious battle, with impassioned partisans on both sides. In overhauling the Model Rules in 2002, the ABA had rejected the recommendation of the Ethics 2000 Commission to include a provision permitting screening of attorneys making lateral moves so as to avoid imputed disqualification. When a similar proposal came up at the August 2008 annual meeting, the ABA's House of Delegates voted, by a margin of only one vote, to table the proposal. When the House of Delegates finally adopted the screening provision, in February 2009, it did so only after a spirited, and frequently heated, debate.

Those opposed to the amendment feared an erosion of the trust between clients and attorneys. They claimed not only that screens would not, and could not, be effective, but that proponents of the amendment were motivated primarily by profit and big firm priorities – including aggressive recruitment of lateral partners or acquisition of entire practice groups – over the traditional pledge of loyalty to client. Proponents of the screening amendment countered that screening protected the core concern of client confidentiality, and that states that had long permitted screening of laterally moving attorneys, including Illinois and Oregon, had not witnessed an outbreak of client betrayal or an increase in conflict of interest disciplinary complaints.

Proponents also noted that Model Rules 1.11 and 1.12 permit screening of attorneys moving from public employment to private employment, such as prosecutors – and those Rules have been in effect since the ABA's adoption of the Model Rules in 1983. The opponents of loosening the imputed conflicts rule were hard pressed to

explain why screening was appropriate when a firm took on a former prosecutor, but not when it recruited a lateral lawyer from another private law firm.

In February 2009, the Delegates voted to adopt the amendment that would permit screening for attorneys moving laterally from one firm to another. At the ABA's next meeting, in August 2009, the House of Delegates voted to further amend Rule 1.10 to clarify that the screening provisions are available to prevent imputed disqualifications *only* in the case of lawyers moving from firm to firm.

Effect of the Amendment of Rule 1.10

The ABA Center for Professional Responsibility Policy Implementation Committee Talking Points Memo on amended Rule 1.10 (copy attached) describes the effect of the additions to the Rule as creating a "limited exception to the general rule that when lawyers are joined together in a law firm the conflicts of interest of one are imputed to all."

Under the amended Rule, if a lawyer's lateral move to a new firm creates a conflict of interest with a client of the new firm, the firm can accept or continue to represent that client so long as the conditions of the Rule are satisfied. As described in the Talking Points Memo, those conditions include the following:

- the personally disqualified lawyer is "timely screened" so that confidential information relating to the representation of the former client is not shared within the new firm;
- the personally disqualified lawyer is not directly apportioned a share of the fees from the matter adverse to the former client; and
- written notice is promptly given to any affected client so that the client can make inquiries and assess compliance with the rule. Disclosure requirements go well beyond any existing state rules.

ABA Center for Professional Responsibility Policy Implementation Committee Talking Points Memo on Amended Rule 1.10.

Ethical Screens in Connecticut

Over the last 20 years, about half of the states have adopted some version of screening in the rules governing lawyer conduct. The judges of the Connecticut Superior Court have not yet taken up the question of amending Rule 1.10 to add a screening provision. But even in the absence of a codification of screening as a remedy for imputed conflicts, Connecticut's trial court judges consistently have approved the use of ethical screens to prevent the imputed disqualification of an entire firm when a lawyer (or paralegal) brings with him or her an unwaived conflict of interest in moving from one firm to another.[3] Indeed, there does not appear to be a reported decision in

[3] See *Laprise v. Paul*, 2007 4636533 *5 (Conn. Super. Ct. 2007) (Leuba, J.) (disqualification motion denied where screening in place and no evidence offered to show attorney disclosed former client's confidences); *Klein v. Bristol Hosp.,* 50 Conn. Supp. 160, 167-68 (2006) (Shortall, J.) (denying motion for disqualification, citing numerous Connecticut decisions approving ethical screening); *Beckenstein Enterprises-Prestige Park, LLC v. Lichtenstein*, 2004 WL 1966863 *3, *4 (Conn. Super. Ct. 2004) (Alander, J.) (denying disqualification motion where affidavit established attorney's timely implementation of screening procedures); *Milne v. Ryea*, 2004 WL 423117 *1 (Conn. Super. Ct. 2004) (Beach, J.) (motion denied where construction of "an adequate 'Chinese wall' could guarantee" no accidental disclosure of client confidences); *Horch v. United of Omaha Life Insurance Co.*, 1999 WL 511165 *2 (Conn. Super. Ct. 1999) (Devlin, J.) (because of the timely implementation of an ethical screen, "no opportunity for disclosure of confidential information ever existed as a result of [the lawyer's change of firms] . . . this issue was anticipated and immediately efforts were made to seal [the conflicted attorney] from this case"); *Temkin v. Temkin*, 1993 WL 392941 (Conn. Super. Ct. 1993) (motion to disqualify firm where paralegal changed firms denied where screen was in place); *Rivera v. Chicago Pneumatic Tool Co.*,1991 WL 151892 (Conn. Super. Ct. 1991) (Teller, J.) (same).

which the court granted a motion to disqualify when the challenged law firm had in place -- or was expected to put in place -- adequate screening.

And even where, in one case, the court has granted a motion for disqualification based on imputed disqualification, it nonetheless implicitly approved the use of properly and timely implemented ethical screens. *U.S. Bank National Association v. Morales*, 2010 WL 3025615 * 4 (Conn. Super. Ct. June 30, 2010) (Aurigemma, J.) (noting that there exists an "exception" to the imputed disqualification bar of Rule 1.10 when the new firm of an attorney who has previously represented an adverse party "takes specific steps to ensure that such attorney has no contact whatsoever with such matter").[4]

Amended Rule 1.10 Protects the Core Concern of Confidentiality

The core concern in any transaction or litigation involving adversity against a former client is the protection of the former client's confidential information from either disclosure or its use to disadvantage the former client. "The standards for disqualification are directed at protecting client confidences." *Bergeron v. Mackler,* 225 Conn. 391, 400 (1993) (reversing order of disqualification on ground that disqualification may not be ordered "on the basis of nothing more than a litigant's subjective perception that another litigant is influencing the proceedings"). "[T]he core interest at stake in rules 1.9 and 1.10 [is] the protection of confidential information gained from a former client by the attorney and at risk of disclosure in his subsequent adverse representation." *Klein v. Bristol Hosp*., 50 Conn. Supp. 160, 165 (2006) (Shortall, J) (denying motion for disqualification; citing 1 G. Hazard & W. Hodes, *The Law of*

[4] However, given the circumstances in that case – where the majority of the caseload in the new firm directly involved the migrating lawyer's former clients – it was unlikely that the new firm could have implemented an effective ethical screen.

Lawyering (3d Ed.2001 & 2005-1 Sup.) § 13.5, p. 13-13). *See also Draper v. Danbury Health Systems, Inc.*, 2009 WL 1054102 (Conn. Super. Ct. 2009) (disqualification motion denied in absence of any indication of misuse of confidential information).

Accordingly, when presented with a disqualification motion based on an imputed disqualification, courts look to the migrating attorney's new firm for the following: assurance that the former clients' confidences are protected and not at risk of disclosure, even though the clients' former lawyer now works for the very firm appearing on the other side of the case. To the extent the court is reassured that the former clients' confidences are not at risk, the balance will tip in favor of the competing interest: that is, the non-moving party's interest in continuing with its chosen counsel. *See Goldenberg v. Corporate Air, Inc.*, 189 Conn. 504, 507 (1983), overruled in part, *Burger & Burger, Inc. v. Murren*, 202 Conn. 660 (1987) (competing interests at stake in a motion to disqualify include the non-moving party's "interest in freely selecting counsel of its choice" and the moving party's "interest in protecting its confidential information from disclosure to an adversary in the pending litigation").

The Committee notes that amended Rule 1.10 does not permit "side-switching" by an otherwise disqualified attorney. It simply permits *other* attorneys at his or her new firm to continue to represent a party adverse to the moving lawyer's former client. Rule 1.9 would continue to prohibits such a lawyer from participating in a matter adversely to his or her former client, and would still dictate that the moving lawyer preserve former clients' confidences and information, while still providing a lawyer the freedom to move from one firm to another without encumbering his or her new firm with imputed conflicts of interest.

Connecticut's courts have consistently concluded that lawyers and law firms can readily address the legitimate worry about the protection of client confidences with an ethical screen that is both timely and meaningful. Adoption of amended Rule 1.10 would serve to codify what already occurs in practice in Connecticut.

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