

1 Rule 1.10 of the Connecticut Rules of Professional Conduct
2 Should be Amended to Permit Screening of Laterally Moving Attorneys¹
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4 At its February 2009 meeting, the American Bar Association's House of
5 Delegates voted to amend Rule 1.10 of the Model Rules of Professional Conduct to
6 provide a screening mechanism that would permit law firms to avoid imputed conflicts of
7 interest triggered by attorneys making lateral moves from one law firm to another. At
8 the ABA's next meeting, in August 2009, the House of Delegates voted to further amend
9 Rule 1.10 to clarify that the screening provisions are available to prevent imputed
10 disqualifications *only* in the case of lawyers moving from firm to firm.

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

14 Proposed Amendment
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16 Adoption of amended Model 1.10 would change the current Connecticut Rule
17 1.10, in pertinent part, as follows (deletions in brackets, additions underlined):

18 RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE
19

20 (a) While lawyers are associated in a firm, none of them shall knowingly
21 represent a client when any one of them practicing alone would be prohibited
22 from doing so by Rules 1.7 or 1.9, unless
23

24 (1) the prohibition is based on a personal interest of the [prohibited]
25 disqualified lawyer and does not present a significant risk of materially limiting the
26 representation of the client by the remaining lawyers in the firm; or
27

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

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

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

41
42 (iii) certifications of compliance with these Rules and with the screening
43 procedures are provided to the former client by the screened lawyer and
44 by a partner of the firm, at reasonable intervals upon the former client's
45 written request and upon termination of the screening procedures.

46 47 48 A Brief History of Imputed Conflicts of Interest and Ethical Screens²

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

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

61 attorney from undertaking representation of another party in that matter, or one that is
62 “substantially related,” where the new representation will be adverse to the former
63 client’s interests.

64 Similarly, if Rule 1.9 would disqualify an attorney from representing a party in a
65 matter, and the attorney joins a new firm, under Connecticut’s current version of Rule
66 1.10 (“Imputation of Conflicts of Interest”) it is presumed that *every* attorney at the new
67 firm, *and the firm itself*, must *also* be disqualified. Put another way, like a contagion, the
68 moving lawyer’s conflict of interest infects every attorney at the new firm whether it is a
69 solo practice or a large firm and whether the firm has one office or dozens of branches
70 around the globe. See Connecticut Rules of Professional Conduct, Rule 1.10 (“While
71 lawyers are associated in a firm, none of them shall represent a client when any one of
72 them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 . . .”).

73 In an effort to address the restrictive impact on lawyer mobility, the ABA, in
74 February 2009, amended Rule 1.10 of the Model Rules “to permit the screening of
75 lawyers when they move from one firm to another so that, as long as all the procedural
76 requirements of the Rule are fulfilled, the moving lawyers’ new colleagues would not be
77 subject to discipline for representing clients in matters that the moving lawyer would be
78 prohibited from handling.” American Bar Association, Standing Committee on
79 Professional Responsibility, Section of Litigation, Standing Committee on
80 Professionalism, Report to the House of Delegates, Recommendation on 109
81 Housekeeping Amendment (August 2009).

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.”

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

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

100 Proponents also noted that Model Rules 1.11 and 1.12 permit screening of
101 attorneys moving from public employment to private employment, such as prosecutors –
102 and those Rules have been in effect since the ABA's adoption of the Model Rules in
103 1983. The opponents of loosening the imputed conflicts rule were hard pressed to

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

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

111
112 Effect of the Amendment of Rule 1.10

113
114 The ABA Center for Professional Responsibility Policy Implementation
115 Committee Talking Points Memo on amended Rule 1.10 (copy attached) describes the
116 effect of the additions to the Rule as creating a "limited exception to the general rule that
117 when lawyers are joined together in a law firm the conflicts of interest of one are
118 imputed to all."

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

- 123
- 124 ➤ the personally disqualified lawyer is "timely screened" so that confidential
125 information relating to the representation of the former client is not shared within
126 the new firm;
 - 127
 - 128 ➤ the personally disqualified lawyer is not directly apportioned a share of the fees
129 from the matter adverse to the former client; and
 - 130
 - 131 ➤ written notice is promptly given to any affected client so that the client can make
132 inquiries and assess compliance with the rule. Disclosure requirements go well
133 beyond any existing state rules.

134

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

137 Ethical Screens in Connecticut

138 Over the last 20 years, about half of the states have adopted some version of
139 screening in the rules governing lawyer conduct. The judges of the Connecticut
140 Superior Court have not yet taken up the question of amending Rule 1.10 to add a
141 screening provision. But even in the absence of a codification of screening as a remedy
142 for imputed conflicts, Connecticut's trial court judges consistently have approved the
143 use of ethical screens to prevent the imputed disqualification of an entire firm when a
144 lawyer (or paralegal) brings with him or her an unwaived conflict of interest in moving
145 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).

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

148 And even where, in one case, the court has granted a motion for disqualification
149 based on imputed disqualification, it nonetheless implicitly approved the use of properly
150 and timely implemented ethical screens. *U.S. Bank National Association v. Morales*,
151 2010 WL 3025615 * 4 (Conn. Super. Ct. June 30, 2010) (Aurigemma, J.) (noting that
152 there exists an “exception” to the imputed disqualification bar of Rule 1.10 when the
153 new firm of an attorney who has previously represented an adverse party “takes specific
154 steps to ensure that such attorney has no contact whatsoever with such matter”).⁴

155 Amended Rule 1.10 Protects the Core Concern of Confidentiality

156 The core concern in any transaction or litigation involving adversity against a
157 former client is the protection of the former client’s confidential information from either
158 disclosure or its use to disadvantage the former client. “The standards for
159 disqualification are directed at protecting client confidences.” *Bergeron v. Mackler*, 225
160 Conn. 391, 400 (1993) (reversing order of disqualification on ground that disqualification
161 may not be ordered “on the basis of nothing more than a litigant’s subjective perception
162 that another litigant is influencing the proceedings”). “[T]he core interest at stake in
163 rules 1.9 and 1.10 [is] the protection of confidential information gained from a former
164 client by the attorney and at risk of disclosure in his subsequent adverse
165 representation.” *Klein v. Bristol Hosp.*, 50 Conn. Supp. 160, 165 (2006) (Shortall, J)
166 (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.

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

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

182 The Committee notes that amended Rule 1.10 does not permit "side-switching"
183 by an otherwise disqualified attorney. It simply permits *other* attorneys at his or her new
184 firm to continue to represent a party adverse to the moving lawyer's former client. Rule
185 1.9 would continue to prohibits such a lawyer from participating in a matter adversely to
186 his or her former client, and would still dictate that the moving lawyer preserve former
187 clients' confidences and information, while still providing a lawyer the freedom to move
188 from one firm to another without encumbering his or her new firm with imputed conflicts
189 of interest.

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