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IN THE SUPREME COURT
STATE OF ARIZONA

PETITION TO AMEND ERS 1.10, 1.11, 1.12, AND 1.18, AND ER 1.0 COMMENT [8], RULE 42, ARIZ. R. SUP. CT.	Supreme Court No. **Petition to Amend ERs 1.10, 1.11, 1.12, and 1.18, and ER 1.0 Comment [8], Rule 42, Ariz. R. Sup. Ct.**

In accordance with Rule 28, Ariz. R. Sup. Ct., the State Bar of Arizona petitions the Court to amend ER 1.10 and to make related amendments to ERs 1.11, 1.12, and 1.18 and to comment [8] to ER 1.0. The proposed amendments modify certain aspects of the ethical rules on screening and imputation of conflicts of interest, including:

(a) Eliminating ER 1.10(d)(1) so that it is consistent with the rules governing screening in other contexts, including private lateral moves of non-litigators (ER 1.10(d)(2)-(3)), government lawyers moving to private practice (ER 1.11) and judges, judicial staff and neutrals moving to private practice (ER 1.12).

(b) Modifying the ethical rules allowing screening (ERs 1.10, 1.11, 1.12 and 1.18) to provide additional detail on the particular

information that must be supplied to the affected former client in the event of screening.

(c) For laterally moving private lawyers, adding a new ER 1.10(d)(3), which requires that the screened lawyer reasonably believe the screening steps taken by the lawyer's new firm will be effective.

(d) Finally, to rectify an apparent oversight in the drafting of ER 1.0 comment [8], relating to the definition of "screened" in ER 1.0(k), adding a reference to ER 1.10 to comment [8].

Appendix A is a redlined version of the proposed amendments.

INTRODUCTION AND BACKGROUND

Arizona's Rules of Professional Conduct have long permitted screening (when implemented with other measures) to avoid imputation, and thus disqualification of the lawyer's firm, in several well-defined situations:

- Former government lawyers generally. Absent consent, ER 1.11(a) precludes a lawyer who participated personally and substantially in a matter as a public officer or employee from representing a private client in connection with that matter. But if the lawyer is screened and apportioned no part of the fee from the otherwise prohibited representation, and written notice is given to the appropriate government agency, the individual lawyer's disqualification is not imputed to the lawyer's entire firm.
- Former judges, judicial staff, and neutrals. Similarly, absent consent, ER 1.12(b) precludes a lawyer who participated personally and substantially as a judge, adjudicative officer, law clerk, arbitrator,

mediator, or neutral from representing anyone in connection with that matter. But if the lawyer is screened and apportioned no part of the fee, and written notice is given to the parties and the appropriate tribunal, the individual lawyer's disqualification is not imputed to the lawyer's firm.

- Former government lawyers with confidential government information. ER 1.11(b) precludes a lawyer having information that the lawyer knows is confidential government information about a person, acquired when the lawyer was a public officer or employee, from representing a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. But if the lawyer is screened and apportioned no part of the fee, the individual lawyer's disqualification is not imputed to the lawyer's firm.
- Lawyers with prospective client information. Similarly, absent consent, ER 1.18(c) precludes a lawyer who has obtained information from a prospective client from representing a client with materially adverse interests in the same or a substantially related matter, if the information could be significantly harmful to that prospective client in the matter. But if the lawyer is screened and apportioned no part of the fee, and written notice is given to the prospective client, the individual lawyer's disqualification is not imputed to the entire firm.

These rules have existed in Arizona for years and, to the State Bar's knowledge, have operated without difficulty.

Arizona's private lateral screening rule, ER 1.10(d), is similar to those above, but it contains a significant difference that the State Bar believes should now be eliminated. Consistent with the foregoing rules, current ER 1.10(d) permits the combination of (a) screening, (b) exclusion from fee apportionment, and (c) notice to the affected former client, to avoid imputing the laterally moving lawyer's disqualification, arising from the lawyer's representation of a former client in a matter, to the lawyer's new firm. But inconsistent with the foregoing rules, current ER 1.10(d)(1) contains a litigation exception which, when applicable, renders screening unavailable to avoid disqualification of the lawyer's new firm. As discussed below, such an exception is no longer warranted, and operates to the detriment of clients and lawyers alike.

I. History of Arizona's ER 1.10(d)(1)

When it was first adopted in 2003, ER 1.10(d)(1) departed markedly from the more restrictive provisions of the ABA Model Rules, which did not then allow private lateral screening. Arizona based its current rule on a proposed change to the ABA Model Rules that was never adopted by the ABA.[1] Under that proposal, as adopted in Arizona, if the new firm is representing a client in a matter **"involv[ing] a proceeding before a tribunal in which the personally disqualified lawyer had a substantial role,"** the new firm may not continue its representation of its current client absent the consent of the laterally moving lawyer's former client, even if the laterally moving lawyer is screened. This distinction arguably evinced appropriate

[1] The ABA Ethics 2000 Commission proposed in August 2001 that the ABA adopt private lateral screening. After debate at the August 2001 ABA annual meeting, the ABA House of Delegates rejected the Commission's proposal. A proposed amendment to the Commission's proposal, to add a litigation exception, was withdrawn before debate. Later, in 2003, Arizona adopted the language of that proposed, then withdrawn, Model Rules amendment.

caution at the time, given the then-newness of screening to facilitate private lawyer mobility.

In the years since Arizona adopted its rule, the ABA Model Rules have been changed to allow private lateral screening. Moreover, based on the Bar's review of other states, it appears that Arizona's ER 1.10(d)(1), imposing a more restrictive standard on litigators than applies to other types of practitioners, is the only such rule in the country.

Now, 10 years later, the State Bar is aware of no substantial continuing reason for the litigation exception. There is no such exception in ERs 1.11, 1.12, or 1.18, yet the State Bar is aware of no problems with protection of former client confidences in those contexts. There is no "side switching" concern; the lawyer moving to a new firm can never, absent the former client's consent, *personally* oppose that former client in the same or a substantially related matter. *See* ER 1.9(a). Moreover, independent of any screening rule, that lawyer has a *personal* professional obligation to maintain the confidences of the lawyer's former client. *See* ER 1.9(c).

II. The Proposed Amendments Benefit Lawyers and Clients

In addition to bringing Arizona more in line with the ABA and other states, the proposed modifications address other concerns with the current rule.

Where the litigation exception precludes screening, clients may lose their counsel of choice, if their firm associates with a lawyer who previously represented the client's opponent in litigation against the client. *E.g., Roosevelt Irrigation District v. Salt River Project Agricultural Improvement & Power District*, 810 F. Supp. 2d 929 (D. Ariz. 2011) (disqualifying law firm from handling litigation for its client based on the hiring of a lateral partner). Because a law firm may have to choose between hiring the lawyer or keeping a current client, litigators are unnecessarily restricted, in the law

firms with which they may affiliate, and law firms are unnecessarily restricted, in the lawyers with whom they may associate.

The litigation exception also unfairly operates against litigators, since ER 1.10(d)(1) does not apply to practitioners in other areas, such as business transactions or real estate deals. Thus, under current ER 1.10(d), a lawyer representing a client in negotiating a deal may (assuming compliance with ER 1.16) terminate that representation and, by complying with the screening, fee apportionment, and notice provisions of ER 1.10(d), join the adverse party's law firm. A comparable litigator may not.

The amorphous language of the litigation exception also has made it difficult to apply. *See Eberle Design v. Reno A&E,* 354 F. Supp. 2d 1093 (D. Ariz. 2005) (noting uniqueness of Arizona rule; holding that "a lawyer does not undertake a 'substantial role' merely by obtaining confidential and sensitive client information" and interpreting "substantial" in ER 1.10(d)(1) to mean "the lawyer's role in the former client's representation must have been material and weighty"); *Roosevelt Irrigation District,* 810 F. Supp. 2d at 946 (in a 127-page opinion devoting extensive analysis to ER 1.10(d)(1)'s litigation exception, noting the "paucity of authority on [ER 1.10(d)(1)] and [that] no court ha[d] interpreted it in its entirety," and resorting to dictionary definitions of "involve").

As these decisions show, ER 1.10(d)(1)'s terminology is difficult to apply even to a well-developed set of facts presented to a thoughtful court. The difficulty is compounded when Arizona lawyers and law firms attempt to apply the rule prospectively, to hypothetical facts that may arise from a lawyer's prospective lateral move. A lawyer may, during his or her career, practice in a solo practice, a small firm, a large firm, or any combination of these, often moving from one to the other multiple

times, not to mention possibly working for the government or as a judicial officer at some point. Where a law firm and candidate lawyer cannot be sure what "involve," "proceeding before a tribunal," and "substantial role" mean, they cannot be sure that a prospective lateral move will not result in loss of one or more current engagements by the firm if the lawyer joins the firm. Inevitably, the end result is that lateral moves that otherwise should occur — at least in the view of the lawyer and the firm — do not, simply because of the uncertainty.

OVERVIEW AND PROPOSED AMENDMENTS

A. ER 1.10(d)

The State Bar proposes three amendments to ER 1.10(d).

First, current ER 1.10(d)(1) is eliminated, and current ER 1.10(d)(2) and (3) are renumbered as ER 1.10(d)(1) and (2), respectively. The effect of this amendment is to eliminate the litigation exception of current ER 1.10(d)(1).

Second, the notice provisions of current ER 1.10(d)(3) — to be renumbered as ER 1.10(d)(2) — are supplied with additional detail, requiring that the former client affected by the screen receive notice **"of the particular screening procedures adopted, and when they were adopted."** One strength of the current rules' screening provisions is their flexibility. ER 1.0(k), which defines "screened," and ER 1.0 comments [8]-[10], which discuss screening, do not specify particular screening procedures that a lawyer or law firm must use. Rather, these rules and comments focus upon the purpose of screening — "to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected," ER 1.0 cmt. [9] — and where screening is permitted, permit it through timely imposition of any procedures "that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect." ER 1.0(k). This flexible

approach allows lawyers and law firms to optimally structure screening procedures appropriate in the particular circumstances. In addition, as noted above, individual lawyers have continuing ethical duties to avoid involvement adversarial to their former client in the matter in which they represented that client, ER 1.9(a), and to protect the confidences of that former client. ER 1.9(c). Nonetheless, requiring that affected former clients receive written notice "of the particular screening procedures adopted, and when they were adopted," may instill affected former clients and the public with additional assurance that confidences reposed in the lawyer will be protected even if the lawyer joins the new firm.

Third, the amendments would add a new ER 1.10(d)(3), requiring that "the personally disqualified lawyer reasonably believe[] that the steps taken to accomplish the screening of material information will be effective in preventing material information from being disclosed to the new firm and its client." It bears noting that this proposed addition may not strictly be necessary, as the laterally moving lawyer must comply with ER 1.9(a) and (c) with or without this provision. Nevertheless, the new ER 1.10(d)(3) may be beneficial in providing still greater certainty to the affected former client that the former client's confidences will be protected notwithstanding the lawyer's move to the new firm.

B. ER 1.11(a)(2), ER 1.12(c)(2), and ER 1.18(d)(2)

ERs 1.11(a)(2), 1.12(c)(2), and 1.18(d)(2) are amended to include the clarification proposed for new ER 1.10(d)(2) — that the recipient be provided notice **"of the particular screening procedures adopted, and when they were adopted."** The particular context of each of these rules aside, the current rules require that the affected client receive notice. There is no reason not to uniformly clarify the information the notice should supply, as proposed.

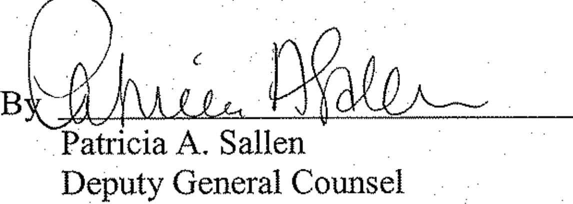
C. **ER 1.0 comment [8]**

Current ER 1.0 comment [8], pertaining to the definition of "screened," refers to ER 1.11, 1.12, and 1.18, but inexplicably omits ER 1.10. The amendment rectifies this omission.

CONCLUSION

When Arizona's litigation exception was adopted in 2003, it marked Arizona's progressivity as compared to the ABA, whose Model Rules of Professional Conduct then made no provision at all for screening. Now, the ABA and a growing number of other jurisdictions allow lateral screening for all types of lawyers, regardless of practice area. The proposed amendments bring Arizona in line with the trend of other authorities and also address significant concerns about the lack of fairness and uncertainty of the current rule. Accordingly, the State Bar of Arizona respectfully requests that the Court amend ER 1.10, 1.11, 1.12, and 1.18, and comment [8] to ER 1.0, as shown in Appendix A.

RESPECTFULLY SUBMITTED this 25th day of October, 2013.



By ______________________
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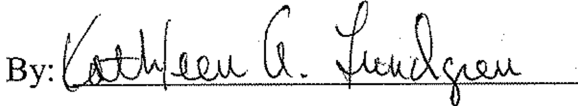
Electronic copy filed with the Clerk
of the Supreme Court of Arizona this
25th day of October, 2013.



By: ______________________

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APPENDIX A

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State Bar's Proposed Amendments to ER 1.0 comment [8], ER 1.10, ER 1.11, ER 1.12, and ER 1.18

(Petitioner's proposed additions are shown by underscoring and proposed deletions are shown by ~~strikethrough~~)

ER 1.0, comment [8]

This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under ERs 1.10, 1.11, 1.12 or 1.18.

ER 1.10(d)

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 is disqualified under ER 1.9 unless:

~~(1) the matter does not involve a proceeding before a tribunal in which the personally disqualified lawyer had a substantial role;~~

(~~2~~1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; ~~and~~

(~~3~~2) written notice of the particular screening procedures adopted, and when they were adopted, is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule; and~~.~~

(3) the personally disqualified lawyer reasonably believes that the steps taken to accomplish the screening of material information will be effective in preventing material information from being disclosed to the new firm and its client.

ER 1.11(a)

Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation. No

lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
(2) written notice of the particular screening procedures adopted, and when they were adopted, is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

ER 1.12(c)

If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
(2) written notice of the particular screening procedures adopted, and when they were adopted, is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule.

ER 1.18(d)

Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
(2) written notice of the particular screening procedures adopted, and when they were adopted, is promptly given to the prospective client.