



2006

Comments: The Use of Screens to Cure Imputed Conflicts of Interest: Why the American Bar Association's and Most State Bar Associations' Failure to Allow Screening Undermines the Integrity of the Legal Profession

Erin A. Cohn

University of Baltimore School of Law

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/ublr>



Part of the [Legal Profession Commons](#)

Recommended Citation

Cohn, Erin A. (2006) "Comments: The Use of Screens to Cure Imputed Conflicts of Interest: Why the American Bar Association's and Most State Bar Associations' Failure to Allow Screening Undermines the Integrity of the Legal Profession," *University of Baltimore Law Review*: Vol. 35: Iss. 3, Article 5.

Available at: <http://scholarworks.law.ubalt.edu/ublr/vol35/iss3/5>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Review by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

THE USE OF SCREENS TO CURE IMPUTED CONFLICTS OF INTEREST: WHY THE AMERICAN BAR ASSOCIATION'S AND MOST STATE BAR ASSOCIATIONS' FAILURE TO ALLOW SCREENING UNDERMINES THE INTEGRITY OF THE LEGAL PROFESSION

I. INTRODUCTION

You are a young associate, fresh out of law school, hired by a large law firm that deals with anything from medical malpractice to construction contracts. After working at the firm for several years you decide to change firms. You interview with a number of firms, but after describing the variety of cases that you have worked on over the years, the firms admit that they do not want to risk hiring you and possibly having to turn down future litigation if a conflict of interest arises. The firms explain that any conflict you may have with a potential client will most likely prevent the entire firm from representing that client. Unfortunately for you, this is a financial risk the firms are not willing to take.

The use of screens to cure imputed conflicts of interest has been an ongoing debate for the American Bar Association (ABA), as well as state bar associations.¹ While competing policy reasons have led to different solutions for different states, only a minority of states permit the use of screens to cure imputed conflicts of interest.²

Screening has been rejected on the basis of the need to protect the confidential nature of the attorney-client relationship.³ However, screening can be a useful method that provides clients the opportunity to truly choose their own counsel, as well as allowing lawyers greater mobility between firms.⁴ The practice of screening essentially prevents an entire firm from being disqualified from representation when one attorney within the firm is prohibited from representing a client due to a conflict of interest.⁵

1. See *infra* Parts III and V.

2. DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 607-08 (4th ed. 2004).

3. See *infra* Part II.B.3.

4. See *infra* Parts II.B.1-3.

5. See *infra* Parts II.B.1-2.

Under traditional rules pertaining to conflicts of interest, an entire firm may be disqualified if one lawyer within that firm is disqualified from representing a client because of confidences gained in an adverse representation.⁶ This imputed disqualification results from a presumption that knowledge gained by one attorney is shared by all other attorneys within that firm.⁷ In an effort to “rebut this presumption . . . procedures designed to create an impermeable barrier to intrafirm exchange of confidential information” have been “adopt[e]d” by law firms facing disqualification.⁸ Screens “aim to isolate the disqualification to the lawyer or lawyers infected with the privileged information that is the source of the ethical problem, and thereby to allow other attorneys in the firm to carry on the questioned representation free of any taint of misuse of confidences.”⁹ Effective screening requires law firms to erect timely screens that are strictly enforced in order to protect client confidences and prevent disqualification.¹⁰ A law firm using a screen is responsible for ensuring that the screen effectively protects a client’s confidential information.¹¹

The ABA Model Rules of Professional Conduct (ABA Model Rules), as well as state rules of professional conduct promote lawyers as “representative[s] of clients,” and “officers of the legal system”¹² The legal profession is deemed to be self-regulating and the authority of the Model Rules is grounded in this unique characteristic,¹³ but by rejecting the screening process the ABA and other state bar associations have demonstrated a distrust in lawyers’ abilities to truly self-regulate.

This Comment will first examine the ABA Model Rules concerning conflicts of interest,¹⁴ the Ethics 2000 Commission’s recommendation to allow for screening,¹⁵ and the House of Delegates rejection of the amended rule.¹⁶ Second, this Comment will discuss how the Restatement of Law Governing Lawyers allows for screening under certain circumstances.¹⁷ Third, this

6. See Comment, *The Chinese Wall Defense To Law-Firm Disqualification*, 128 U. PA. L. REV. 677, 677-78 (1980).

7. *Id.*

8. *Id.* at 678.

9. *Id.*

10. See *infra* Part II.B.1.

11. 7 AM. JUR. 2D *Attorneys at Law* § 198 (2004).

12. See MODEL RULES OF PROF’L CONDUCT, Pmb. § 1 (2003); See also, e.g., MD RULES OF PROF’L CONDUCT, Pmb. § 1 (2003) (stating that lawyers are “representative[s] of clients,” and “officers of the legal system . . .”).

13. See MODEL RULES OF PROF’L CONDUCT, Pmb. §§ 10-12.

14. See *infra* Part II.A.

15. See *infra* Part III.A.

16. See *infra* Part III.B.

17. See *infra* Part IV.

Comment will look at other states, Maryland in particular, which permit screening to cure imputed conflicts of interest.¹⁸ These states will serve as examples of the successful implementation of screening procedures.¹⁹ Finally, this comment will demonstrate that in failing to adopt screening procedures, the ABA and other state bar associations have in fact undermined the integrity of the legal profession.²⁰

II. CONFLICTS OF INTEREST AND THE ABA MODEL RULES

The legal profession is one of continually increasing lateral mobility,²¹ so that lawyers frequently find themselves moving between firms during the course of their career.²² This increased mobility gives rise to a growing number of conflicts of interest concerning the representation of former and current clients.²³ The ABA Model Rules concerning conflicts of interest are aimed at protecting client confidences during representation and beyond, even when one lawyer migrates between firms.²⁴ Importantly, the ABA Model Rules specifically address the importance of the confidential nature of the attorney-client relationship.²⁵

The Preamble to the ABA Model Rules states, “[a] lawyer should keep in confidence information relating to representation of a client”²⁶ The theory being that in order to zealously represent a client and encourage full disclosure, a lawyer must guarantee complete confidentiality throughout the course of representation and beyond.²⁷

A. ABA Model Rules 1.9 & 1.10

ABA Model Rule 1.9 addresses the responsibility that an attorney has to former clients.²⁸ Rule 1.9(b) states:

A lawyer shall not knowingly represent
a person in the same or a substantially

18. See *infra* Part V.

19. See *infra* Part V.

20. See *infra* Parts VI–VII.

21. See Robert A. Creamer, *Three Myths About Lateral Screening*, 13 THE PROF. LAW. 20 (2002) (stating that opponents of screening have often “characterized lateral lawyers as ‘side-switching’ lawyers”).

22. RHODE & LUBAN, *supra* note 2, at 606–07.

23. See *id.* at 607.

24. See MODEL RULES OF PROF’L CONDUCT R. 1.9 & 1.10 (2003); see also *id.* R. 1.9 cmts. 4–9 (addressing the meaning of Rule 1.9 as it relates to lawyers moving between firms).

25. See *id.* R. 1.6. cmt.

26. MODEL RULES OF PROF’L CONDUCT, Pmb1.

27. MODEL RULES OF PROF’L CONDUCT R. 1.6. cmts. 1, 2, 17.

28. See *id.* R. 1.9(b).

related matter in which a firm with which the lawyer formerly was associated had previously represented a client

- (1) whose interests are materially adverse to that person; and
- (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.²⁹

By limiting a lawyer's ability to represent certain persons, Rule 1.9 attempts to protect clients from worrying that information they disclose to their attorney could later be used against them in another matter.³⁰ Rule 1.10 goes even further to protect client confidences by limiting a law firm's ability to represent certain persons when an attorney within the firm is individually disqualified from representing a client.³¹

In particular, ABA Rule 1.10 addresses the issue of imputation of conflicts of interest, stating that:

When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm unless: the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

- (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.³²

Rules 1.9 and 1.10 are designed to ensure that attorneys remain loyal to their clients.³³ Additionally, Rule 1.10(c) allows for

29. *Id.*

30. *Id.* R. 1.9; *see also id.* R. 1.9 cmt. 8 (stating, in part, that "[p]aragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client").

31. *See id.* R. 1.10(a).

32. *Id.* R. 1.10(b).

33. *See id.* R. 1.9 cmt. & R. 1.10 cmts. 2-3.

removal of imputation if the former or affected client gives informed consent;³⁴ however, there are some situations where the conflict of interest is considered so severe that a client's informed consent will not remove the imputation.³⁵

B. Screening—The “Chinese Wall” Defense

A screen is a method which can address the risk that is created by attorneys who desire to migrate between firms.³⁶ Specifically, “[l]aw reformers borrowed the concept of the ‘Chinese Wall,’ an institutional mechanism long used in banks, securities, and investment banking firms to segregate functions among separate departments and to insure that confidential information in one did not find its way into another.”³⁷ Although a primary concern relating to screening is whether it is really an effective measure to protect client confidences,³⁸ it is clear that disqualification is a drastic measure that interferes with a client's right to choose counsel.³⁹

34. See *id.* R. 1.10(c). Comment e to Rule 1.10 provides that informed consent “denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” *Id.* R. 1.10 cmt. e. Specifically, Rule 1.10(c) allows for the affected client to waive the imputation by giving informed consent under the requirements set forth in Rule 1.7(b). *Id.* R. 1.10(c). Rule 1.7(b), in turn, provides that even if a concurrent conflict of interest exists the lawyer may still represent the client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Id. R. 1.7(b).

35. See *id.* R. 1.10 cmt. 6 (stating that “[i]n some cases, the risk may be so severe that the conflict may not be cured by client consent”). With respect to client waivers of future conflicts, comment 6 references comment 22 of Rule 1.7. See *id.* Comment 22 explains that the risk is too severe when the consent is broad and not specific, “because it is not reasonably likely that the client will have understood the material risks involved.” See *id.* R. 1.7 cmt. 22. In these cases the consent will be deemed ineffective. See *id.*

36. Susan P. Shapiro, *Bushwacking the Ethical High Road: Conflict of Interest in the Practice of Law and Real Life*, 28 LAW & SOC. INQUIRY 87, 156 (2003).

37. *Id.*

38. *Id.* at 159.

39. See *Kala v. Aluminum Smelting & Ref. Co.*, 688 N.E.2d 258 (Ohio 1998). In *Kala*, the Ohio Supreme Court held that an attorney who switched sides while an appeal was still pending could not be effectively screened in order to prevent disqualification of the entire firm. See *id.* at 268. Although the court closely analyzed the facts of this particular case in order to avoid an unnecessary disqualification, it ultimately held that “under this set of egregious facts, the appearance of impropriety was so great that the attempts made by [the firm

1. The Presumption of Shared Confidences

There is a rebuttable presumption that knowledge obtained by one attorney is shared by all of the other attorneys at that lawyer's firm.⁴⁰ The "presumption of shared confidences" exists when an attorney has previously represented a client with interests adverse to a potential or current client at that attorney's current firm "in a substantially related matter."⁴¹ The presumption of shared confidences imputes one attorney's disqualification to all other attorney's in the new firm;⁴² however, the new firm may be able to rebut the presumption by erecting a timely and effective screen.⁴³

2. Effective Screening

The "Chinese Wall" defense allows a firm to rebut the presumption that information communicated between a client and one attorney is automatically shared with all of the other attorneys in the firm.⁴⁴ An effective screen blocks the attorney creating the conflict from obtaining or sharing any knowledge with regard to the particular case.⁴⁵ Certain factors to be considered in determining the effectiveness of a screen include:

- (1) the substantiality of the relationship between the former and current matters, (2) the time elapsing between the matters, (3) the size of the firm, (4) the number of attorneys, (5) the nature of the disqualified attorney's involvement in the former matter, (6) the speed with which the wall is erected, and (7) the strength of the wall.⁴⁶

attempting to avoid disqualification] to erect a Chinese wall were insufficient to overcome the appearance of impropriety." *Id.*

40. 32 AM. JUR. 2D *Federal Courts* § 224 (1995).

41. 7 AM. JUR. 2D *Attorneys at Law* § 198 (1997).

42. *See, e.g.,* Lee A. Pizzimenti, *Screen Verité: Do Rules About Ethical Screens Reflect the Truth About Real-Life Law Firm Practice?*, 52 U. MIAMI L. REV. 305, 310 (1997).

43. *See infra* Part II.B.2.

44. *See* 32 AM. JUR. 2D *Federal Courts* § 224.

45. *See, e.g.,* *Gerald v. Turnock Plumbing, Heating & Cooling, LLC*, 768 N.E.2d 498, 504 (Ind. App. 2002) (stating that the presumption that confidential information held by one attorney in a firm is shared with all of the attorneys in the firm "can be rebutted by a demonstration that specific institutional mechanisms (e.g., Fire Walls) were implemented to effectively insulate against any flow of confidential information from the infected attorney to any other member of his or her present firm") (citations omitted).

46. Comment, *supra* note 6, at 715.

Importantly, “[t]he burden is always on the party relying on this ‘Chinese Wall’ to demonstrate its existence and effectiveness.”⁴⁷

3. The Use of Screens—Supporters vs. Critics

Those who are against the use of screens to cure imputed conflicts of interest argue that allowing screening compromises the integrity of the profession.⁴⁸ Specifically, critics of screening insist that clients need the security that comes with reasonable expectations of confidentiality.⁴⁹ Ultimately, opposition to screening methods seems to revolve around one central theme: a general distrust of lawyers.⁵⁰ In those instances where a lawyer is prohibited from representing a client because of a conflict of interest, critics of screening believe that disqualification of that lawyer’s entire firm is appropriate in order to protect that lawyer’s former client.⁵¹ Notwithstanding these arguments against the use of screening to cure imputed conflicts of interest, scholars and practitioners remain divided on whether individual lawyers should be screened or entire law firms should be disqualified when imputed conflicts of interest arise.⁵²

Those in favor of using screening to avoid disqualification of an entire firm rebut critics’ concerns with important policy issues regarding an individual’s right to choose their own counsel.⁵³ While proponents of screening argue that there is very little evidence that former clients have been harmed when screening mechanisms are put in place,⁵⁴ the effect on current clients is obvious and detrimental.⁵⁵ Clearly, a current client may be prohibited from having the representation he desires; moreover, if representation has already commenced, “the innocent client suffers

47. 7 AM. JUR. 2D *Attorneys at Law* § 198 (1997).

48. See, e.g., John Gibeaut, *Screening Not Enough to Avoid Firm’s Disqualification*, 1 A.B.A. J. eReport 36 (2002) (LexisNexis).

49. See *id.*

50. Creamer, *supra* note 21, at 21.

51. See Pizzimenti, *supra* note 42, at 318; see also Margaret Graham Tebo, *A Treacherous Path*, 86 A.B.A. J. 54 (2000).

52. See Pizzimenti, *supra* note 42, at 306; Tebo, *supra* note 51, at 55.

53. See, e.g., Creamer, *supra* note 21, at 21 (asserting that “[f]or every imputed disqualification based on the rejection of screening, there is a client that loses its lawyer of choice . . . [a]nd the harm to *this* client is real, not theoretical”); Comment, *supra* note 6, at 679 (stating that “[d]isqualification restricts the client’s right to counsel of its own choice, delays the resolution of litigation, and subjects the client to higher costs”).

54. See Creamer, *supra* note 21, at 21.

55. Not only do overly strict ethical rules restrict an attorney’s employment opportunities, they restrict the availability of legal services. Lawyers and firms will be inclined to refuse to accept representation of smaller clients with matters that do not generate substantial fees for fear that they would be forced to reject more lucrative representation in the future. See Pizzimenti, *supra* note 42, at 314.

the cost, disruption and delay resulting from imputed disqualification."⁵⁶

While disqualification certainly harms the current client, proponents of screening also argue that disqualification has become a tactical step, rather than a genuine attempt to protect a former client when a conflict of interest arises.⁵⁷ Since disqualification has been used as a tool in the litigation process,⁵⁸ "judges must exercise caution not to paint with a broad brush under the misguided belief that coming down on the side of disqualification raises the standard of legal ethics and the public's respect."⁵⁹ Proponents of screening further assert that attorneys are aware of the severe consequences that an attorney faces as a result of sharing confidences, so a motion for disqualification is usually "a tactical effort to force the other side to switch firms in midstream, rather than a move based on genuine concern that confidential information may be disseminated."⁶⁰ While it is argued that disqualification has generally become no more than a tactical effort,⁶¹ proponents of screening also assert that screening would provide greater mobility for attorneys.⁶²

Those in favor of screening also emphasize the burden that imputed disqualification puts on a lawyer's mobility in a day and age when attorneys are constantly changing affiliations for a variety of reasons.⁶³ Proponents view screening as a balance

56. See Creamer, *supra* note 21, at 21.

57. Tebo, *supra* note 51, at 55 ("[P]roponents of screening say an even bigger concern is that some clients will lose their counsel of choice if an adverse party uses disqualification as a tactical measure.").

58. See *Frecman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 722 (7th Cir. 1982). The United States Court of Appeals for the Seventh Circuit considered a motion for disqualification with great scrutiny, noting that while some motions to disqualify counsel are legitimate and imperative, others merely serve the purpose of interrupting the litigation process and disrupting one's adversary. *Id.* Specifically, the court stated that "[motions to disqualify counsel] should be viewed with extreme caution for they can be misused as techniques of harassment." *Id.*

59. *Panduit Corp. v. Allstate Plastic Mfg. Co.*, 744 F.2d 1564, 1576-77 (Fed. Cir. 1984) (holding that screening is merely one method by which a firm may rebut the presumption of shared confidences in order to avoid imputed disqualification).

60. Tebo, *supra* note 51, at 56.

61. See, e.g., *supra* note 57 and accompanying text.

62. See *infra* notes 63-64 and accompanying text.

63. See Creamer, *supra* note 21, at 22 ("[T]he inflexible application of the rules of imputed disqualification without recognition of appropriate screening unduly restricts the ability of this large group of private lawyers to find new positions."); Gibeaut, *supra* note 48 ("[Disqualification] discourages lawyers from changing jobs."); Shapiro, *supra* note 36, at 140 ("Other conflicts arise as lawyers move from job to job, and as law firms hire and fire attorneys, and merge with one another."); Tebo, *supra* note 51, at 55 ("[T]oday, the legal profession, like the rest of the business world, is much more fluid, and lawyers are likely to change firms several times during their careers.").

between competing policy concerns, so that the confidences of former clients are protected without depriving current clients of their choice of counsel, or lawyers the ability to change jobs.⁶⁴

Although the practice of screening has not always received much support from the courts,⁶⁵ the ABA's Ethics 2000 Commission was persuaded that screens can be an effective method for curing conflicts.⁶⁶

III. REVISING THE ABA'S CONFLICT OF INTEREST RULES

A. *Ethics 2000 Commission*

In 1997, the Ethics 2000 Commission (the Commission) was formed in order to review the ABA Model Rules and suggest modifications.⁶⁷ The Commission was the first thorough review of the Rules since their adoption in 1983.⁶⁸ The Commission looked at the rules concerning conflicts of interest and proposed an amendment to Rule 1.10, which would allow for screens to cure imputed conflicts of interest.⁶⁹

The proposed amendment was drafted as subsection (c) of Rule 1.10 and stated:

(c)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 Rule 1.9 unless: (1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee there from; and (2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this

64. See Creamer, *supra* note 21, at 21-22 ("Lateral screening would provide protection for the legitimate concerns of the clients of the lateral's former firm without inflicting the undeserved punishment of imputed disqualification on the innocent second client.").

65. See 32 AM. JUR. 2D *Federal Courts* § 224 (1995).

66. See *infra* Part III.A.

67. See American Bar Association, Ethics 2000 Commission, <http://www.abanet.org/cpr/ethics2k.html> (last visited Jan. 18, 2006).

68. See Lonnie T. Brown, Jr., Foreword to *Ethics 2000 and Beyond: Reform or Professional Responsibility as Usual*, 2003 U. ILL. L. REV. 1173, 1174 (2003) ("Although various changes have been made to these rules since their inception in 1983, Ethics 2000 represented the first attempt to evaluate the Model Rules in their entirety.").

69. See MODEL RULES OF PROF'L CONDUCT R. 1.10(c) (Proposed Rule 2001), <http://www.abanet.org/cpr/e2k-rule110.html> (last visited Jan. 18, 2006).

Rule.⁷⁰

Additionally, the proposed comment number six following Rule 1.10(c) read *inter alia*, as follows: “[w]here the conditions of paragraph (c) are met, imputation is removed, and consent to the new representation is not required. Lawyers should be aware, however, that courts may impose more stringent obligations in ruling upon motions to disqualify a lawyer from pending litigation.”⁷¹ The proposed comment also states that while the rule does not prohibit the disqualified attorney from receiving a salary or partnership share that was established by a prior agreement, the attorney may not receive any other compensation directly related to the representation from which the lawyer has been screened.⁷² The comment additionally specifies that when notice to the clients is required, it should include a description of the disqualified lawyer’s prior representation, as well as a description of the screening mechanisms that have been instituted.⁷³

Perhaps most helpful in understanding the Commission’s reasoning is the Reporter’s Explanation memo, which accompanied the proposed amendment to Rule 1.10(c), as well as the proposed comment. The memo stated, in part:

The Commission is persuaded that nonconsensual screening in these cases adequately balances the interests of the former client in confidentiality of information, the interests of current clients in hiring counsel of their choice (including a law firm that may have represented the client in similar matters for many years) and the interests of lawyers in mobility, particularly when they are moving involuntarily because their former law firms have downsized, dissolved or drifted into bankruptcy. There are presently seven jurisdictions that permit screening of laterals by Rule. The testimony the Commission has heard indicates that there have not been any significant numbers of complaints regarding

70. *Id.*

71. *See id.* cmt. 6.

72. *Id.* cmt. 7.

73. *Id.* cmt. 8.

lawyers' conduct under these Rules.⁷⁴

The Explanation memo clearly states that the Commission considered the competing policy concerns with regard to screening and found that this method was an acceptable, perhaps an even more favorable, alternative to disqualification.⁷⁵ Unfortunately, the ABA House of Delegates was not persuaded by the Commission's findings.⁷⁶

B. House of Delegates' Rejection of the Commission's Proposal

The House of Delegates is the policy-making body of the ABA,⁷⁷ and any changes to the Model Rules must be approved by the House.⁷⁸ The ABA House of Delegates met in August of 2001 to debate amendments to the Model Rules, and the House vote on the new amendments was completed in February 2002.⁷⁹ In order to vote on the new amendments, the ABA House of Delegates considered the Commission's report,⁸⁰ which included the Reporter's Explanation memo for each rule for which an amendment was proposed.⁸¹ Additionally, a Minority Report was filed by one commissioner who dissented to several of the proposed amendments.⁸² Despite the findings of the Ethics 2000 Commission, the proposed Rule 1.10(c) was not included among the changes made to the ABA Model Rules.⁸³

74. MODEL RULES OF PROF'L CONDUCT R. 1.10 (Reporter's Explanation of Changes 2001), <http://www.abanet.org/cpr/e2k-rule110rem.html> (last visited Jan. 18, 2006).

75. *Id.*

76. *See infra* Part III.B.

77. *See* American Bar Association, ABA Leadership, <http://www.abanet.org/leadership/delegates.html> (last visited Jan. 18, 2006).

78. LISA G. LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 23 (2005).

79. American Bar Association, Ethics 2000 Commission, <http://abanet.org/cpr/ethics2k.html> (last visited Jan. 18, 2006).

80. *Id.*

81. *See* American Bar Association, Ethics 2000 Commission, <http://abanet.org/cpr/ethics2k.html> (last visited Jan. 18, 2006).

82. Lawrence J. Fox, *Minority Report*, <http://www.abanet.org/cpr/e2k-dissent.html> (last visited Jan. 18, 2006).

This dissent is filed, therefore, in the hope that matters raised here, while they failed to persuade a majority of my fellow Commissioners, will find a more hospitable reception on the floor of the House, be the subject of amendments at that time, and result in successful appeals from my failure of advocacy in the 'court' below.

Id.

83. *Compare* MODEL RULES OF PROF'L CONDUCT R. 1.10 (2003) ("A disqualification prescribed by this rule may be waived by the affected client under conditions stated in Rule 1.7"), *with* American Bar Association, Ethics 2000 Commission, <http://abanet.org/cpr/e2k-rule110.html> (last visited Jan. 18, 2006) (stating that a lawyer shall not knowingly represent a client if the lawyer is disqualified under Rule 1.9, unless: 1) the lawyer is timely screened and will not receive a portion of the fee; and 2) written, timely notice is given to the client).

In the Minority Report submitted by Commissioner Lawrence J. Fox, he urged the House of Delegates to recognize that the proposed amendment to Rule 1.10 permitted the use of screens, which failed to truly protect client confidentiality.⁸⁴ The Report quotes from the Preamble of the ABA Model Rules, reiterating that the legal profession is self-regulating.⁸⁵ The Minority Report then goes on to argue, however, that lawyers may not be trusted to actually self-regulate when given the opportunity.⁸⁶ Specifically, Commissioner Fox argues that client confidences will not be sufficiently protected when the responsibility of enforcing screens, or reporting screening violations, is left solely to the lawyers involved in the conflict.⁸⁷

The Minority Report states that “[r]arely if ever will violation of a screen be communicated to the former client whose confidences it is intended to protect. A breach of a screen easily could be inadvertent, and lawyers may hesitate to report it.”⁸⁸ Furthermore, the Minority Report argues that “[t]he change in the rule also will place a burden on the affected client to enforce lawyer loyalty through the expense of a motion, when a rule would mandate lawyer compliance.”⁸⁹ Here, the Minority Report seems to suggest that rules mandating a lawyer’s compliance are effective in regulating a lawyer’s actions, or protecting clients’ interests.⁹⁰ On the other hand, the Report simultaneously argues that a rule permitting screening, while still mandating a lawyer’s responsibility to protect confidential communications, would essentially prove ineffective.⁹¹

The Minority Report also criticizes the proposed amendment to Rule 1.10(c) particularly because the new rule would afford no extra protection to a client whose lawyer “switch[es] sides” during the course of representation.⁹² Despite Commissioner Fox’s strong opposition to the use of screens as permitted by the proposed amendment to Rule 1.10, the Commissioner cites the Restatement of the Law’s rule permitting screening as a more acceptable

84. See Fox, *supra* note 82.

85. *Id.* (quoting MODEL RULES OF PROF’L CONDUCT, Pmb. § 12 (2003)).

86. See *id.*

87. See *id.* “Whom did the commission expect to complain—firms that have used screens, either in jurisdictions that permit them or in situations of client consent? Did the commission really expect firms to confess to negligence or worse, with loss of business and lawsuits to follow? Really?” *Id.* (quoting Professor Andrew Kaufman, Address at the Michael Frank Lecture (June 1, 2001)).

88. *Id.*

89. *Id.*

90. See *id.*

91. See *id.*

92. See *id.*

compromise.⁹³ This reasoning suggests that some form of screening may even be acceptable to such an opponent of the Ethics 2000 Commission's proposal.⁹⁴

IV. THE RESTATEMENT OF LAW GOVERNING LAWYERS PROMOTES SCREENING

The American Law Institute (ALI) began drafting a Restatement of the Law Governing Lawyers in 1986, and completed it in 1998.⁹⁵ The Restatement, although not binding, combines general principles of ethics pertinent to practicing attorneys.⁹⁶

Moreover, it is essentially consistent with the ABA Model Rules with regard to conflicts of interest⁹⁷ and imputation,⁹⁸ with

93. *See id.* (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 124(2)(a) (2000)). Commissioner Fox notes that there are certain jurisdictions that prohibit nonconsensual screening in instances where an attorney switches sides during the course of representation, but still allow for nonconsensual screening in other situations. *See id.* He argues that “[t]his explains why the Restatement of the Law Governing Lawyers Section 124 recognizes nonconsensual screening only if ‘any confidential [sic] information communicated to the personally prohibited lawyer is unlikely to be significant in the subsequent matter.’ The Commission’s proposal travels far beyond any such limitation.” *Id.* (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 124). *See also infra* note 110 and accompanying text.

94. *See Fox, supra* note 82.

95. THOMAS D. MORGAN & RONALD D. ROTUNDA, MODEL RULES OF PROF’L CONDUCT AND OTHER SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 359 (2004).

96. *See id.*

97. *Compare* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 121-122, 132 (2000), *with* MODEL RULES OF PROF’L CONDUCT R.1.10 (2003). Section 132, entitled “A Representation Adverse to the Interests of a Former Client,” states:

Unless both the affected present and former clients consent to the representation under the limitations and conditions provided in § 122, a lawyer who has represented a client in a matter may not thereafter represent another client in the same or a substantially related matter in which the interests of the former client are materially adverse. The current matter is substantially related to the earlier matter if:

- (1) the current matter involves the work the lawyer performed for the former client; or
- (2) there is a substantial risk that representation of the present client will involve the use of information acquired in the course of representing the former client, unless that information has become generally known.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132.

98. *Compare* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123, *with* MODEL RULES OF PROF’L CONDUCT R.1.10. Section 123, entitled, “Imputation of a Conflict of Interest to an Affiliated Lawyer,” states:

Unless all affected clients consent to the representation under the limitations and conditions provided in § 122 or unless imputation hereunder is removed as provided in § 124, the restrictions upon a lawyer imposed by §§ 125-135 also restrict other affiliated lawyers who:

the exception that the Restatement permits screening as a means for removing imputation.⁹⁹ Section 124 of the Restatement, entitled "Removing Imputation," states that imputation can be cured if the lawyer creating the conflict is screened from participating in the representation of the client, provided that timely and adequate notice of the screening is provided to any affected client.¹⁰⁰ Although section 124 does permit the use of screens to cure imputed conflicts of interests, section 124(2)(a) places one important limitation on the use of screens.¹⁰¹ That subsection suggests that a screen should only be used to cure an imputed conflict of interest when "any confidential client information communicated to the personally prohibited lawyer is unlikely to be significant in the subsequent matter"¹⁰² The Restatement's rule regarding the use of screens does not go as far as the Ethics 2000 Commission's proposed amendment to Rule 1.10 attempted to go,¹⁰³ but section 124 does go further than the current ABA Model Rules.¹⁰⁴ Specifically, the Restatement promotes the use of screens, as long as there are safeguards to protect affected clients.¹⁰⁵

Despite the ABA House of Delegates's rejection of the Ethics 2000 Commission's proposal to amend Model Rule 1.10,¹⁰⁶ some states have taken action and amended their state model rules to permit the use of screens.¹⁰⁷

(1) are associated with that lawyer in rendering legal services to others through a law partnership, professional corporation, sole proprietorship, or similar association;

(2) are employed with that lawyer by an organization to render legal services either to that organization or to others to advance the interests or objectives of the organization; or

(3) share office facilities without reasonably adequate measures to protect confidential client information so that it will not be available to other lawyers in the shared office.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123.

99. *Id.* § 124(2)-(3).

100. *Id.* § 124(2)(b)-(c).

101. *See supra* note 98 and accompanying text.

102. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 124(2)(a). Requiring that any confidential information communicated to the personally prohibited lawyer be insignificant in the subsequent matter creates another safeguard protecting the client's confidential communications. *Id.*

103. *See supra* Part III.A.

104. *Compare* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 124 (promoting screens), with MODEL RULES OF PROF'L CONDUCT R. 1.10 (2003) (no promotion of screens).

105. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 124(2)-(3).

106. *See supra* Part III.B.

107. *See infra* Part V.

V. STATES THAT PERMIT SCREENING TO CURE IMPUTED CONFLICTS

Although most states have adopted the ABA Model Rules, or have derived their own rules from the ABA's Model Rules or Model Code,¹⁰⁸ a minority of states have chosen to depart from the ABA Model Rules on the subject of screening.¹⁰⁹

A. *Maryland Rule 1.10(b) Permits the Use of Screens*

Prior to the rejection of the Commission's proposal by the ABA House of Delegates, Maryland adopted a rule permitting screening in conflicts cases. Maryland Rule of Professional Conduct (MRPC) 1.10(b) provides, in pertinent part:

When a lawyer becomes, associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person unless:

(1) the newly associated lawyer has acquired from the former client no information protected by Rules 1.6 and (2) 1.9(b) that is material to the matter; or the newly associated lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.¹¹⁰

This rule effectively states that a disqualified lawyer is screened if that lawyer is isolated from all material knowledge concerning the matter, isolated from all contact with the client, and precluded from discussing the matter with any other individual at the firm.¹¹¹

Maryland's rule permitting screens, Rule 1.10, was amended to include the language quoted above on December 16, 1999, and the new rule became effective on January 1, 2000.¹¹² The comment to this rule provides insight into the policy reasons which persuaded

108. Richard J. Magid, *Suing Your Own Client: Disqualification? Don't Be So Sure*, 29 LITIG. 41 (2003).

109. See *infra* note 128 and accompanying text.

110. MD. RULES OF PROF'L CONDUCT R. 1.10(b) (2005).

111. *Id.*

112. See *id.*

the Maryland House of Delegates to amend it in order to permit screening in certain conflict of interest cases.¹¹³

There are several competing policy reasons surrounding the issue of screening, which the comment to Rule 1.10 addresses.¹¹⁴ While the comment asserts the importance of a former client having security in knowing that the attorney's loyalty is not compromised,¹¹⁵ clients should ultimately be free to choose their own legal counsel. Additionally, the comment maintains that lawyers should have a certain degree of freedom in moving between law firms and taking on new clients.¹¹⁶ In many cases, without the ability to use screens, a lawyer desiring to move between firms can be viewed as too great of a risk to hire, if that lawyer has the potential to create conflicts of interest in the future.¹¹⁷ Ultimately, this predicament adversely affects both lawyers and potential clients by imposing unnecessary limits on each party.

In *Stratagene v. Invitrogen Corp.*,¹¹⁸ the United States District Court for the District of Maryland evaluated a claim for disqualification based on imputation under MRPC 1.10, using a two-step analysis; specifically, by applying Rule 1.10(b)(1), then Rule 1.10(b)(2).¹¹⁹ First, under 1.10(b)(1), the court must consider whether the prohibited lawyer acquired any information protected by Rules 1.6¹²⁰ or 1.9(b)¹²¹ that was material to the matter.¹²² If

113. See *id.* R. 1.10 cmt.

[I]t should be recognized that today many lawyers practice in firms, that many to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputed disqualification were defined with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

Id.

114. See *id.* cmt.

115. See *id.*

116. See *id.*

117. Shapiro, *supra* note 36, at 141, 156.

118. 225 F. Supp. 2d 608 (2002).

119. See *id.* at 613-14.

120. See MODEL RULES OF PROF'L CONDUCT R. 1.10(b)(1) (2003). Rule 1.6 mandates that a lawyer shall not reveal any information obtained from a client during the course of representation "unless the client gives informed consent, the disclosure is impliedly authorized . . . or the disclosure falls within one of the narrow exceptions provided for in subsection b of the rule." See *id.* R. 1.6(a).

121. See *id.* Rule 1.10(b)(1). Rule 1.9(b) addresses the duties that lawyers have to former clients. See *id.* R. 1.9(b). Further, the rule prohibits a lawyer who has "formerly represented a client" in a certain matter from "thereafter represent[ing] another person in the same or substantially related matter," when the current client's interests are "materially adverse" to those of the former client. *Id.* R. 1.9(a); see also *supra* notes 28-30 and accompanying text.

protected information is acquired, the lawyer's conflict will be imputed to that lawyer's new firm, unless the prohibited lawyer has been effectively screened.¹²³ Importantly, the court analyzed the comment to Rule 1.10(b) and asserted that "the burden of proof regarding access to confidential information should rest upon the firm whose disqualification is sought."¹²⁴

The Preamble to the MRPC states that, "[t]he legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement."¹²⁵ Maryland's adoption of the screening process recognizes the self-regulatory nature of the profession by entrusting firms with the responsibility of properly screening attorneys who create a conflict of interest.¹²⁶ Importantly, this process protects against conflicts without automatically disqualifying a lawyer, or a law firm, from representing a potential client.¹²⁷

B. Other States Permitting the Use of Screens

While Maryland's decision to permit screens to cure imputed conflicts of interest is certainly not the majority position, fourteen other states have also amended their rules of professional conduct to permit some type of screening.¹²⁸ These rules vary from state to state, but generally require that the clients affected receive notice of the screening mechanism, and that the screened lawyer is given

-
122. See also *Stratagene*, 225 F. Supp. 2d at 613 (quoting language from Rule 1.10(b)(1) requiring that a new lawyer have no information "material to the matter").
123. See MODEL RULES OF PROF'L CONDUCT R. 1.10(b)(1); see also *Stratagene*, 225 F. Supp. 2d at 614 (upholding the requirement in Rule 1.10(b)(1) that conflicts will be imputed to firms if a new attorney is not screened effectively).
124. *Id.* at 613.
125. MD. RULES OF PROF'L CONDUCT, Pmb. § 10 (2005).
126. See *id.* R. 1.10 cmts. 9-10.
127. See *id.* R. 1.10 cmt. 8. See also *id.* R. 1.10 cmt. 6 ("Where conditions of paragraph e [describing the screening process] are met, imputation is removed . . .").
128. See 17A ARIZ. RULES OF PROF'L CONDUCT R. 1.10(d) (2004); DEL. RULES OF PROF'L CONDUCT R. 1.10(c)(1) (2005); ILL. RULES OF PROF'L CONDUCT R. 1.10(b)(2) (2004); IOWA RULES OF PROF'L CONDUCT R. 32:1.7 & 32:1.10 (2005); MASS. RULES OF PROF'L CONDUCT R. 1.10(d)(2)(ii); MICH. RULES OF PROF'L CONDUCT R. 1.10(b)(1) (2005); 52 MINN. RULES OF PROF. CONDUCT R. 1.10(b)(2) (2006); MONT. RULES OF PROF'L CONDUCT R. 1.10(c)(1) (2005); N.J. RULES OF PROF'L CONDUCT R. 1.10(c)(2) (2006); N.C. RULES OF PROF'L CONDUCT R. 1.10(c)(1) (2006); OR. RULES OF PROF'L CONDUCT R. 1.10(c) (2005); 42 PA. RULES OF PROF'L CONDUCT R. 1.10(b)(1) (2004); TENN. RULES OF PROF'L CONDUCT R. 1.10(c) (2005); WASH. RULES OF PROF'L CONDUCT R. 1.10(b) (2005).

no part of the profits from that representation.¹²⁹ Each of these states weighed the competing policy concerns and concluded not only that clients should have broad discretion when choosing their legal counsel, but also that law firms are capable of creating effective screens to protect the interests of former and current clients.¹³⁰

Each state that has opted to permit some form of screening has done so in an independent manner, taking whatever steps that state felt was necessary to protect clients' interests.¹³¹

In *Clinard v. Blackwood*,¹³² the Supreme Court of Tennessee demonstrated that although Tennessee's Rules of Professional Conduct permit screening to cure imputed conflicts of interest, another, broader limitation on the use of screens exists under the Rules.¹³³ The Court stated that "even 'if there is no actual conflict of interest, the court must nonetheless consider whether conduct has created an appearance of impropriety.'"¹³⁴ So, even if the screen used does rebut the presumption that confidential information has passed from the personally prohibited attorney to the rest of the firm, "[t]he 'appearance of impropriety' is therefore an independent ground upon which disqualification may be based."¹³⁵ Tennessee uses the "appearance of impropriety" standard¹³⁶ as an additional check when ethical issues arise, in order to ensure that client confidences are protected without depriving current clients of the representation of their choice.¹³⁷

Pennsylvania has permitted the use of screens to cure imputed conflicts of interest for well over a decade.¹³⁸ Despite a case of

129. See Charlotte K. Stretch, *State Committees Review and Respond To Model Rules Amendments*, 15 PROF. LAW. 14, 15 (2004). Specifically, "Minnesota, North Carolina and Oregon do not include provisions relating to the apportionment of the fee. Illinois, Iowa, and Maryland do not require notice to the client regarding the screen." *Id.*; see also ILL. RULES OF PROF'L CONDUCT R. 1.10(b); IOWA RULES PROF'L CONDUCT R. 32:1.10; MD. RULES OF PROF'L CONDUCT R. 1.10(c); MINN. RULES OF PROF'L CONDUCT 1.10(b); N.C. REVISED RULES OF PROF'L CONDUCT R. 1.10(c); OR. RULES OF PROF'L CONDUCT R. 1.10(c).

130. See Shapiro, *supra* note 36, at 1309.

131. See Stretch, *supra* note 129, at 15.

132. 46 S.W.3d 177 (Tenn. 2001).

133. See *id.* at 186 (asserting that "[e]thical rules must necessarily be broad and flexible so as to have some application in various ethical dilemmas, and the appearance of impropriety standard can work well when more specific rules may be ineffective").

134. *Id.* at 187 (quoting *State v. Culbreath*, 30 S.W.3d 309 (Tenn. 2001)).

135. *Id.* (quoting *Culbreath*, 30 S.W.3d at 312-13).

136. Specifically, the "appearance of impropriety" standard considers whether a "reasonable layperson" with knowledge of the facts would find that the conflict poses a potential and "substantial risk" to one of the clients, or offends the public interest. See *id.*

137. *Id.* at 187-88.

138. See PA. RULES OF PROF'L CONDUCT R. 1.10(b) (2005).

ineffective screening in 1992,¹³⁹ the Pennsylvania Rules of Professional Conduct continue to permit screening.¹⁴⁰ In *Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*,¹⁴¹ a Pennsylvania law firm attempted to represent competing companies at the same time, on the basis that it had supposedly erected a “Chinese Wall” so that the respective lawyers working for the competing companies were screened from each other.¹⁴² The Pennsylvania Supreme Court found that the firm’s actions constituted an ethical violation,¹⁴³ but the court neither criticized the concept of screening, nor challenged its validity.¹⁴⁴ “Indeed, the *Maritrans* situation is remarkable for its rarity. It is also remarkable because, even after *Maritrans*, the Pennsylvania Supreme Court continued to permit lateral screening pursuant to Rule 1.10(b) of the Pennsylvania Rules of Professional Conduct, which the Court adopted in 1988.”¹⁴⁵

Notwithstanding *Maritrans*, evidence tends to show that few complaints have arisen in states that permit nonconsensual screening to cure imputed conflicts of interest.¹⁴⁶ The Ethics 2000 Commission’s proposed amendment to Rule 1.10, that is, “to

139. See *Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277 (Pa. 1992). In particular, the Supreme Court of Pennsylvania affirmed the trial court’s determination that, “Pepper [a co-defendant attorney] breached its obligation, which was fortified by a specific promise, to keep from Messina [another co-defendant attorney] that which was learned after the erection of the ‘Chinese Wall.’” *Id.* at 1287.

140. See PA. RULES OF PROF’L CONDUCT R. 1.10(b). Rule 1.10(a) states that no lawyer in a firm may represent a client when any other lawyer in the firm “practicing alone would be prohibited from doing so.” See *id.* R. 1.10(b). Additionally, subsection b, addressing the use of screens, states:

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter unless:

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

(2) written notice is promptly given to the appropriate client to enable it to ascertain compliance with the provisions of this rule.

Id.

141. 602 A.2d at 1281.

142. See *Maritrans*, 602 A.2d at 1281 (“[T]he attorneys on one side of this ‘Chinese Wall’ would not discuss their respective representations with the attorneys on the other side.”).

143. See *id.* at 1283-84 (citations omitted) (“Pepper and Messina, as attorneys, had a duty to administer properly their responsibilities to respect the confidences of *Maritrans*.”).

144. See *id.* at 1288.

145. Creamer, *supra* note 21, at 21.

146. See *id.*

permit 'screening' of private lawyers moving between law firms," undoubtedly resulted, in part, from such lack of evidence.¹⁴⁷

VI. A NEED FOR CONSISTENCY

The ABA, as well as state bar associations, espouse the self-regulatory nature of the profession and enact model rules to protect clients, lawyers, and the integrity of the legal profession;¹⁴⁸ yet, the rejection of the use of screens defeats these very purposes.¹⁴⁹ Screens allow individuals to choose their representation, as well as allow lawyers mobility without compromising their ability to represent new clients.¹⁵⁰

Ultimately, the ABA's rejection of the use of screens demonstrates a distrust of lawyers, in their self-regulatory capacity, to effectively erect screens.¹⁵¹ Perhaps even more unsettling is the inconsistent way in which this important ethical issue has been analyzed, as well as put into practice.¹⁵²

A. *ABA Model Rule 1.11 Permits Screening for Government Employees*

Those who oppose the use of screens to cure imputed conflicts of interest repeatedly argue that screening methods do not sufficiently guarantee former clients that their confidential communications will be protected when their lawyer migrates to a new firm.¹⁵³ Although the House of Delegates rejected the Ethics 2000 Commission's proposal to amend Rule 1.10 to allow

147. *See id.*

148. *See* MODEL RULES OF PROF'L CONDUCT, Pmb1. §§ 10-12 (2003).

149. *See* Creamer, *supra* note 21, at 21-22.

150. *See id.*

151. *See id.* at 20-21. A central argument of those opposed to screening is that lawyers cannot be trusted to protect the confidences of former clients. *Id.* at 21. Although the ABA House of Delegates does not provide an explanation for each proposed amendment that it adopts or rejects, Commissioner Fox's Minority Report echoes the general sentiments of those opposed to screening. *See* American Bar Association, Ethics 2000 Commission, http://abanet.org/cpr/e2k-report_home.html (follow "This document" hyperlink) (last visited Jan. 18, 2006); Fox, *supra* note 82. In particular, the Minority Report argues that, "[r]arely if ever will violation of a screen be communicated to the former client whose confidences it is intended to protect. A breach of a screen easily could be inadvertent, and lawyers may hesitate to report it." *Id.* The Minority Report quickly dismisses the Commission's argument that despite concerns about enforcement and reporting, "the commission heard no evidence to suggest that these objections have a factual basis in the experience of jurisdictions that permit screening." *See id.*

152. *See infra* Part VI.A-B (discussing the use of screens for government employees, as well as the lack of uniformity between state rules of professional conduct and the ABA's Model Rules of Professional Conduct).

153. *See supra* Part II.B.3.

screening,¹⁵⁴ the ABA Model Rules do permit screening for government employees.¹⁵⁵ Rule 1.11, entitled “Special Conflicts of Interest for Former and Current Government Officers and Employees,”¹⁵⁶ states that a lawyer who has formerly served as a government employee is subject to Rule 1.9(c),¹⁵⁷ and is prohibited from representing a person in a matter in which the lawyer participated “personally and substantially as a public officer or employee”¹⁵⁸ With regard to screening, subsection (b) states in pertinent part:

- (b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
- (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.¹⁵⁹

Additionally, subsection (c) states that a lawyer who obtained “confidential government information about a person” while in a government position is prohibited from representing “a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person.”¹⁶⁰ However, the rule does not impute the disqualification to the rest of the lawyer’s firm if the disqualified lawyer is “timely” screened from the matter and “apportioned no part of the fee” from the representation.¹⁶¹

Notwithstanding the fact that there is little difference between screening a lawyer who migrates between a government job and a private firm, and a lawyer who migrates between two

154. *See supra* Part III.B.

155. *See* MODEL RULES OF PROF’L CONDUCT R. 1.11 (2003).

156. *Id.*

157. *Id.* R. 1.11(a)(1). Rule 1.9(c) addresses a lawyer’s duties to former clients, and prohibits a lawyer who has formerly represented a client, or whose current or former firm has formerly represented a client, from using any information related to that representation to the disadvantage of the former client. *See id.* R. 1.9(c).

158. *See id.* R. 1.11(a)(2).

159. *Id.* R. 1.11(b).

160. *Id.* R. 1.11(c).

161. *Id.*

private firms, one practice is allowed by the ABA Model Rules, while the other has been rejected by the House of Delegates.¹⁶²

The comments to Model Rule 1.11 explain the policy issues involved when dealing with government employees; in particular, that screening is permitted in order to avoid discouraging qualified lawyers from entering public service.¹⁶³ Although such a policy may be important, the theory behind it does not hold up.¹⁶⁴

Screening has been criticized because individuals are skeptical that lawyers can be trusted to keep confidential information about a former client when it could be used to their advantage;¹⁶⁵ however, this argument makes no distinction between the trustworthiness of a government employee and a lawyer employed by a private firm. It is clear that the opponents of lateral screening believe that the risk created when private lawyers move between firms is too great to be cured by screening mechanisms; however, these same opponents believe that conflicts of interest can be adequately cured by screening mechanisms when an attorney is moving between public and private sectors.¹⁶⁶ The rationale behind the latter reasoning is to encourage mobility from private to public employment, yet the conflict remains the same.¹⁶⁷ While it is important to encourage public service, the distinction made between government lawyers and private attorneys, with regard to screens, is an injustice of its own.¹⁶⁸ Moreover, “[i]f former government lawyers can be trusted to comply with a screening mechanism, then private lawyers can be trusted to do so as well.”¹⁶⁹

162. See *id.*; see also Pizzimenti, *supra* note 42, at 312-13 (“[M]ost commentators discern no reason to distinguish the moral uprightness of government lawyers from that of private ones.”), *infra* Part III.B (discussing the House of Delegates’ rejection of proposed Rule 1.10(c)).

163. See MODEL RULES OF PROF’L CONDUCT R. 1.11 cmt. 4 (2003). “The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.” *Id.*

164. The Minority Report attempts to explain the rationale behind the screening exception for government employees. Fox, *supra* note 82. Specifically, it explains that

the conclusion was reached that the government uniquely was a different kind of client that might be asked to endure the indignity of having its former lawyers screened in order to encourage the best and the brightest to undertake public service. That exception reflected a noble cause and it remains one today.

Id.

165. Creamer, *supra* note 21, at 20-21.

166. *Id.* at 20-22.

167. *Id.* at 22.

168. See *id.*; see also Pizzimenti, *supra* note 42, at 312-13. (“[M]ost commentators discern no reason to distinguish the moral uprightness of government lawyers from that of private lawyers.”).

169. See Creamer, *supra* note 21, at 22.

Additionally, ABA Model Rule 1.12 allows for the screening of former judges, law clerks, arbitrators, mediators, and other third-party neutrals to prevent imputed disqualification.¹⁷⁰ In *County of Los Angeles v. Forsyth*,¹⁷¹ the Court of Appeals for the Ninth Circuit suggested that ethical rules permitting screening for former judges should, perhaps, be extended to private attorneys in order to confront “[t]he changing realities of law practice” and the “harsh[ness]” of disqualification.¹⁷² Again, if screening is permitted for former government employees, former judges, law clerks, arbitrators, mediators, and third-party neutrals,¹⁷³ private attorneys should be governed by the same rules. It certainly seems that ethical rules created to govern lawyers should generally be applicable to all lawyers, all of the time.

B. *A Need for Uniformity in the Courts*

The lack of uniformity between state model rules of professional conduct and the ABA’s Model Rules, as well as among state and federal courts is also damaging to the integrity of the profession.¹⁷⁴ The fact that the drafters of Maryland’s ethical rules seem to trust Maryland lawyers enough to allow them to be screened while the ABA does not generally afford that same right

170. See MODEL RULES OF PROF’L CONDUCT R. 1.12 (2003). Rule 1.12(c) concerning imputation states:

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

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

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

Id.

171. 223 F.3d 990, 997 (9th Cir. 2000) (holding that “the vicarious disqualification of a firm does not automatically follow the personal disqualification of a former settlement judge,” when timely erected screens effectively rebut the presumption of shared confidences).

172. *Id.* at 996-97. The court stated: “[w]e would nevertheless accept the costs of automatic disqualification, if it were the only way to ensure that lawyers honor their duties of confidentiality and loyalty. But it is not. A client’s confidences can also be kept inviolate by adopting measures to quarantine the tainted lawyer.” *Id.* at 996. Additionally, the court stated that “[t]he changing realities of law practice call for a more functional approach to disqualification than in the past.” *Id.* at 997.

173. See *supra* note 170 and accompanying text.

174. See *supra* Part VI. While this Comment analyzes how the inconsistencies between states’ ethics codes, with regard to the use of screens to cure imputed conflicts of interest, reflect on the legal profession, it is important to note that this is not the only area of substance in which states’ ethics codes significantly diverge. See, e.g., *supra* notes 132-37 (discussing the Tennessee “appearance of impropriety” standard).

to other lawyers,¹⁷⁵ calls into question the legal profession's entire ethical system.

When trying to determine ethical standards for lawyers one must consider that:

While most state rules have adopted or are derived from the ABA Model Rules of Professional Conduct or the ABA Model Code, or a combination of both, they are interpreted and applied differently by a variety of federal and state courts, as well as by various state and local authorities. To further complicate matters, some federal courts have adopted and apply the Rules of Professional Conduct of the state in which they sit, while other federal courts adhere to national standards of attorney conduct promulgated by national legal associations, such as the ABA. Still other federal courts look to state Rules of Professional Conduct but are willing to consider national standards.¹⁷⁶

It is difficult to comprehend how there can be such great variation in ethical standards for one profession.

Some courts have opened the door to screening procedures when there is no rule permitting the use of screens.¹⁷⁷ In *Doe v. Perry Community School District*, a case of first impression concerning the use of screens,¹⁷⁸ the Supreme Court of Iowa stated that screening can be used in limited situations to cure imputed conflicts of interest.¹⁷⁹ Iowa's Rules of Professional Responsibility mandate that if a lawyer is prohibited from representing a client due to a conflict of interest, that lawyer's firm

175. See *supra* Parts V & VI.B, respectively.

176. Magid, *supra* note 108, at 41.

177. See *infra* note 182 and accompanying text.

178. 650 N.W.2d 594, 597 (Iowa Sup. 2002). "We must determine whether a screening mechanism known as a Chinese wall is sufficient to allow a law firm to eliminate the conflict of an attorney who switched sides of representation during the same case." *Id.*

179. *Id.* at 601. Ultimately, the court concluded that screens can be used to cure imputed conflicts of interest, as long as the two matters are not substantially related. *Id.* In determining whether two matters are substantially related, the court will consider "the nature and scope of the prior representation, the nature of the present lawsuit, and whether confidences may have been disclosed." *Id.* at 600 (citing *Hoffman v. Internal Med. P.C.*, 533 N.W.2d 834, 836 (Iowa Ct. App. 1995)). If the two matters are found to be substantially related then the conflict is imputed to the firm, and disqualification is required. *Id.* at 601.

must also decline or withdraw from the representation.¹⁸⁰ While the court found that the screen in this particular case was not sufficient to prevent imputation because the matters were substantially related,¹⁸¹ the court did suggest that a screen erected under the proper circumstances could be effective,¹⁸² notwithstanding Iowa's general rule of professional responsibility concerning imputed disqualification.¹⁸³

The *Doe* decision demonstrates that although courts may use the ethical rules as the basis for ruling on a motion to disqualify, the extent to which the rules are utilized is always subject to judicial interpretation.¹⁸⁴ Attorneys may, in fact, be subject to discipline for violating an ethical rule, while not necessarily being disqualified from representing a particular client.¹⁸⁵ Given the internal nature of screening procedures, it has been suggested that “[t]rial courts can influence the evolution of screening procedures through case-by-case adequacy reviews” and “[s]tate supreme courts can codify in their ethics rules screening guidelines that provide complying firms with a safe harbor from the threat of disqualification.”¹⁸⁶

Although the Iowa court took a bold step, which will hopefully encourage other courts to consider the effectiveness of screens, it is also clear that “allowing screening by court decision, rather than by a black letter rule, has its own pitfalls. Although the facts in the recent Iowa case were clear from any standpoint, they may be fuzzier the next time around.”¹⁸⁷

-
180. IOWA CODE OF PROF'L RESPONSIBILITY FOR LAWYERS DR-105(E) (2002) (“if a lawyer is required to decline employment or withdraw from employment, no partner or associate of the lawyer or the lawyer’s firm may accept or continue such employment.”), *repealed by* IOWA RULES OF PROF'L CONDUCT R. 32:1.7 & 32:1.10 (2005) (prohibiting a firm from representing a former client of a former associated lawyer only under specific circumstances).
 181. *Doe*, 650 N.W.2d at 601. In this case, the plaintiff’s original attorney switched to the defendant’s firm in the middle of the litigation, so that even the firm representing the defendant stipulated that the matters were substantially related. *Id.* at 596-97, 598. Defendant’s counsel argued, however, that even though the matters were substantially related, the defendant’s entire firm should not be disqualified, because a “Chinese Wall” had been erected to protect confidences communicated by the plaintiffs to their original lawyer. *Id.* at 600.
 182. *See id.* at 601. The court concluded that in this case, because a substantial relationship existed between the current and former representation, the defendant’s law firm must be disqualified. *Id.* at 599. When there is not a substantial relationship between the current and former representation, the court will consider whether a screen has been effective in protecting client confidences. *See id.* at 600.
 183. *See* IOWA CODE OF PROF'L RESPONSIBILITY FOR LAWYERS R. 5-105 (repealed 2005).
 184. *See supra* text accompanying notes 178-82.
 185. *See In re Wenz*, 87 P.3d 376, 380 (Mont. 2004).
 186. Ted Schneyer, *A Tale of Four Systems: Reflections on How Law Influences the “Ethical Infrastructure” of Law Firms*, 39 S. TEX. L. REV. 245, 263 (1998).
 187. Gibeaut, *supra* note 48.

The lack of uniformity among courts and among states where ethics are concerned poses a great threat to the integrity of the profession.¹⁸⁸ In a profession there should be certain ethical rules from which no derogation is allowed, and professionals in a position to create and amend these rules should strive for uniformity.

VII. CONCLUSION

After an extensive review, the Ethics 2000 Commission recommended an amendment to the ABA Model Rules that would permit screening.¹⁸⁹ The Restatement of Law Governing Lawyers states that screens can be used to cure conflicts.¹⁹⁰ In writing the Restatement, the ALI, described as "a prestigious group of practicing lawyers, judges, and academics,"¹⁹¹ apparently weighed the competing policy concerns surrounding the screening process, and concluded that screens can effectively cure conflicts.¹⁹² Moreover, the few states that do permit screening have yet to encounter negative ethical repercussions.¹⁹³ It certainly appears that:

[R]ecognition of the Chinese wall defense thus offers a practicable solution to a growing problem of legal ethics. Without detracting from the ethical standards of the legal profession, expanded use of Chinese walls will help to remove artificial obstacles to the job mobility of attorneys, private and public, while securing to clients the maximum right to counsel of their choice.¹⁹⁴

The lack of uniformity among sources of influence and authority such as the courts, state rules of professional conduct, the ABA Model Rules, and the Restatement of Law Governing Lawyers undermines the integrity of the legal profession.¹⁹⁵

Rules governing lawyers should strive to protect clients and promote the integrity of the profession. Notwithstanding the relative lack of problems arising from the use of screens in the

188. See *supra* notes 148-52 and accompanying text.

189. See *supra* Part III.A.

190. See discussion *supra* Part IV.

191. See MORGAN & ROTUNDA, *supra* note 95, at 359.

192. See discussion *supra* Part IV.

193. See *supra* Part V.A-B.

194. Comment, *supra* note 6, at 715.

195. See discussion *supra* Part VI.B.

sixteen states which permit them to cure conflicts,¹⁹⁶ other states have been reluctant to follow in the footsteps of those states.¹⁹⁷

The Restatement of the Law Governing Lawyers promotes the use of screens,¹⁹⁸ and the Ethics 2000 Commission found screens to be an effective method for curing conflicts before resorting to disqualification.¹⁹⁹ The ABA Model Rules permit screening for former government employees, judges, law clerks, arbitrators, mediators, and other third-party neutrals, but decline to allow the same rule to apply to private lawyers.²⁰⁰ At the same time, state and federal courts look to varying national and state ethical standards when evaluating potential misconduct.²⁰¹

While opponents of screening suggest that such a practice will undermine the integrity of the profession and create the appearance of impropriety,²⁰² they also promote the various duties of lawyers and the self-regulatory nature of the profession.²⁰³ This lack of uniformity and clear distrust of lawyers' abilities to construct and respect screens directly conflicts with the goals and principles as stated in the ABA Model Rules.²⁰⁴ It is, in fact, these actions which undermine the integrity of the profession.

Erin A. Cohn[†]

196. See discussion *supra* Part V.A-B.

197. See discussion *supra* Part V.B.

198. See *supra* Part IV.

199. See *supra* Part III.A.

200. See *supra* Part VI.A.

201. See *supra* Part VI.B.

202. See *supra* notes 48, 50 and accompanying text.

203. See Fox, *supra* note 82 (quoting MODEL RULES OF PROF'L CONDUCT, Pmbl. § 12 (2003)).

204. See Robert W. Meserve, *Chair's Introduction to ABA Commission on Evaluation of Professional Standards*, xi, xii (2003); MODEL RULES OF PROF'L CONDUCT, Pmbl. § 10.

† J.D. expected May 2006, University of Baltimore School of Law; B.A., College of the Holy Cross, 2003.