



TO: Susan Brotman
President, APRL

FROM: Bill Hodes, Bob Creamer and Mark Tuft (Tuft dissenting)

SUBJECT: Report of Committee Regarding Proposed Amendment
to Rule 1.10 Recommended by the Standing Committee on
Ethics and Professional Responsibility

DATE: May 21, 2008

A committee consisting of Bob Creamer, Bill Hodes and Mark Tuft was appointed by APRL President Susan Brotman to consider what position APRL should take, if any, on the proposal before the ABA House of Delegates to further amend Model Rule 1.10. The proposal would add a paragraph to Rule 1.10, borrowed verbatim from Rule 1.11; the new language would permit non-consensual screening in the private sector in situations implicating Rule 1.9.

While recognizing that more than a few APRL members would oppose the proposed amendment, the committee unanimously concluded that a solid majority of APRL members would support it. The committee also agreed that APRL should support the proposal, but should also advance a friendly amendment (described below). Mark Tuft disagreed with an important aspect of the proposed amendment, however, and has submitted a partial dissent explaining why, which is appended at the end of this report.

It is important to note at the outset that the proposed Rule 1.10 would not disturb the current regime at the extremes. Lawyers who have been involved—even tangentially—with a particular client and matter at a private firm are forever barred (by Rule 1.9(a)) from personally opposing that client (in the same or a related matter), whether they move to a new firm or not. At the other extreme, lawyers who have no involvement whatsoever with a client's matter, and learn nothing about its affairs that could later be turned against it are barred (by Rule 1.10(a)) from opposing that client while still in the firm, *but lose*

that disability upon leaving the firm. Not being tainted, they could establish a solo practice that would not be restricted in any way in opposing the former client, or they could join a new firm without tainting any member of it. (Law of lawyering cognoscenti refer to the latter as a *Silver Chrysler* situation.)

Thus, the issue presented by the proposed amendment to Rule 1.10 boils down to dealing with the middle of the spectrum—an involved lawyer moves to a new private firm, does not *personally* oppose the former client in the same or a related matter, but has new colleagues who do or want to. Should the other members of the new firm be allowed to press ahead without the consent of the former client, if the lawyer in transit is timely screened from participation? The committee agreed with the ABA Standing Committee on Ethics and Professional Responsibility, which is sponsoring the amendment, that it is no longer tenable to make a sharp distinction between former government lawyers and lawyers leaving a private law firm. As the Standing Committee rightly said in its accompanying memo, there is no sound reason to think that private sector lawyers will be more likely to “cheat” by evading or avoiding a screen.

The Standing Committee did not sufficiently explain, however, the somewhat different purposes served by screening in the two settings, and this may have increased Mark’s unease to the point of dissent. To the extent that screening is designed to prevent client confidences from “leaking,” even inadvertently, to members of the new firm, all three of us agreed that timely and rigorous screening would be effective and that the consent of the former client should therefore not be required. This would be true, moreover, whether the moving lawyer was the lead lawyer in the old firm, the senior litigator involved in the matter, or a young associate deeply involved in discovery and document searches.

But what about loyalty concerns? Under Rule 1.11, loyalty is the *chief* concern, because the representation bar and the requirement for screening to avoid imputation both apply *whether or not the former government lawyer will oppose the former governmental client*, let alone in the same or a substantially related matter. The main fear is that the lawyer will be disloyal *while still in government service*—by making contacts and trading on information and experience provided by the taxpayers, for example.

Bob Creamer and I thought that loyalty concerns should play little or no role in the private sector under Rule 1.10 as it applies to lawyers coming into one private firm from another. This thought no doubt animated the Standing

Committee's proposal as well, but it is not addressed sufficiently in the accompanying materials, in our view.

Precisely because we are dealing only with post-relationship conduct, the loyalty value is already much diminished. *After all, even lawyers who were directly and heavily involved in representing a former client are permitted to oppose that client, even in litigation and even as lead counsel, so long as it is in an unrelated matter.* Moreover, by definition, in screening situations, the former lawyer will *not* be opposing the former client—only his new colleagues will.

As noted in his minority report, Mark gave more weight to loyalty concerns—it would appear to the former client to be more of a betrayal, if a major player on the client's team later showed up wearing the opposition team's colors (even if only sitting on the bench). Thus, Mark supports an approach—adopted by several states but rejected by the Standing Committee in its proposal—that permits or prohibits non-consensual screening, depending on the level of involvement of the moving lawyers, and perhaps the prominence of the lawyer within the former firm. The majority of the committee opposed this “tiered” approach for two reasons. First, no matter how much care is taken with language, it is simply too difficult (and too generative of satellite argumentation and litigation) to make such distinctions.

Second, the understanding of prohibited “side-switching” that must be adopted—as in Mark's dissent—is so broad as to effectively swallow the proposed amendment altogether. If it is considered to be an unacceptable betrayal merely to be “associated” with a new firm that is opposing the former client in the same matter, even though sharing neither information nor profits, as in the *Greig* case Mark cites, then screening would *never* be allowed to cure the disloyalty. It would thus be bootless to distinguish between levels of earlier involvement—it would be simpler and more consistent to stay with the current flat prohibition of all non-consensual screening in the private sector.

A majority of the committee recommends that APRL support proposed Rule 1.10(e)(1) without change, although the overall lead-in language to Rule 1.10(e) itself is faulty and should be revised. That language refers to “disqualification under Rule 1.9,” which does not match the language of Rule 1.9. It would be better to use language similar to that used in Rule 1.10(a)—“would be prohibited by Rule 1.9 from doing so.”

With respect to proposed Rule 1.10(e)(2), the committee unanimously agreed that a notice provision would be salutary, even though some jurisdictions have allowed non-consensual screening without such a provision for some time, without apparent ill effect. All also agreed that the proposed notice to the former client of the screening—using language borrowed verbatim from Rule 1.11—was too cryptic. Rule language along the lines suggested in proposed Comment [11] would be more elegant and more descriptive.

The committee urges APRL to support the Standing Committee’s proposal, but to suggest the following language as a friendly amendment or amendments:

Rule 1.10(e)

(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 would be prohibited by ~~is disqualified under~~ Rule 1.9 from doing so 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 is promptly given to any affected former client, including a description of the screened lawyer’s prior representation and of the screening procedures employed. ~~to enable it to ascertain compliance with the provisions of this Rule.~~

Minority Report by Mark Tuft

My primary concern with the Standing Committee's recommendation is that it seeks to permit screening in all contexts without giving adequate consideration to the intermediate approach utilized by a number of the 21 states the report cites. As Bob's updated article notes, only 12 states permit screening of lateral lawyers without regard to the lawyer's level of knowledge or degree of involvement in the very matter that the new firm is handling that is directly adverse to the affected client. As such, the Standing Committee's “one size fits all” recommendation represents a truly minority view. The “middle of the spectrum,” as described in the Committee Report covers a lot of territory. I think New York's proposed rule and the rule in a few other states, such as

Arizona, Colorado, Indiana, Nevada, New Jersey and Tennessee, strike a better balance that does not diminish the protections of confidentiality and client loyalty.

The policy reason behind the significant change the Standing Committee recommends cannot be that private lawyers can be trusted like government lawyers. I don't think that is the issue. The policy issue is whether the irrebutable presumption in the current imputation rule should be change to reflect the reality of lawyer mobility (some one smarter than me said that all lawyers who practice together are temporary in one degree or another) without undermining the confidence that clients are entitled to have that their lawyers won't join forces in the middle of the case with an adversary's firm that is out to destroy them. An overly broad rule that tends to undermine client trust will, in turn, undermine the public's trust in a legal system that allows such situations to occur without client consent.

I read Rule 1.10(a) as including a loyalty component. The Standing Committee's report raises the loyalty issue but doesn't give it much consideration. I do not believe the loyalty concerns are simply a version of the "appearance of propriety" standard, nor do I believe such concerns are greatly diminished in the private sector or that they go away because the lawyer responsible for the client's matter joins the firm that is on the opposite side. Under the proposed amendment, a lawyer who participated substantially in representing the client at the former firm could ethically join a new firm that is charged with the responsibility of attacking and undermining the very work the lawyer performed for the affected client.

For example, suppose the lateral lawyer negotiates an important contract or prosecutes a critical patent while at the former firm. The firm the lawyer seeks to join has been hired to challenge the validity of the contract or patent. Are ethical walls intended to protect client loyalty as well as confidentiality in this situation? Rule 1.0(k) suggests that the object of screening under the Model Rules is to protect information the isolated lawyer is obligated to protect. I am not aware of a case that holds that a breach of loyalty to a former client in this situation can be cured by an ethical wall.

This gets to the issue of what does it mean to "switch sides." According to at least one case, a "side switching" attorney is one who formerly represented a client in a matter and subsequently undertakes representation :or affiliates himself with a firm who has undertaken representation," of an adversary in a

related matter. See *Greig v. Macy's Northeast, Inc.*, 1 F. Supp.2d 397, 401 (D.N.J. 1998). Does the status of a “side switching” lawyer who associates with a firm on the other side of the client's matter change because that firm employs an ethical wall?

As I said, I think states like Arizona, Colorado, Indiana, Tennessee and New York's proposed rule strike a better balance. We can quibble about the particular wording, but the personally disqualified lawyer who has participated substantially in the matter is not a difficult concept to understand. Even in the case of government lawyers, there are times where courts will not permit a lawyer who moves into government service as the elected head of the office to be walled off to avoid a “side switching” conflict from being imputed to the entire office. See *City and County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal 4th 839 (2006).