

1 Andrew F. Halaby (#017251)  
2 Joy L. Isaacs (#030693)  
3 Amanda F. Jenkins (#030694)  
4 SNELL & WILMER L.L.P.  
5 One Arizona Center  
6 400 E. Van Buren  
7 Phoenix, AZ 85004-2202  
8 Telephone: (602) 382-6000  
9 [ahalaby@swlaw.com](mailto:ahalaby@swlaw.com)  
10 [jisaacs@swlaw.com](mailto:jisaacs@swlaw.com)  
11 [ajenkins@swlaw.com](mailto:ajenkins@swlaw.com)

12 **IN THE SUPREME COURT OF THE STATE OF ARIZONA**

13 In the Matter of PETITION TO  
14 AMEND ERs 1.10, 1.11, 1.12, AND  
15 1.18, AND ER 1.10 COMMENT [8],  
16 RULE 42, ARIZ. R. SUP. CT.

R-13-0046

**COMMENT IN SUPPORT OF  
PETITION**

17 This Court should adopt the rule amendments proposed in Petition R-13-  
18 0046 (the “Petition”). The undersigned, who chaired the subcommittee of the State  
19 Bar of Arizona Ethics Committee which developed the Petition’s proposal, submits  
20 the following additional comments in his individual capacity.

21 **I. THE CURRENT RULE PARTICULARLY IMPACTS LAWYERS IN  
22 CERTAIN PRACTICE AREAS.**

23 Bill Klain’s February 21, 2014 comment, filed in support of the Petition,  
24 addresses the plight of lawyers recently admitted to practice. That plight is  
25 particularly pronounced for lawyers litigating in matters that tend to involve  
26 multiple parties and take place over protracted periods: bankruptcy cases,  
27 environmental litigation, water rights adjudications, and similar matters.

28 To take bankruptcy as just one example, a complex Chapter 11 proceeding  
may feature many creditors with adverse interests. Each of these creditors would,

1 presumably, prefer to engage counsel familiar with local rules and practices. Yet  
2 only a limited number of local firms handle such matters. Necessarily, then, the  
3 prospect of an overbroad interpretation of current ER 1.10(d)(1)'s amorphous  
4 provisions, as they pertain to any attorney who has worked on the case for one  
5 creditor, has the practical effect of barring that attorney from working for other  
6 local firms who represent other creditors. The same is true of any other protracted,  
7 multi-party litigation. In practical effect, attorneys who have worked on the case  
8 are tied to their current firms, as opposed to competing firms for whom those  
9 attorneys may want to work, for the duration of that and, potentially, any  
10 overlapping litigation.

11 **II. THE PROPOSED RULE DOES NOT COMPROMISE CLIENT**  
12 **INTERESTS. IT ADVANCES CLIENT INTERESTS.**

13 Objections to private lateral screening often focus upon the prospect —  
14 presented here in Mr. Klain's nomenclature — that if Lawyer moves to Target  
15 Firm, Lawyer will share Client *C*'s confidences, obtained during the representation  
16 of Client *C* while at Current (now, putatively, former) Firm, with Client *T* or Client  
17 *T*'s lawyers — Lawyer's new colleagues — at Target Firm.

18 This concern is overblown.

19 First, as noted in the Petition (at 8:2-5), ER 1.9(a) and (c)<sup>1</sup> currently operate  
20 to preclude Lawyer from revealing former Client *C*'s confidences *regardless* of ER  
21 1.10(d). Any argument based on the prospect that Lawyer will reveal those  
22 confidences is thus non-unique to the Petition's proposal — and assumes a level of  
23 venality on Lawyer's part which is entirely unjustified.

24 Second, if the concern is that Lawyer's new colleagues at Target Firm will  
25 stumble upon papers or files in Lawyer's possession that relate to Client *C*'s former  
26 representation by Lawyer in the Matter, that concern too is unfounded. Given ER  
27 1.7(b)(3), Lawyer cannot take Client *C*'s representation in the Matter with Lawyer

28 <sup>1</sup> ER 1.9(b) applies only if Lawyer did not work on the Matter at all, and thus is not germane to the Petition.

1 to Target Firm, even if Client C wants to move with Lawyer to Target Firm. So  
2 presumably, Lawyer will possess no papers or files relating to Lawyer's former  
3 representation of Client C for her new colleagues to stumble upon.<sup>2</sup>

4 Third, the Petition adds an additional safeguard to ensure the secrecy of any  
5 of Client C's confidential information that is reposed in Lawyer: Lawyer must,  
6 under proposed new ER 1.10(d)(3), "reasonably believe[] that the steps taken to  
7 accomplish the screening of material information will be effective in preventing  
8 material information from being disclosed to the new firm and its client." [Petition  
9 at 11:18-21.]<sup>3</sup> In view of ER 1.9(c), the undersigned believes that this new section

10 <sup>2</sup> If Lawyer is representing Client C in other matters besides the Matter  
11 at Target Firm, Lawyer had to obtain Client C's and Client T's consent to do so,  
12 because of Target Firm's (ongoing) representation of Client T adversely to Client C  
13 in the Matter. See ER 1.7(a)(1). Presumably, informed consent having been  
14 obtained, Client C is comfortable with whatever confidentiality preservation  
15 arrangements Lawyer and Target Firm have made with respect to Lawyer's work  
16 for Client C at Target Firm.

17 <sup>3</sup> Proposed new ER 1.10(d)(3) is adapted from Colorado Rule of  
18 Professional Conduct 1.10(e)(4), which is a sensible measure even though, as  
19 explained below, broad "substantial involvement" qualifiers such as Colorado's are  
20 not. In this, among other reasons, the Petition's proposed rule is superior to the  
21 ABA's private lateral screening rule. ABA Model Rule 1.10(a)(2), requires, among  
22 other things, "a statement that review may be available before a tribunal." Such a  
23 statement improperly injects disqualification and liability issues into the rules of  
24 professional conduct. See ER Preamble [20] ("The Rules are designed to provide  
25 guidance to lawyers and to provide a structure for regulating conduct through  
26 disciplinary agencies. They are not designed to be a basis for civil liability."). The  
27 ABA rule also requires "certifications of compliance . . . by a partner of the firm at  
28 reasonable intervals upon the former client's written request and upon termination  
of the screening procedures." The ABA rule thus requires someone who may have  
no connection to the lateral to *personally* (a) vouch for Lawyer's ethical compliance  
whenever the former client requests it or (b) determine that the former client's  
requests have come too frequently to be "reasonable." The proposed rule change,  
in contrast, requires that the personally involved lawyer, not some other lawyer at  
the firm, make the determination that screening will be effective. The ABA rule's  
provisions, however necessary as a political accommodation when the ABA was  
wrangling over private lateral screening years ago, are inferior to those proposed  
here. No good reason exists to create a private lateral screening regime that differs

1 is, strictly speaking, unnecessary. But former clients and the public may draw  
2 comfort from proposed new ER 1.10(d)(3), particularly where Lawyer is moving to  
3 a small firm.

4 Fourth, there is no substantial empirical evidence that laterally moving  
5 lawyers breach their former clients' confidences. As reported by the ABA when it  
6 adopted its private lateral screening regime in 2009, the Model Rules' quarter  
7 century of permitting screening in public-private lateral moves yielded not "even a  
8 handful of instances in which confidentiality ha[d] been breached."<sup>4</sup>

9 The foregoing realities help explain why the proposed rule change does not  
10 undermine client interests. There is no reason for this Court to assume the worst  
11 about the practicing bar's willingness or ability to safeguard former client  
12 confidences. Indeed, under the current rule, a paralegal or legal secretary — even  
13 one who played a "substantial role" in the matter — may move from Current Firm  
14 to Target Firm so long as the paralegal or legal secretary is screened from  
15 involvement in the Matter. *See* ER 1.10 cmt. [4]. There is no sensible basis to  
16 assume lawyers are less ethical than staff. If such concerns are to supply the basis  
17 for rejecting the petition, they give cause to revisit other rules, such as ER 1.11, ER  
18 1.12, and ER 1.18, as well.

19 In fact, the Petition's proposal favors clients. Clients need lawyers to protect,  
20 defend, and advance clients' rights and interests. The current rule deprives clients  
21 of their counsel of choice. Upon leaving Current Firm, Lawyer would not be  
22 representing Client *C* in any event. But under the current rule, Target Firm can be  
23 conflicted out by imputation once Lawyer joins Target Firm, costing Client *T* its  
24

---

25 from those of extant ER 1.11, 1.12, and 1.18.

26 <sup>4</sup> *See* Report 109 as Adopted by House of Delegates Feb. 16, 2009, at  
27 11, *available at* [americanbar.org/content/dam/aba/migrated/leadership/2009/  
midyear/daily\\_journal/Adopted109.doc](http://americanbar.org/content/dam/aba/migrated/leadership/2009/midyear/daily_journal/Adopted109.doc); *see also* Ethics 2000 Commission Report  
28 at 6, *available at* [americanbar.org/content/dam/aba/administrative/  
professional\\_responsibility/report\\_hod\\_082001.authcheckdam.pdf](http://americanbar.org/content/dam/aba/administrative/professional_responsibility/report_hod_082001.authcheckdam.pdf).

1 counsel as well. And Lawyer's other clients as well as Target Firm's clients, all of  
2 whom might be better served were Lawyer to move to Target Firm as Lawyer  
3 wishes to do, are deprived of the opportunity to receive representation from Lawyer  
4 at Target Firm. Under the proposal, Client *T* keeps its counsel of choice, while  
5 Lawyer gains the ability to offer services to clients while affiliated with the law  
6 firm she believes will best help her serve clients well.

7 **III. THE PROPOSED RULE CHANGE EVINCES WHAT IS BEST**  
8 **ABOUT THE ARIZONA JUDICIARY'S HISTORY AND CULTURE**  
9 **OF INNOVATION.**

10 Arizona's judiciary innovates. When Arizona adopted current ER 1.10(d)(1)  
11 more than a decade ago, it permitted private lateral screening even though the ABA  
12 had not. (Petition at 4 n.1.)

13 Arizona's one-of-a-kind rule has proved unworkable in application. The  
14 rule's amorphousness — deriving largely though not exclusively from its  
15 "substantial role" term<sup>5</sup> — chills lateral moves that lawyers want to make. Under  
16 current ER 1.10(d)(1), Target Firm cannot safely hire Lawyer without jeopardizing  
17 a current client's representation, and Lawyer cannot even try to avoid that  
18 eventuality (by seeking Client *C*'s advance consent to Target Firm's continued  
19 representation of Client *T* if Lawyer moves to Target Firm) unless she prematurely  
20 reveals her (necessarily tentative) job change plans to her current employer. The  
21 very act of revealing those plans may at once put Lawyer into an uncomfortable  
22 position with Current Firm and, if Client *C* refuses consent, scuttle the very  
23 employment opportunity that prompted Lawyer's request in the first place. No one  
24 deserves to be put in such a position, just to change jobs.

25 The Arizona judiciary's proud history and culture of innovation demand that,  
26 current ER 1.10(d)(1) having had its tryout and proved unworkable, the rule now be

27 <sup>5</sup> The ABA Standing Committee on Professional Responsibility rejected  
28 just such a limitation as too vague to provide sufficient disciplinary guidance and  
too vague to effectively ease lateral lawyer movement. February 16, 2009 Report at  
14-15.

1 dropped.

2 **IV. THE PROPOSED RULE CHANGE COMPORTS WITH THE**  
3 **NATIONAL TREND. MORE IMPORTANTLY, IT IS GOOD**  
4 **POLICY.**

5 The national trend favors facilitating private lawyer lateral movement. When  
6 the ABA Ethics 2000 Commission first proposed private lateral screening, only  
7 seven states permitted it.<sup>6</sup> By 2008, when the ABA proposal was again introduced,  
8 that number had increased to 12.<sup>7</sup> Today, the number is 29.

9 But the question isn't whether to permit private lateral screening. Arizona  
10 does. It has since it adopted current ER 1.10(d)(1) in 2003. Arizona isn't going to  
11 move backward.

12 The question is whether the qualifier of current ER 1.10(d)(1) makes sense,  
13 or whether instead this Court should drop ER 1.10(d)(1) and eliminate its chilling  
14 effects on private lawyer lateral movement. Setting Arizona and its litigation-  
15 specific qualifier aside, half the states that permit private lateral screening impose a  
16 "substantial involvement" or similar restriction,<sup>8</sup> while the other half permit private  
17 lateral screening free of any such restriction.<sup>9</sup> The latter group has it right. Arizona  
18 should join them, for the practical, real world reason that such qualifiers generally,

---

19 <sup>6</sup> See Ethics 2000 Commission Report at 6.

20 <sup>7</sup> February 16, 2009 Report at 9.

21 <sup>8</sup> See Colo. R. Prof'l Conduct 1.10(e)(1); Haw. R. Prof'l Conduct  
22 1.10(c)(1); Ind. R. Prof'l Conduct 1.10(c)(1); Mass. R. Prof'l Conduct 1.10(d)(2);  
23 Minn. R. Prof'l Conduct 1.10(b)(1); Nev. R. Prof'l Conduct 1.10(e)(1); N.D. R.  
24 Prof'l Conduct 1.10(b)(1)-(2); N.H. R. Prof'l Conduct 1.10(c)(3); N.J. R. Prof'l  
25 Conduct 1.10(c)(1); N.M. R. Prof'l Conduct 16-110(C); Ohio R. Prof'l Conduct  
26 1.10(c); Tenn. R. Prof'l Conduct 1.10(d)(1); Vt. R. Prof'l Conduct 1.10(a)(2); Wis.  
27 R. Prof'l Conduct 1.10(a)(2)(i).

28 <sup>9</sup> See Conn. R. Prof'l Conduct 1.10(a)(2); Del. R. Prof'l Conduct  
1.10(c); Idaho R. Prof'l Conduct 1.10(a)(2); Ill. R. Prof'l Conduct 1.10(e); Ky. R.  
Prof'l Conduct 1.10(d); Md. R. Prof'l Conduct 1.10; Mich. R. Prof'l Conduct  
1.10(b); Mont. R. Prof'l Conduct 1.10(c); N.C. R. Prof'l Conduct 1.10(c); Or. R.  
Prof'l Conduct 1.10(c); Pa. R. Prof'l Conduct 1.10(b); R.I. R. Prof'l Conduct  
1.10(c); Utah R. Prof'l Conduct 1.10(c); Wash. R. Prof'l Conduct 1.10(e).

1 and ER 1.10(d)(1) with respect to litigation matters, keep lawyers from getting jobs  
2 and clients from getting lawyers.

3 A plain, simple, and effective remedy beckons. This Court should grant the  
4 Petition.

5 DATED this 20th day of May, 2014.

6 SNELL & WILMER L.L.P.

7

8 By /s/ Andrew F. Halaby

9 Andrew F. Halaby

10 Joy L. Isaacs

11 Amanda F. Jenkins

12 Electronic copy served this date  
13 upon Petitioner.

14 18466035

15

16

17

18

19

20

21

22

23

24

25

26

27

28