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

| In the Matter of: | Supreme Court No. R-13-0046 |
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| **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.** | **REPLY OF THE STATE BAR OF ARIZONA** |

The Bar presents the following reply comment in support of the Petition.

**THE BAR CAREFULLY CONSIDERED CLIENT INTERESTS**

The Bar's fresh look at ER 1.10(d) was sparked in substantial part by the District of Arizona's August 2011 decision in *Roosevelt Irrigation District v. Salt River Project Agricultural Improvement & Power Dist.*, 810 F. Supp. 2d 929. As had *Eberle Design v. Reno A&E*, 354 F. Supp. 2d 1093 (D. Ariz. 2005), *Roosevelt* demonstrated that ER 1.10(d)(1)'s amorphous language makes it difficult to interpret, and therefore virtually impossible to apply predictively.[1]

[1] This is true even if, as the (lone) opposing comment asserts, *Roosevelt* and *Eberle* were correctly decided. That such deep interpretive analysis was required shows that ER 1.10(d)(1) is not clear.

Thus, Client $T$[2] can have no assurance that, if Target Firm hires Lawyer, Client $T$ will get to keep its counsel of choice. And even if Target Firm is willing to risk disqualification from the Matter by hiring Lawyer, Target Firm lawyers may be subject to discipline if they continue to represent Client $T$. *See* ER 1.9(a) and 1.10(a). These risks turn on whether Target Firm's representation of Client $T$ "involves" a "proceeding before a tribunal" in which Lawyer had a "substantial role." Ethics rules need to be clear. This rule is not.[3]

Current ER 1.10(d)(1) is defective. Before adopting the particular solution advanced by the Petition, the Bar considered a variety of alternatives.

### A. The Bar Considered a Broader "Substantial Involvement" Qualifer, and Rejected It for Good Reason.

The Ethics Committee considered and rejected simply eliminating the litigation-specific aspect of ER 1.10(d)(1). The same chilling effects of the current rule would apply to that rule too. Indeed, they would be exacerbated, since a broadened rule would apply not just to litigators, but to all practitioners. To broaden ER 1.10(d)(1) would cast an even darker pall over the Arizona market for lateral lawyers, and thus represent a backward, not forward, step. No lawyer who wants to change jobs should have to wonder whether her new colleagues will confront

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[2] This terminology comes from page 2 of Bill Klain's February 21, 2014 supporting comment. The Bar uses it here for brevity's sake.

[3] The same is true of the Restatement approach, which the opposing comment invokes. Determining whether Client $C$'s "confidential client information" which was "communicated to" Lawyer is "[]likely to be significant" in the Matter — significant to whom, the Restatement rule does not say — is virtually as amorphous as current ER 1.10(d)(1). Only two states, Minnesota and North Dakota, have adopted such provisions. *See* Minn. R. Prof'l Conduct 1.10(b)(1); N.D. R. Prof'l Conduct 1.10(b)(1).

disciplinary charges because she has joined their firm. No law firm who wants to associate with a lawyer should have to risk discipline upon current personnel in order to hire the new lawyer.

It bears noting that of the 29 states (besides Arizona) that permit private lateral screening, a near-majority (14) do so free of any substantial involvement qualifier.[4] Another nine (including Arizona) have adopted qualifiers based on Lawyer's involvement in the Matter[5]; two others have adopted similar qualifiers based on confidential information reposed in Lawyer[6]; and still four others have adopted combination qualifiers based on involvement, confidential information, or both.[7] The Petition would, if adopted, push the near-majority of qualifier-free private lateral screening states into a majority.

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[4] *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).

[5] *See* Ariz. R. Prof'l Conduct 1.10(d); Colo. R. Prof'l Conduct 1.10(e)(1); Ind. R. Prof'l Conduct 1.10(c)(1); N.J. R. Prof'l Conduct 1.10(c)(1); Nev. R. Prof'l Conduct 1.10(e)(1); Ohio R. Prof'l Conduct 1.10(c); Tenn. R. Prof'l Conduct 1.10(d)(1); Wis. R. Prof'l Conduct 1.10(a)(2)(i); Vt. R. Prof'l Conduct 1.10(a)(2).

[6] *See* Minn. R. Prof'l Conduct 1.10(b)(1); N.D. R. Prof'l Conduct 1.10(b)(1)-(2).

[7] *See* Haw. R. Prof'l Conduct 1.10(c)(1); Mass. R. Prof'l Conduct 1.10(d)(2); N.H. R. Prof'l Conduct 1.10(c)(3); N.M. R. Prof'l Conduct 16-110(C).

## B. The Bar Also Considered the ABA Model Rule, and Rejected It for Good Reason.

The Ethics Committee also considered and rejected the current ABA private lateral screening model rule, 1.10(a)(2), a copy of which is attached as Exhibit A.[8] The ABA model rule has several defects beyond those already submitted to this Court:

- It requires a statement of the firm's compliance with the rules of professional conduct. This is inconsistent with the rules' overall framework, which generally governs individual conduct rather than firm conduct.

- It requires "an agreement by the firm to respond promptly to *any* written inquiries or objections by the former client about the screening procedures." (Emphasis added.) The lack of any limitation on this requirement is self-evident, as is the contract-like liability exposure it pins upon the firm. In practical effect, this requirement would enable a former client, unhappy with the lawyer's move to the new firm, to obstruct that move to nearly the same degree as the current rule.

- It requires a statement of the screened lawyer's compliance with the rules of professional conduct. The screened lawyer is required to comply with the rules of professional conduct in any event; a statement to that effect adds nothing except, perhaps, individual liability exposure for the lawyer.

- It requires certifications of compliance with the rules by a partner of the firm "upon termination of the screening procedures." But the screening procedures may never be terminated, or the screened lawyer may leave Target Firm, or the certifying partner may leave Target Firm. It is impractical to impose such an open-ended obligation, having disciplinary import, upon a partner of the Target Firm having no

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[8] Only two states, Connecticut and Idaho, have adopted the ABA rule in substantially its current form. *See* Conn. R. Prof'l Conduct 1.10(a); Idaho R. Prof'l Conduct 1.10(a). A third, Vermont, appears to have adopted the ABA rule *along with* a substantial involvement qualifier. *See* Vt. R. Prof'l Conduct 1.10(a).

connection to Lawyer's move except that someone at the firm needs to provide the requisite certification.

The important teaching of the ABA experience is that the ABA has joined modernity by accepting private lateral screening — just as the Petition asks Arizona to do. That the ABA found it necessary to include impractical additional provisions does not mean Arizona is bound to adopt those provisions. Arizona is free to adopt the rule that makes the most sense for Arizona clients and lawyers.

### C. The Petition Avoids Extremes on Either Side of the Private Lateral Screening Issue, and Proposes a Sensible, Modern, Client-Protective Middle Way Instead.

The Bar acknowledges the existence of strong opinions on private lateral screening. But many of those opinions rest at one of two extremes, neither of which the Petition's proposal advances.

Some believe there should be no private lateral screening at all, as in California. But Arizona doesn't follow that rule, and hasn't for more than a decade.

Others might argue private lateral movement should be permitted free of any screening or related requirement, leaving ER 1.9(a) and (c) to guide Lawyer's conduct at Target Firm.

The Petition doesn't espouse that view either. The proposed revised ER 1.10(d) would not only require timely screening and notice, and preclude Lawyer from receiving any share of the fee from the Matter, but also impose the following additional client protections:

- The proposed rule requires written notice to the former client of the particular screening procedures adopted. This requirement, inspired by the ABA model rule, goes beyond Arizona's current screening requirements.
- The proposed rule requires written notice to the former client of when the particular screening procedures were adopted. This requirement

buttresses the current and proposed ER 1.10(d)(1) requirement that the screen be timely implemented.

- As noted in the May 20, 2014 supporting comment, the proposed rule requires that 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 Target Firm and Client *T*. The requirement goes beyond Arizona's current screening requirements.

The Petition thus proposes a "middle way" that appropriately advances both client and lawyer interests. The Bar is acutely aware of the need to protect clients — which is why, for example, the Bar opposed efforts at the ABA level to erode conflict imputation as a general principle at the same time it began looking at ER 1.10(d).[9] The Petition's proposal protects clients while at the same time facilitating operation of the free market for lawyer services, with all the benefits deriving from free markets at work.

## CONCLUSION

The State Bar acknowledges the experimentation ethic that led to current ER 1.10(d)(1)'s adoption by this Court more than a decade ago. There is nothing inherently wrong, and much that is right, in Arizona's willingness to experiment with an Ethics 2000 proposal that was withdrawn before debate at the ABA.[10] (See

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[9] See Dec. 2, 2011 J. Kanefield Letter to N. Vera, attached as Exhibit B.

[10] The opposing comment invokes two "empirical studies," one of which dates back to the Ethics 2000 timeframe, and the other of which is still older. The more recent, Shapiro, asserts that it is "suggestive," but denies that it was "designed to test the competing claims and hypotheses bandied about in the debate over screening." 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, 1316. Shapiro characterizes the other, older work as having "tainted" methodology. *See id.* at 1315-16 (discussing Lee A. Pizzimenti, *Screen Verite: Do Rules About*

Petition at 4 n.1.) But time has shown that this unique experiment has failed, as worthy experiments often do. The State Bar respectfully requests that this Court now move forward by granting the Petition.

RESPECTFULLY SUBMITTED this 18th day of June, 2014.

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Deputy General Counsel

Electronic copy filed with the
Clerk of the Arizona Supreme Court
this 18th day of June, 2014.

by:

*Ethical Screens Reflect the Truth About Real-Life Law Firm Practice?*, 52 U. Miami L. Rev. 305 (1997)).