

MOTION TO SUBSTITUTE FAILED**AMERICAN BAR ASSOCIATION****SECTION OF LITIGATION****REPORT TO THE HOUSE OF DELEGATES****RECOMMENDATION**

1 **RESOLVED**, That the American Bar Association amends Model Rule of Professional
2 Conduct 1.10 and its related Comments to add new subsections (e) and (f) to read as follows:
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4 **Rule 1.10 Imputation of Conflicts of Interest: General Rule**
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6 (e) When a lawyer becomes associated with a firm, the firm may not undertake to or continue
7 to represent a person in a matter that the firm knows or reasonably should know is the same or
8 substantially related to a matter in which the newly associated lawyer (the “personally
9 disqualified lawyer”), or a firm with which that lawyer was associated, had previously
10 represented a client whose interests are materially adverse to that person unless:
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12 (1) the personally disqualified lawyer has no information protected by
13 Rule 1.6 or Rule 1.9 that is material to the matter (“material information”);
14 or
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16 (2) the personally disqualified lawyer (i) had neither substantial
17 involvement nor material information relating to the matter and (ii) is
18 screened immediately from any participation in the matter in accordance
19 with paragraph (f) of this Rule and is apportioned no part of the fee
20 therefrom.
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22 (f) For the purposes of paragraph (e) of this Rule, a personally disqualified lawyer in a firm will
23 be deemed to have been screened from any participation in a matter if:
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25 (1) all material client information possessed by the personally disqualified
26 lawyer has been isolated from the firm;
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28 (2) the personally disqualified lawyer has been isolated from all contact
29 relating to the matter with the client and any witness for or against the
30 client;
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32 (3) the personally disqualified lawyer and others in the firm have been
33 instructed not to discuss the matter with each other;

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(4) the former client of the personally disqualified lawyer or of the firm with which the personally disqualified lawyer was associated receives notice of the conflict and an affidavit of the personally disqualified lawyer and the firm describing the procedures being used effectively to screen the personally disqualified lawyer, and attesting that (i) the personally disqualified lawyer will not participate in the matter and will not discuss the matter or the representation with any other lawyer or employee of his or her current firm, (ii) no material information was transmitted by the personally disqualified lawyer before implementation of the screening procedures and notice to the former client; and (iii) during the period of the lawyer’s personal disqualification those lawyers or employees who do participate in the matter will be apprised as they become involved in the matter and on a periodic basis thereafter that the personally disqualified lawyer is screened from participating in or discussing the matter; and

(5) the personally disqualified lawyer and the firm with which he is 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.

(g) In any matter in which the former client and the person or entity being represented by the firm with which the personally disqualified lawyer is now associated are not before a tribunal, the firm, the personally disqualified lawyer, or the former client may seek judicial inquiry of the screening procedures used, or may seek court supervision to ensure that implementation of the screening procedures has occurred and that effective actual compliance has been achieved.

Comment

[8] Paragraphs (e) and (f) of Rule 1.10 apply when a lawyer moves from a private firm to another firm and those paragraphs are intended to create procedures similar in some cases to those under Rule 1.11(b) for lawyers moving from a government agency to a private firm. Paragraphs (e) and (f) of Rule 1.10, unlike the provisions of Rule 1.11, do not permit a firm, without the consent of the former client of the disqualified lawyer or of the disqualified lawyer’s firm, to handle a matter with respect to which the disqualified lawyer was personally and substantially involved, or had material information, as noted in Comment 11 below. Like Rule 1.11, however, Rule 1.10(e) can only apply if the lawyer no longer represents the client of the former firm after the lawyer arrives at the lawyer’s new firm.

76 [9] If the lawyer has no confidential information about the representation
77 of the former client, the new firm is not disqualified and no screening
78 procedures are required. This would ordinarily be the case if the lawyer
79 did no work on the matter and the matter was not the subject of discussion
80 with the lawyer generally, for example at firm or working group meetings.
81 The lawyer must search his or her files and recollections carefully to
82 determine whether he or she has confidential information. The fact that
83 the lawyer does not immediately remember any details of the former
84 client's representation does not mean that he or she does not in fact
85 possess confidential information material to the matter.

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87 [10] If the lawyer does have material information about the representation
88 of the client of his former firm, the firm with which he or she is associated
89 may represent a client with interests adverse to the former client of the
90 newly associated lawyer only if the personally disqualified lawyer had no
91 substantial involvement with the matter and received no substantial
92 material information about the matter, the personally disqualified lawyer is
93 apportioned no part of the fee, and all of the screening procedures are
94 followed, including the requirement that the personally disqualified lawyer
95 and the new firm reasonably believe that the screening procedures will be
96 effective.

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98 [11] In situations where the personally disqualified lawyer was
99 substantially involved in a matter, or had material information, the new
100 firm will only be allowed to handle the matter if the former client of the
101 personally disqualified lawyer or of the law firm provides informed
102 consent and the firm reasonably believes that the representation will not be
103 adversely affected, all as required by Rule 1.7.

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105 [12] The former client is entitled to review of the screening procedures if
106 the former client believes that the procedures will not be or have not been
107 effective. If the matter involves litigation, the court before which the
108 litigation is pending would be able to decide motions to disqualify or to
109 enter appropriate orders relating to the screening. If the matter does not
110 involve litigation, the former client can seek judicial review of the
111 screening procedures from a trial court.

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113 [13] Paragraph (e) (2) does not prohibit the screened lawyer from
114 receiving a salary or partnership share established by prior independent
115 agreement, but that lawyer may not receive compensation directly related
116 to the matter in which the lawyer is disqualified.