

**2009 Statement of the Association of Professional Responsibility Lawyers
Supporting the ABA Standing Committee on Ethics and Professional
Responsibility's November, 2008, Report and Recommended Amendment to
Rule 1.10 re Screening**

APRL supported 2008 Annual Meeting Report 114, in which the Standing Committee on Ethics and Professional Responsibility (“Ethics Committee”) proposed an amendment to Model Rule 1.10 to enable nonconsensual screening of lawyers moving laterally from one private firm to another to prevent imputation from creating per se conflicts of interest that would otherwise arise from such lateral moves. A revised version of that proposal will be before the Mid-Year Meeting as Report 109. An alternate proposal, by the Section of Litigation, will be before the meeting as Report 110. APRL has reviewed the two proposals and reaffirms its support of the proposal of the Ethics Committee. While the Litigation Section proposal would be better than no amendment, it adds little to client protection and has very limited value in facilitating lawyer mobility and enabling clients to engage or retain lawyers of their choice with the special skills and resources they require.

While recognizing that more than a few APRL members would oppose (and some are actively opposing) the proposed amendment from of the Ethics Committee, the APRL board unanimously concluded that the Ethics Committee proposal is far superior to the Litigation Section proposal. APRL board member Mark Tuft disagrees with an important aspect of that proposed amendment. He 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 a client seeking to engage these other members of the new firm have the ability to do so without having their choice of counsel vetoed by the withholding of consent by the former client, if the lawyer in transit is timely screened from participation? All of those involved in APRL's consideration of the issue agreed with the Ethics Committee that it is no longer tenable to make a sharp distinction between former government lawyers and lawyers leaving a private law firm. As the Ethics 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.

It is not clear whether the Litigation Section disagrees on this point. Rather, it argues that any client who fears cheating (with or without foundation) should be able to veto movement to a new firm of a lawyer with more than insubstantial involvement or more than immaterial information. To the extent that screening is designed to prevent client confidences from "leaking," even inadvertently, to members of the new firm (and fear of that is the main thrust of the Litigation Section report), all of those involved in APRL's consideration of the issue 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. If the client has a factual basis for concerns about the adequacy of the protection provided by the screen, the client may seek protection from a court.

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.

APRL concludes (despite Mark Tuft's dissent) that the abstract conception of loyalty implicit in that dissent 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, just as it plays little role for public sector lawyers moving to a private firm. While the Ethics Committee appears to agree, APRL thinks this point is not addressed sufficiently in its Report.

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 gives more weight to loyalty concerns—positing that 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 Ethics 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. APRL opposes 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. Indeed, that concept of loyalty would seem to require prohibiting involvement of lawyers who leave the firm without ever having been involved or having had access to confidential information. 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. (Because APRL does not accept that broad but overly abstract view of loyalty due a client of a lawyer's former firm, APRL would consider the Litigation Section proposal superior to no change, but APRL strongly prefers the Ethics Committee proposal.)

Third, to the degree that the Litigation Section's proposal purports to be patterned on the current Massachusetts version of Rule 1.10 (d) – whose counterpart in the Model Rule is 1.10(e) – it should be noted that the two rules differ in a crucial particular: Massachusetts's 1.10 (d) enables non-consensual screening to avoid a conflict when the moving lawyer "had neither substantial involvement nor *substantial* material information relating to the matter, while the Litigation Section's proposal deletes the second "substantial" in that subsection, permitting possession of *any* material information, no matter how insubstantial, to defeat

screening as a means of preventing a per se conflict. This effectively renders subdivision (e)(2) of the Litigation Section proposal of relatively little value except to lawyers who already qualify for screening because they had no substantial involvement in the matter.

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. According to Robert Creamer's updated article, 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," described in the Committee Report covers a great deal of territory. New York's proposed rule and the rule in several 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. This "middle ground" approach, which is not the same as the Litigation Section proposal, achieves the primary objectives of the Standing Committee's proposal except in the most extreme situations. The concerns expressed in the majority report that the more balanced approach would "swallow the proposed amendment altogether" and that it would be difficult to apply have not been shown to be the case in the states that have adopted it.

The policy reason behind the significant change the Standing Committee recommends should not be that private lawyers can be trusted like government lawyers. The policy issue should be whether the irrebutable presumption in the current imputation rule should be changed to reflect the reality of lawyer mobility without undermining the confidence that clients are entitled to have that their lawyers will not 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 an abstract concept or a version of the "appearance of propriety" standard. Loyalty concerns are not greatly diminished in the private sector, nor do they go away because the lawyer responsible for the client's matter joins the firm that is on the opposite side and agrees to simply sit on

the side lines. Under the Standing Committee's 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?

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).