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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of PETITION TO AMEND ERs 1.10, 1.11, 1.12, AND 1.18, AND ER 1.10 COMMENT [8], RULE 42, ARIZ. R. SUP. CT.	R-13-0046 **COMMENT IN SUPPORT OF PETITION AND REQUEST FOR EXPEDITED/PROVISIONAL ADOPTION**

For the reasons stated below, we respectfully submit that this Court should adopt the rule amendments proposed in Petition R-13-0046 (the "Petition"). Further, given the present Rule's current, real victimization of Arizona lawyers recently admitted to the practice of law, we urge the Court to consider making these changes effective promptly, either through an expedited ruling adopting the Petition, or provisional adoption of the proposed rule changes pending final disposition.

I. CURRENT ER 1.10(d)(1) PARTICULARLY VICTIMIZES LITIGATORS RECENTLY ADMITTED TO PRACTICE.

To the extent that ER 1.10(d)(1) exists to avoid the specter of a laterally moving lawyer revealing a client's secrets, the rule poorly fits the reality of the lateral lawyer marketplace — and disproportionately and unfairly impacts litigators recently admitted to the practice of law.

The Petition's proposed abrogation of ER 1.10(d)(1) would impact a narrow class of

cases: those in which a laterally moving litigator ("Lawyer") moves from one firm ("Current Firm") to another ("Target Firm"), in a litigation matter ("Matter") in which both Current Firm and Target Firm represent clients with adverse interests ("Client *C*" and "Client *T*," respectively), and in which Lawyer worked on the Matter for Client *C* while at Current Firm. The proposal would not allow Lawyer to "switch sides" and work for Client *T* in the Matter; ER 1.9(a) would bar Lawyer from doing so regardless of ER 1.10. Nor would the proposal allow Lawyer to take Client *C*'s representation in the Matter along with Lawyer to Target Firm; Target Firm already represents Client *T* in the Matter, and ER 1.7(b)(3) would bar Target Firm from representing both Client *C* and Client *T* in the Matter. The proposal would simply allow Lawyer to be screened from the Matter after moving to Target Firm while preserving Target Firm's ability to continue to represent Client *T* in the Matter.

But in this narrow class of cases, neither Lawyer nor Target Firm has any predictable assurance under current ER 1.10(d)(1) that Lawyer's move will not result in disqualification of Target Firm from continuing to represent Client *T* in the Matter. This is true regardless of how little Lawyer has worked on the Matter, because after the fact, Client *C* — still represented by Current (now, as to Lawyer, former) Firm may succeed in persuading the court that Lawyer's role in the Matter was "substantial."[1] Upon such a showing, the screening provisions of current ER 1.10(d)(2)-(3) would not be available to Lawyer and Target Firm to avoid the disqualification-by-imputation (from representing Client *T*) otherwise caused by ER 1.9(a) operating in concert with ER 1.10(a).[2] Target Firm then would have to choose between keeping Client *T* as a client in the Matter or hiring Lawyer. Considering this potential disqualification, as well as the prospect that a *post hoc* charge of

[1] It is theoretically true that Client *C* could consent to Target Firm's continued representation of Client *T* in the matter. As explained below, however, it is often impractical to attempt to secure that consent in advance.

[2] To be sure, the court could decline to disqualify Target Firm — a violation of the Rules of Professional Conduct does not necessarily justify disqualification. ER Preamble at ¶ 20. But litigants and courts can and do invoke the ethics rules in deciding whether to disqualify. *See e.g. Roosevelt Irrigation District v. Salt River Project Agricultural Improvement & Power District*, 810 F. Supp. 2d 929 (D. Ariz. 2011); *Eberle Design v. Reno A&E*, 354 F. Supp. 2d 1093 (D. Ariz. 2005).

unethical conduct might be leveled at its lawyers for continuing to represent Client *T*, Target Firm may well simply choose not to hire Lawyer.

Theoretically, all this uncertainty equally stifles potential lateral moves by both recently admitted litigators and more senior litigators. But practically, it victimizes the recently admitted litigators to a greater extent. This is because, generally speaking, senior litigators' most valuable stock-in-trade, as lateral candidates, is the business they may bring to a new firm. Given that a senior litigator in our hypothetical Lawyer's shoes could never bring Client *C*'s representation in the Matter to Target Firm, *see* ER 1.7(b)(3), senior litigators and target firms handling common matters may tend to self-select away from one another regardless of ER 1.10(d)(1).

It is a junior litigators such as Lawyer — who in many instances will have done only a little work on the Matter, and may well have done that work far removed from Client *C* and any of its sensitive confidential information — who are left to be impacted by ER 1.10(d)(1). Critically, for these junior litigators, there is no practical solution to the problem posed by the current rule. The only way Lawyer can assure Target Firm that Client *C* will not seek to disqualify Target Firm from continuing to represent Client *T* in the Matter, if Lawyer moves to Target Firm, is to attempt to obtain Client *C*'s consent, *before the fact of Lawyer's move*, to Client *T*'s continued representation by Target Firm. But Lawyer may not want to reveal to Current Firm (her current employer) that she is talking to another firm, particularly since, if Client *C* refuses consent, Target Firm may not hire Lawyer after all. And of course, even if Client *C* consents initially, it may change its mind.

The correct solution to this dilemma is to dispose of current ER 1.10(d)(1) altogether, as proposed in the Petition. Junior litigators should not be thwarted from making lateral moves that, in their and their prospective employers' judgment, make economic sense.

II. THIS ADVERSE IMPACT IS OCCURRING <u>TODAY</u>.

An attorney who was in exactly this situation recently sought advice from the undersigned. This lawyer was offered a position with a firm that represents a client who, in a pending action expected to last for some time, is an adverse party to a client of the firm at

which the lawyer is presently employed. While this lawyer was involved in the representation of the current firm's client, a more senior attorney at the firm was lead counsel on the matter, coordinated the representation and served as the point-person for direct communications with the client. The senior attorney perceived the lawyer's proposed lateral move to be barred by a conflict of interest and the firm was initially hesitant to approach the client to seek its consent.

Absent client consent (which consent likely would be requested from the client by the current firm, presumably displeased with the lawyer's tentative departure), the present Rule would operate to prevent the lawyer's employment with the new firm. At the same time, the lawyer having raised the planned lateral move with the lawyer's current firm, the current firm was no longer willing to continue employing the lawyer. Accordingly, the ability of the lawyer to accept the position offered by the tentative new firm rested exclusively in the hands of his current firm's client, which in turn was being consulted by the reluctant current firm. Ultimately, the lawyer was able to secure employment with the new firm. Notwithstanding this fortuitous outcome, for a period of time the lawyer faced the very real prospect of unemployment, with the lawyer's fate resting in the hands of the current firm's client as advised by the current firm.

Perhaps better than any hypothetical scenario presented to the Court in connection with its consideration of the Petition, this real life situation amply illustrates the unnecessary adverse impact that Arizona's present Rule can have upon a lawyer's ability to move laterally from firm to firm under circumstances where proper screening can prevent harm to the client at issue, and the degree to which that ability may be hampered – if not outright controlled – by persons less than motivated to assist that lawyer.

III. EXPEDITED CONSIDERATION WOULD BENEFIT THE BAR AT LARGE.

We have always understood the rule amendment schedule in Arizona as ensuring full and transparent public vetting of petitions to aid the Court in its evaluation of proposed amendments. Likewise, we understand delayed effective dates for most adopted rule amendments as facilitating the need for the Bar and the Judiciary to be made aware of

changes affected by the Court's action, educate themselves as to such changes and their impact, and prepare to incorporate these changes into their practices/cases so as to avoid any resultant harm to parties and clients. Neither consideration appears applicable to the relief sought by the instant Petition.

While the rulemaking process runs its course with respect to the Petition, the current Rule will continue to stifle lawyer mobility and pose unreasonable obstacles to attorneys' ability to secure the employment of their choosing. In the situation described in section II above, the lawyer in question faced prospective unemployment when a firm stood ready and willing (but not able) to hire the attorney. It is not unreasonable to assume other Arizona attorneys find themselves in this unfortunate quandary, pending possible adoption of the amendments by this Court. A balancing of the actual harm faced by these attorneys against the interests served by the Court's normal rulemaking schedule supports expedited consideration of the Petition, perhaps after an abbreviated comment period.

Similarly, the rationale supporting delayed effective dates, unquestionably sound as concerns amendments to rules impacting the procedures governing pending actions where due process must be afforded to persons involved as parties to civil and criminal proceedings, would seem inapplicable to the relief sought by the Petition. Instead, a delayed effective date in this context would operate simply to perpetuate the needless and harmful restrictions imposed by the current Rule upon Arizona's attorneys. If the Court agrees that the amendments proposed by the Petition are warranted, it is difficult to perceive how adoption of the proposed amendments on an immediately-effective, even if provisional, basis would serve the interests typically advanced by delayed effective dates.

IV. CONCLUSION.

For those reasons set forth in the Petition and herein, we urge the Court to grant the Petition, and adopt the proposed amendments forthwith.

DATED this ___ day of February, 2014.

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Electronic Copy filed with the Clerk of the Supreme Court of Arizona this 21st day of February, 2014.

By */s/ William G. Klain*