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IN THE SUPREME COURT

STATE OF ARIZONA

In the Matter of, PETITION TO AMEND RULES 31, 34, 38, 39, AND 42, RULES OF THE SUPREME COURT	Supreme Court No. R-15-0018 **COMMENT OPPOSING AMENDMENTS TO ETHICAL RULES 1.6 AND 1.10 (ARIZ. SUP. CT. R. 42)**

> 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 Rules (ERs) 1.6 and 1.10

[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).

of the Arizona Rules of Professional Conduct. Although the Petition's drafting Committee submitted great work in a short amount of time, it did miss the mark on two particular points: the proposed revision to the duty of confidentiality in ER 1.6 is overly broad, and the proposed revision to the imputed conflicts of interest rule in ER 1.10(d) will negatively impact clients, former clients, and their likely perception of the profession.

I. THE PROPOSED REVISION TO ER 1.6 IDENTIFIES A VALID PROBLEM BUT URGES THE WRONG SOLUTION

¶2 Arizona's current ER 1.6 has been on the books since 1985 (when Arizona moved from the old Code to the Rules of Professional Conduct). Other than a few specific exceptions to the duty of confidentiality,[2] Arizona's current rule is substantially similar to the Model Rule. The Arizona rule, the Model Rule, and the Restatement define confidential information as "information relating to the representation of a client."[3] The majority of states use this same definition.[4] Although the Petition identifies a legitimate need to add another exception to this general rule, it fails to explain why Arizona should move away from the majority approach in defining a client's confidential information. Indeed, the majority approach has much to commend it: it provides a bright-line rule, and as the

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[2] *See* ER 1.6(b), (c) (adding exceptions permitting or requiring disclosure of otherwise confidential information to prevent a client's criminal acts). These exceptions are, in part, holdovers from the old Code.

[3] ARIZ. RULES OF PROF'L CONDUCT ER 1.6(a); MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (same); *see* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 59 (2000) ("Confidential client information consists of information relating to representation of a client, other than information that is generally known.").

[4] *See, e.g.*, A.B.A., CPR Policy Implementation Comm., Variations of the ABA Model Rules of Professional Conduct (May 13, 2015) (listing state rules varying from the Model Rules), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_6.pdf.

drafters of the Model Rules further recognized three-plus decades ago, any close calls as to whether a particular piece of information is confidential should be resolved in favor of non-disclosure (and therefore resolved in favor of the client's right to control the information disclosed about the client and the client's matter).[5]

¶3 Rejecting this bright-line rule, the Petition instead asks the Court, all practitioners, and all clients in the future to identify three categories of information: "'Confidential information' consists of information gained during or relating to the representation of a client, whatever its source, that is (**a**) protected by applicable privileges and protections (**b**) likely to be embarrassing or detrimental to the client if disclosed, or (**c**) information that the client has requested to be kept confidential." Unfortunately, new categories (**b**) and (**c**) both have flaws for the following reasons.

¶4 With respect to information "likely to be embarrassing or detrimental to the client if disclosed," we respectfully submit that it is client, not the lawyer, who should make that determination wherever practical.[6] Information may be "embarrassing" or "detrimental" to the client for reasons unknown or unappreciated by the lawyer—including reasons that develop later in time.[7]

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[5] Indeed, even in certain states that take the Petition's narrower approach to a client's confidential information, cautionary language is wisely added: "In determining whether information is protected from disclosure under this rule, the lawyer shall resolve any uncertainty in favor of the duty of confidentiality." ALASKA RULES OF PROF'L CONDUCT R. 1.6(a).

[6] The rules already appropriately permit lawyers to disclose information "impliedly authorized" to effectuate the agree-upon objectives of the representation (in addition to several other disclosure exceptions discussed below). *See* ER 1.6(a)-(d). The Petition, however, would permit a lawyer to make additional disclosures to suit the lawyer's, not the client's, objectives.

[7] For example, at the time of disclosure, the fact that a client consulted a lawyer or a particular type of lawyer (e.g., intellectual property, professional liability, or estate planning) might not be embarrassing or detrimental, but once the underlying matter makes the newspapers (or nowadays, the Internet) or the other side is served with

Moreover, the proposal would invite lawyers to substitute their own subjective judgment about what might be "embarrassing" to the client—yet this is certainly one judgment that the client is in the best position to make. Our current rule, which requires lawyers to ask the client for consent to disclose such information, is a better approach in our opinion.

¶5 With respect to information that "the client has requested to be kept confidential," relying on this category to protect client information inadvertently creates a class-system in favor of sophisticated or repeat players. Clients who regularly use lawyers or who have in-house lawyers will know to request confidentiality to the fullest extent. Poor or one-shot clients will not know to make this request, and the proposed rule does not require lawyers to inform these clients of their right to make this request.

¶6 The Petition's primary motivation to move to this suboptimal approach is that our current definition of confidentiality "appears to be honored more in the breach." [Pet. at 13.] Although the Petition itself does not include citations or studies supporting its empirical assertions about law practice or the stifling effects of our current ethical rules, we have no reason to doubt this particular assertion. The rules, however, already provide a number of exceptions to our otherwise broad rule (including exceptions to seek ethical advice, to check conflicts, to be candid with the court, to self-defend, to protect life, and to discuss hypotheticals with other lawyers). *See, e.g.*, ER 1.6(b)-(d); *id.* cmt. 4; ER 3.3. From whatever ill our current rule continues to suffer, a specific exception can and should be drafted.

¶7 The Petition identifies the following as information that should no longer be

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process, the fact or timing of the consultation might well be embarrassing or detrimental—or both.

treated as confidential: "public information about a [lawyer]'s past work [that] is [or should be] widely and easily available" and "information about the outcome of similar cases in which the lawyer has been involved." But the Petition seemingly solves this problem by its own specific exception: "'Confidential information' does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates." [Pet. at 65.] We have no objection to the preceding exception, and if this proposed language does not cover all areas of concern to the drafting Committee, the Committee or anyone else of course may draft additional language and submit it for public comment. The Petition does not identify a reason to rush through a substantial revision to our long-standing confidentiality rule.

¶8 In sum, our current rule follows the majority approach to confidentiality, and the Petition's specific exception for legal knowledge, research, and generally known information appears to solve the problem it raises.[8] The Petition therefore

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[8] Similarly, the Restatement's definition of confidentiality specifically excepts "information that is generally known." RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 59 (2000). The comments to the Restatement elaborate on this exception:

> Whether information is generally known depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositories such as government offices, or in publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access. Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense. Special knowledge includes information about the whereabouts or identity of a person or other source from which information can be acquired, if those facts are not themselves generally known.

does not justify the additional step of reverting back to the old, more-complicated, and less-client-protecting definition of confidentiality.

II. ANY AMENDMENT TO THE IMPUTED CONFLICTS OF INTEREST RULES SHOULD NOT SIGNIFICANTLY WEAKEN CLIENTS' RIGHTS TO CONSENT.

¶9 Although the Petition to amend ER 1.10(d) 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.[9] 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.[10] We therefore respectfully oppose the amendment and propose alternative amendments for the Court's consideration.

A. Recessions Should Not Drive the Ethical Rules.

¶10 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

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Id. cmt. d. Moreover, the Restatement recognizes the common assumption that "[c]onfidential client information does not include what a lawyer learns about the law, legal institutions such as courts and administrative agencies, and similar public matters in the course of representing clients." *Id.* cmt. e.

[9] Our comments below are substantially similar to those we submitted in opposition to the Bar's Petition R-13-0046. Although the wording differs in certain respects, the new Petition does not identify or fix the weaknesses in the first petition.

[10] *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))).

screening rule along with several other jurisdictions.[11] 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 federal courts have interpreted and applied our limited screening rule, moreover, and both reached the right result in the circumstances.[12]

¶11 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) in 2009, 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.[13]

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[11] *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.

[12] *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 under 10 hours on the matter).

[13] 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.

¶12 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."[14] 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 as no clients are apparently championing the amendment in Arizona.[15] 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.[16]

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[14] *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/.

[15] *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 16 (noting that lawyers occasionally—and significantly—err in implementing and maintaining screens).

[16] *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

¶13 Proponents of loosening our ethical rules nevertheless suggest that our 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 might suggest. If the moving lawyer never actually obtained material confidential information from the 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).[17] Thus, the rules already permit appropriate movement without consent.

¶14 Furthermore, the proponents' 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.[18] Moreover, the lawyer's client is often the one losing "counsel of choice" when the lawyer decides to join the new (and opposing) firm.

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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).

[17] As carefully worded, we have no objection to the Petition's proposed amendment to ER 1.10(b); we object only to the sweeping change to ER 1.10(d).

[18] Thus, although the former petition argued that "[w]here the litigation exception precludes screening, clients may lose their counsel of choice," 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

¶15 To advance its controversial amendment in the face of these problems, the proponents in the ABA and here rely 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 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.[19] Moreover, the more promiscuous use of screening for former government lawyers is simply the result of a policy tradeoff.

¶16 In particular, 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.[20] In other words, good lawyers would still enter private practice notwithstanding the current imputation rules.[21] Indeed, we have operated under a

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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.").

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

[20] *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).

[21] *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.").

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.

¶17 In closing, for the client's lead lawyer to join the opposing firm—and not to be required to obtain the client's consent—goes too far. This stretch is why the ABA narrowly approved this amendment in tougher 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. The vast majority of other states have heard the message: approximately 37 states either permit only limited screening or no screening at all.[22] Some of the most populous and influential states—such as California, New York, and Texas—likewise do not permit screening in these circumstances.

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

B. In the Alternative, the Court Could Adopt the Balanced Approach of Our Neighboring States and the Restatement.

¶19 As explained above, this full-blown-screening amendment is unwarranted, particularly given its actual and apparent costs. The Petition does, however, contain one meritorious notion: it would remedy the uneven treatment of litigation and transactional lawyers. Our current "limited" screening rule typically applies only to litigators, while it broadly permits "full" screening for transactional

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[22] *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.pdf.

lawyers.[23] But contrary to the proposed amendment, we need not dilute the ethical rules to achieve equal treatment of litigation and transactional lawyers.

¶20 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~~. . . .[24]

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).[25] Colorado essentially does so as well,[26] except that it uses the "substantial participation" terminology common to other ethical rules.[27]

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[23] 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). This Court in 2003 might have reasonably drawn a distinction between the generally more contentious and adversarial posture of litigation and the generally less contentious and adversarial nature of transactional practice. Therefore, our current rule restricts a lawyer in a litigation matter from dropping the client and moving to the other side, but the rule does not impose the same restriction on a lawyer involved in a transactional matter.

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

[25] *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* MASS. RULES OF PROF'L CONDUCT R. 1.10(d)(2) (permitting screening only if "the personally

¶21 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."[28] Minnesota and North Dakota, for example, essentially follow the *Restatement* approach.[29]

¶22 At a minimum, the Court should adopt Indiana's approach, which permits screening only if "the personally disqualified lawyer did not have primary responsibility for the matter that causes the disqualification under Rule 1.9."[30] This approach would at least eliminate the possibility that the lead lawyer for the client could drop the client and switch to the two-person opposing law firm midway through the litigation.[31] The Petition would permit this switch,

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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).

[26] COLO. RULES OF PROF'L CONDUCT R. 1.10(e).

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

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

[29] *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.").

[30] IND. RULES OF PROF'L CONDUCT R. 1.10(c)(1); *infra* Appendix (proposing this alternative language). New Jersey adopted a similar rule but added the word "proceeding." 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").

[31] The Petition's proposed comments do acknowledge that the size of the firm might be a factor in determining whether screening would be reasonably adequate under the circumstances. [*See* Pet. at 70.] Placing a "factor" in a comment does not prohibit the lead lawyer's conduct, however. *See, e.g.*, ARIZ. RULES OF PROF'L CONDUCT Scope cmt. 21 ("The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.").

notwithstanding how appalling it would feel and appear to the lead lawyer's now-former client. Although the Petition appears sensitive to client protection, its proposal does not actually provide much, if any, additional protection.[32]

¶23 In sum, if the Court is inclined to address the uneven treatment of transactional and litigation lawyers in our current limited screening rule, it should not follow the Petition's approach; the Court could and should employ the less costly approaches of our neighboring states and the Restatement.

CONCLUSION

¶24 First, the Court should deny the Petition's request to move back to the old Code's more complicated and less protective approach to the duty of confidentiality; we have no objection, however, to the Petition's limited request to adopt a specific exception for legal knowledge, research, and generally known information. Second, although the Petition's proposed dilution of the imputed conflicts rules might be better for lawyer mobility, this move comes with significant costs to clients and public perception.[33] However well-drafted, the

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[32] To the Petition's credit, the Petition seemingly intended to provide additional protections for clients by adding the following requirement: "the screening procedures adopted [must be] reasonably adequate under the circumstances to prevent material information from being disclosed to the firm and its client." [Pet. at 69.] This addition does not actually provide much, if any, additional protection for clients, however. Both the Arizona and Model Rules already require that screening must be "reasonably adequate under the circumstances." *See, e.g.*, ER 1.0(k) ("'Screened' denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law."). And as we have noted above (see, e.g., note 16), screens are periodically flawed.

[33] *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. . . .").

Petition does not justify those costs, and the ER 1.10(d) amendment should therefore be rejected.

RESPECTFULLY SUBMITTED this 20th day of May, 2015.

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Electronic copy of this Comment filed with
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this 20th day of May, 2015.

Copy of this Comment emailed
this 20th day of May, 2015, to:

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APPENDIX

[Alternative Screening Amendment 1]

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.

[Alternative Screening Amendment 2]

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 primary responsibility for the matter that causes the disqualification under ER 1.9; ~~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.