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IN THE SUPREME COURT

STATE OF ARIZONA

In the Matter of, PETITION TO AMEND ER 1.10 OF THE ARIZONA RULES OF PROFESSIONAL CONDUCT (RULE 42 OF THE ARIZONA RULES OF SUPREME COURT)	Supreme Court No. R-13-0046 **COMMENT OPPOSING AMENDMENT TO ER 1.10** **(Public Hearing Requested Pursuant to Rule 28(E))**

> We continue to adhere to the view . . . that problems of the job market and mobility are not solved by loosening ethical standards required of the profession. The rules of professional behavior are not branches which bend and sway in the winds of the job market and changes in the size and location of law firms. Rather, the rules must be the bedrock of professional conduct.[1]

¶1 Pursuant to Rule 28(D) of the Arizona Rules of Supreme Court, we hereby comment in opposition to the Petition to Amend Ethical Rule (ER) 1.10 of the

[1] *Dewey v. R.J. Reynolds Tobacco Co.*, 536 A.2d 243, 253 (N.J. 1988) ("We cannot conceive of any situation in which the side-switching attorney or his new firm would be permitted to continue representation if, unlike the situation before us, the attorney had in fact *actually* represented the former client or had acquired confidential information concerning that client's affairs.") (internal quotation marks omitted).

Arizona Rules of Professional Conduct. Although the Petition is well-drafted, the Petition omits a stark reality: The amendment would strip clients of their current right to informed consent before their lead lawyers can leave them and join the opposing firm. To be sure, other ethical rules and the amendment itself contain some protections for these former clients, but the amendment would necessarily (1) take away a right from clients and (2) appear to many former clients that the fox is guarding the hen house.[2] We therefore respectfully oppose the amendment and propose an alternative amendment for the Court's consideration.

I. RECESSIONS SHOULD NOT DRIVE THE ETHICAL RULES.

¶2 When the legal market was fairly strong in August 2001, the ABA rejected this attempt to water down the rules of imputed conflicts. Proponents had suggested, in effect, that the client's lead lawyer should be permitted to join the opposing law firm and that firm should not be disqualified so long as it erected a screen around the lawyer. Not only did the ABA wisely reject that suggestion, but this Court also effectively rejected it, choosing instead to adopt a limited screening rule along with several other jurisdictions.[3] Our limited screening rule appropriately permits screening only when the disqualified lawyers have not played a substantial role in the clients' matters. This limitation provides some consolation to the affected former clients because such lawyers are less likely to possess material confidential information or otherwise be in the real or apparent position to prejudice the clients' matters after joining the opposing firm. Two

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[2] *See, e.g.*, *Cardona v. Gen. Motors Corp.*, 942 F. Supp. 968, 977-78 (D.N.J. 1996) ("In the end there is little but the self-serving assurance of the screening-lawyer foxes that they will carefully guard the screened-lawyer chickens.") (quoting CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 7.6.4, at 402 (1986))).

[3] *See* ARIZ. RULES OF PROF'L CONDUCT ER 1.10(d). Arizona's well-qualified Ethical Rules Review Group (ERRG) proposed ER 1.10(d), using the work product of the Ethics 2000 Commission.

federal courts have interpreted and applied our limited screening rule, moreover, and both reached the right result in the circumstances.[4]

¶3 Although the ABA had stood strong for former clients' rights when the legal market was favorable, the ABA watered down the ethical rules when the legal market declined. Because many lawyers wanted or needed to switch firms, the ABA created this amendment to relax imputed conflicts of interest. To be sure, the House of Delegates sharply divided 226 to 191, but the majority voted to permit screening to sweep away imputed conflicts—no matter how large the lawyer's role in the now-abandoned client's matter and no matter how troubling that lawyer's firm-swap would appear to the client.[5]

¶4 As the Virginia State Bar Ethics Counsel argued, this amendment "[wa]s telling the organized bar, courts and public that lawyers with a substantial role may terminate that role, abandon the client, and join the law firm that represents that lawyer's adversary."[6] As Larry Fox, a well-known firm partner, author, and professor of legal ethics, also noted, the ABA was "put[ting]the interest of lawyers ahead of clients," and "[t]here are no clients here to protect their interests"—just

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[4] *See Roosevelt Irrigation District v. Salt River Project Agricultural Improvement & Power District*, 810 F. Supp. 2d 929, 948 (D. Ariz. 2011) (disqualifying a firm whose new partner had played a substantial role in the underlying matters); *Eberle Design, Inc. v. Reno A & E*, 354 F. Supp. 2d 1093, 1096 (D. Ariz. 2005) (refusing to disqualify an associate attorney who had spent less than 10 hours on the matter).

[5] The ABA did, however, put in place some additional "prophylactic" measures to give the now-former clients some assurances that their lawyers will not betray their confidences. These measures are discussed below (Pt. III).

[6] *ABA House Oks Lateral Lawyer Ethics Rule Change* (Feb. 16, 2009) (quoting James McCauley), http://www.abajournal.com/news/article/aba_house_oks_lateral_lawyer_ethics_ rule_change/.

as no clients are apparently championing the amendment in Arizona.[7] Finally, as revealed in both experience and two empirical studies, screens are far-from-perfect protection for former clients. Without careful implementation and vigilance, screens can be untimely, deficient, or even breached.[8]

¶5 The Petition nevertheless suggests that our ethical rules are outdated (2003), stifle lawyer mobility, and limit "counsel of choice." But the current imputation rules are not as rigid, anti-lawyer, and anti-client as the Petition suggests. If the moving lawyer never actually obtained material confidential information from the

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[7] *ABA House Oks Lateral Lawyer Ethics Rule Change* (Feb. 16, 2009) (quoting in part Lawrence Fox), http://www.abajournal.com/news/article/aba_house_oks_lateral_lawyer_ethics_rule_change/. To the proponents' argument that "no [screening] violations were reported" in states that permitted full screening, Mr. Fox noted that any violations would "take place behind a black curtain. The client can't know." *Id.*; *see also infra* note 8 (noting that lawyers occasionally—and significantly—err in implementing and maintaining screens).

[8] *See, e.g.*, *Maritrans v. Pepper, Hamilton & Sheetz*, 602 A.2d 1277, 1281-82 (Pa. 1992) (noting that law firm breached its screening arrangement); Susan P. Shapiro, *If It Ain't Broke . . . an Empirical Perspective on Ethics 2000, Screening, and the Conflict-of-Interest Rules*, 2003 U. ILL. L. REV. 1299, 1326 (2003) (attempting to answer empirically whether "screens meet the specifications found in the ethics codes and case law? Not always, especially in the smaller firms. Admonitions simply to 'stay the hell away' do not live up to the spirit of the rules. Even walls constructed from more sophisticated blueprints have points of vulnerability, especially with respect to computer networks and firmwide communications. Even more problematic, firms often do not construct screening devices as quickly as necessary because of the lag between the time that the migratory lawyer joins the firm and the time that their tainted baggage is discovered."); Lee A. Pizzimenti, *Screen Verite: Do Rules About Ethical Screens Reflect the Truth About Real-Life Law Firm Practice?*, 52 U. MIAMI L. REV. 305, 333 (1997) ("In summary, I found a large majority of responding firms take conflicts seriously and attempt to resolve them in a measured manner. However, both they and firms with fewer concerns are hampered by flawed conflicts detection, flawed systems for maintaining screens and, to some extent, an adversarial rather than fiduciary analysis of screen issues. This is aggravated by the fact that no firm responding had developed a policy of sanctions regarding breaching screens. Moreover, there are enormous difficulties in proving a screen has been breached.") (footnote omitted).

former firm's client, neither the lawyer nor the new firm would be disqualified in the matter. ER 1.9(b). Similarly, when the lead lawyer leaves a firm, the old firm is no longer disqualified so long as its lawyers no longer possess material confidential information. ER 1.10(b). Thus, the rules already permit appropriate movement without consent.

¶6 Furthermore, the Petition's claim that our current rule deprives clients of their "counsel of choice" is actually a self-created problem. The new firm's client would lose its "counsel of choice" only if (1) the opposing lawyer decides to join the firm, (2) the firm decides to hire the opposing lawyer, and (3) they neither wait for the matter to conclude nor obtain the consent of the lawyer's former or soon-to-be former client.[9] Moreover, the lawyer's client is often the one losing "counsel of choice" when the lawyer decides to join the new (and opposing) firm.

¶7 To advance its controversial amendment in the face of these problems, the Petition also relies on the public-private distinction in the imputation rules, which generally permit screening for mobile government lawyers but not private lawyers. Although proponents often point to this distinction as the reason to jettison or limit imputation rules, this reasoning disfavors client interests. That

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[9] Thus, although the Petition argues that "[w]here the litigation exception precludes screening, clients may lose their counsel of choice" [Pet. at 5], the full picture is not so client-centered. *See, e.g.*, Neil W. Hamilton & Kevin R. Coan, *Are We A Profession or Merely A Business?: The Erosion of the Conflicts Rules Through the Increased Use of Ethical Walls*, 27 HOFSTRA L. REV. 57, 88-89 (1998) ("When courts take into account the policy of client choice, at first blush, it appears as though the courts are taking on the noble task of protecting the rights of clients at the expense of attorneys. That effort is not as noble as it seems however. Lurking in the shadows of every policy discussion citing the right of client choice is the fact that the client's dilemma in this type of conflict problem is caused exclusively by the fact that a lawyer has moved in the first place. . . . The client choice rationale is thus implicitly a policy of giving more weight to lawyers' financial interests and the concept of the profession as a business.").

government clients are currently entitled to less prophylactic protection over their confidential information and to less loyalty from their former lawyers is *not* a worthy reason to dilute the protection and loyalty that private clients currently enjoy.[10] Moreover, the more promiscuous use of screening for former government lawyers is simply the result of a policy tradeoff. Fear existed that good lawyers would refrain from taking government employment if they could not later join firms appearing before or working against those same government agencies. Whatever the objective basis for the original fear or its persistence, the fear has never applied to private practice.[11] In other words, good lawyers would still enter private practice notwithstanding the current imputation rules.[12] Indeed, we have operated under a full or limited imputation rule in Arizona for decades; attorneys have nevertheless thronged to private practice throughout this period. The same is true in the vast majority of other states, which also protect former clients with full or at least limited imputation rules.

¶8 In closing, for the client's lead lawyer to join the opposing firm—and not to bother to secure consent from the client—goes too far. This stretch is why the

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[10] Indeed, a more client-centered view might suggest just the opposite: that the government lawyer imputation rules should be strengthened.

[11] *See, e.g.*, *Towne Dev. of Chandler, Inc. v. Super. Ct.*, 173 Ariz. 364, 369, 842 P.2d 1377, 1382 (Ct. App. 1992) (noting that "[t]he purpose of the rigorous disqualification provision of the rule is to reasonably assure the client previously represented . . . that the principle of loyalty to the client is not compromised" and "explain[ing] why the standard of ER 1.11 is less severe") (internal quotation marks and citation omitted).

[12] *See, e.g.*, Ted Enarson, *Lateral Screening: Why Your State Should Not Adopt Amended Model Rule of Professional Conduct 1.10*, 37 J. LEGAL PROF. 1, 11 (2012) ("[O]ne would be hard-pressed to find an attorney who would be discouraged from working in the private sector for fear that he/she later would not be able to move laterally to another firm within that same sector.").

ABA split on this amendment in tough times and rejected it in thicker times, why other states have split, and why many clients become understandably concerned, upset, or even shocked when their trusted lawyers join the opposing firm. Other states have mostly heard the message: approximately 37 states—the vast majority—either permit only limited screening or no screening at all.[13] Some of the most populous and influential states—such as California, New York, and Texas—likewise do not permit screening in these circumstances.[14]

¶9 For these reasons, the Petition's call to weaken our imputation rules and to take away private clients' right to informed consent should not prevail.

II. IN THE ALTERNATIVE, THE COURT COULD ADOPT THE APPROACH OF OUR NEIGHBORING STATES AND THE RESTATEMENT.

¶10 As explained above, this full-blown-screening amendment is unwarranted, particularly given its actual and apparent costs. The Petition does, however, contain one kernel of merit: it would remedy the uneven treatment of litigation and transactional lawyers. Our current "limited" screening rule actually only limits litigators; it permits "full" screening for transactional lawyers.[15] But

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[13] *See, e.g.*, ABA Policy Implementation Comm., State Adoption of Lateral Screening Rule (2012), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/lateral_screening.authcheckdam.pdf.

[14] *See, e.g.*, ABA Policy Implementation Comm., State Adoption of Lateral Screening Rule (2012), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/lateral_screening.authcheckdam.pdf.

[15] Technically, the current rule does not necessarily discriminate against lawyers; it draws a distinction between types of matters. ER 1.10(d) permits screening only when the "the matter does not involve a *proceeding before a tribunal* in which the personally disqualified lawyer had a substantial role." ARIZ. RULES OF PROF'L CONDUCT ER 1.10(d)(1) (emphasis added); *see also* N.J. RULES OF PROF'L CONDUCT R. 1.10(c)(1) (permitting screening only if "the matter does not involve a proceeding in which the personally disqualified lawyer had primary responsibility"). The Court might have reasonably drawn a distinction between the generally more contentious and

contrary to the proposed amendment, we need not dilute the ethical rules to achieve equal treatment of litigation and transactional lawyers.

¶11 In fact, the Court could simply delete four offending words ("proceeding before a tribunal") and adjust the accompanying language accordingly. A simple and suggested amendment to ER 1.10(d)(1) follows and is repeated in the Appendix:

> 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: . . . the personally disqualified lawyer did not have a substantial role in the matter ~~does not involve a proceeding before a tribunal in which the personally disqualified lawyer had a substantial role~~. . . .[16]

The Court would not be alone in applying a limited screening concept to both litigators and transactional lawyers. Our neighbors—Nevada and New Mexico—do so (among other states).[17] Colorado essentially does so as well,[18] except that it

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adversarial posture of litigation and the generally less contentious and adversarial nature of transactional practice.

[16] *See* ARIZ. RULES OF PROF'L CONDUCT ER 1.10(d)(1); *infra* Appendix.

[17] *See* NEV. RULES OF PROF'L CONDUCT R. 1.10(e)(1) (permitting screening only if "[t]he personally disqualified lawyer did not have a substantial role in or primary responsibility for the matter that causes the disqualification under Rule 1.9"); N.M. RULES OF PROF'L CONDUCT R. 16-110(C)(2) (permitting screening only if "the newly associated lawyer did not have a substantial role in the matter"); *see also* IND. RULES OF PROF'L CONDUCT R. 1.10(c)(1) (permitting screening only if "the personally disqualified lawyer did not have primary responsibility for the matter that causes the disqualification under Rule 1.9"); MASS. RULES OF PROF'L CONDUCT R. 1.10(d)(2) (permitting screening only if "the personally disqualified lawyer . . . had neither substantial involvement nor substantial material information relating to the matter"). Utah, however, is a full-screening state. UTAH RULES OF PROF'L CONDUCT R. 1.10(c).

[18] COLO. RULES OF PROF'L CONDUCT R. 1.10(e). Unlike the Petition, Colorado's rule also requires that both "the personally disqualified lawyer *and the*

uses the "substantial participation" terminology common to other ethical rules.[19]

¶12 Alternatively, but similarly, the Court could adopt the *Restatement* approach, which permits screening only if "any confidential client information communicated to the personally prohibited lawyer is unlikely to be significant in the subsequent matter."[20] Minnesota and North Dakota, for example, essentially follow the *Restatement* approach.[21]

¶13 In sum, if the Court is inclined to address the uneven treatment of transactional and litigation lawyers in our current limited screening rule, it could and should employ the less costly approaches of our neighboring states and the *Restatement* over the Petition's approach.

III. IF THE PETITION'S PUSH FOR WEAKENED IMPUTATION RULES NEVERTHELESS PREVAILS, THE FULL ABA MODEL RULE SHOULD BE ADOPTED, NOT JUST THE PARTS THAT "BENEFIT LAWYERS" AND FIRMS.

¶14 Although the Petition recommends the new Model Rule's not-too-popular concept of full screening, the Petition unfortunately deletes several of the Model

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partners of the firm with which the personally disqualified lawyer is now associated reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the firm and its client." *Id.* (emphasis added).

[19] *See* ARIZ. RULES OF PROF'L CONDUCT ER 1.11, 1.12.

[20] RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 124(2)(a) (2000).

[21] *See* MINN. RULES OF PROF'L CONDUCT R. 1.10(b)(1); N.D. RULES OF PROF'L CONDUCT R. 1.10(b)(1)-(2) (permitting screening only if "any confidential information communicated to the lawyer is unlikely to be significant in the matter" and "there is no reasonably apparent risk that any use of confidential information of the former client will have a material adverse effect on the client.").

Rule's new prophylactic protections.[22] To give some assurance to former clients that the new firm's screen is and will remain effective, the Model Rule requires "a statement [to the former client] of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and . . . certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures."[23] These protections alone do not go far enough for former clients in our opinion, but if the Court is inclined to become a full-screening state, we recommend following the Model Rule and including these protections.

CONCLUSION

¶15 Although the Petition's proposed amendment might be better for lawyer mobility, it comes with significant costs to clients and public perception.[24] However well-drafted, the Petition does not justify those costs.

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[22] To the Petition's credit, however, it would require that former clients receive notice "of the particular screening procedures adopted, and when they were adopted." Pet. at 7-8; *see also* ER 1.18 cmt. 9 (requiring that the notice include a description of the screening procedures); MODEL RULES OF PROF'L CONDUCT R. 1.10(a)(2)(ii) (same). The Petition also recommends that the Court add identical notice requirements to ERs 1.11, 1.12, and 1.18, to which we would have no objection.

[23] MODEL RULES OF PROF'L CONDUCT R. 1.10(a)(2)(ii)-(iii).

[24] *See generally Roberts & Schaefer Co. v. San-Con, Inc.*, 898 F. Supp. 356, 363 (S.D.W. Va. 1995) ("[I]n an age of sagging public confidence in our legal system, maintaining confidence in that system and in the legal profession is of the utmost importance. In this regard, courts should be reluctant to sacrifice the interests of clients and former clients for the perceived business interest of lawyers. . . .").

RESPECTFULLY SUBMITTED this 20th day of May, 2014.

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Electronic copy of this Comment filed with the Clerk of the Supreme Court of Arizona this 20th day of May, 2014.

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APPENDIX

ER 1.10. Imputation of Conflicts of Interest: General Rule

(a)-(c) [No Change]

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

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

(3) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.