EXECUTIVE SUMMARY

1. Summary of the Recommendation

The Recommendation would amend ABA Model Rule of Professional Conduct 1.10 ("Imputation of Conflicts of Interest: General Rule") to prohibit imputation of disqualification within a law firm of one lawyer’s conflict of interest to all other lawyers in the firm, provided that an appropriate screening mechanism is established.

2. Summary of the Issue that the Resolution Addresses

The current Rule 1.10 permits lawyers to move from government service, or from positions as judges, arbitrators or law clerks, into a new firm without their conflicts of interest from previous representations being imputed to all other lawyers in their new firm. The conflicts of lawyers moving from one private firm to another are at present imputed to all of the lawyers in the new firm.

3. Please Explain How the Proposed Policy Position will Address the Issue

The amendment of the Model Rule will permit the screening of a lawyer who would be unable to represent a party because of a conflict from his or her former practice in another firm, so that other lawyers in the firm could undertake a representation that that lawyer could not undertake.

4. Summary of Minority Views

No minority views have been expressed to the Standing Committee at this time.
RESOLVED, that The American Bar Association adopts the following amendment to Model Rule of Professional Conduct 1.10:

Imputation of Conflicts of Interest: General Rule

* * *

(e) notwithstanding paragraph (a), and in the absence of a waiver under paragraph (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 therefrom; and

(2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

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Comment

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[9] When the conditions of paragraph (e) are met, no imputation of a lawyer’s disqualification occurs, and consent to the new representation is therefore 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.

[10] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (e)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior
independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[11] Notice, including a description of the screened lawyer’s prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.
Model Rule of Professional Conduct 1.10(a) imputes the disqualification of one lawyer in a law firm to all other members of the firm except when the disqualification is based on a personal interest of the lawyer that will not limit the ability of the other lawyers in the firm to represent the client. The only exceptions to the broad application of imputation are in Model Rules 1.11 (addressing private firms that hire former government lawyers), 1.12 (addressing firms that hire a former judge, judicial law clerk, arbitrator, mediator, or other “third-party neutral”), and 1.18 (discussing situations in which information has been imparted by a prospective client). In each of those situations, the law firm may avoid imputed disqualification by screening the disqualified lawyer from any involvement in the matter.

To date, proposals to amend the ABA Model Rules to allow screening when a lawyer moves from one private firm to another have been unsuccessful, most recently in 2002, when a proposal by the Commission on Evaluation of the Model Rules of Professional Conduct (“Ethics 2000”) was rejected by the House of Delegates by a margin of 176 to 130. Since the advent of the Model Rules, however, many states have made different policy choices. There are now 21 states in which the movement of a personally disqualified lawyer to a new firm does not result in imputation of that lawyer’s disqualification to other lawyers in the new firm if the lawyer is timely screened from participation in the matter.¹

The Standing Committee on Ethics and Professional Responsibility has carefully considered the issues relating to imputed disqualification, and believes that it is time for the American Bar Association to extend the concept of screening, which the Model Rules have long permitted in other contexts, to lawyers who move between private firms.² Such a change must be accomplished, however, without diminishing the duty of confidentiality that a lawyer owes to a former client.

The current Model Rules imputation policy implies that only lawyers moving from public service to private practice should be trusted to honor or comply with an effective screening procedure. It is also possible to infer from the Model Rules’ formulation that former clients of private law firms are entitled to greater protections than are government entities whose lawyers

¹ See Arizona Rule 1.10(d); Colorado Rule 1.10(d); Delaware Rule 1.10(c); Illinois Rule 1.10(b),(2); Indiana Rule 1.10(c); Kentucky Rule 3.130(1.10)(d); Maryland Rule 1.10(c); Massachusetts Rule 1.10(d)-(e); Michigan Rule 1.10(b); Minnesota Rule 1.10(b); Montana Rule 1.10(c); Nevada Rule 1.10(c); North Carolina Rule 1.10(c); North Dakota Rule 1.10(b); Ohio Rule 1.10(c)-(d); Oregon Rule 1.10(c); Pennsylvania Rule 1.10(b); Tennessee Rule 1.10(c)-(d); Utah Rule 1.10(c); Washington Rule 1.10(e); and Wisconsin Rule 20:1.10(a). Several of these jurisdictions impose the conditions reflected in the proposed amendment, i.e., requiring that the personally disqualified lawyer receive no part of the fee from the matter, and that notice be given to the affected former client or firm. A few have included requirements that an affidavit be given to the former client and/or firm describing the screening procedures or that the matter not be one in which the personally disqualified lawyer participated substantially. New York has under consideration a rule permitting screening so long as no confidential information acquired by the lawyer in the previous representation was “material” or “significant” to the current matter.

² Standing Committee Member Susan Martyn dissents from this Recommendation
have moved to the private sector. The Committee believes neither presumption is sound. The increasing number of states that have rejected these presumptions is evidence that the ABA’s stance does not reflect the realities of the practice of law.

Some who objected in the past to the expansion of screening practices argued that screening permits “side switching,” whereby a lawyer who has represented one party in a matter will be permitted to represent an opposing party. On the contrary, the purpose of an effective screening mechanism is to prohibit a disqualified lawyer from having any contact with any other lawyers in the new firm about the matter that gave rise to the disqualification.

The current posture of this Association, embodied in Rule 1.10 of the present Model Rules, can be interpreted as reflecting a deep distrust of lawyers in private practice, assuming that a personally disqualified lawyer and the other lawyers in the lawyer’s new firm will cheat, and a skepticism that any screen can be objectively verified to the reasonable satisfaction of private clients. The Standing Committee believes that both of these presumptions should be disavowed.

The screening provisions that have been adopted in nearly half the states have proven effective in protecting client confidentiality, and this belief finds support from lawyers, clients, and disciplinary counsel from those jurisdictions. We are firmly convinced that screening is as effective in the context of private lawyers changing firms as it has been for many years in the context of lawyers moving from government service to private practice. The Ethics 2000 Commission came to the same conclusion, and the rejection of its screening proposal was unfortunate as a matter of principle. Although we recognize that it was an historic concern for promoting government service that supported screening in the contexts of Rules 1.11 and 1.12, the increasing number of states that have endorsed screening for lawyers in all contexts reflects a growing consensus that the public-private distinction is unfounded and should be abandoned.

The Standing Committee’s Recommendation is similar to the proposal of the Ethics 2000 Commission advanced in 2002. It draws upon the most reasonable and effective provisions identified in the state rules referred to above, as well as the provisions already embodied in Rules 1.11, 1.12, and 1.18. We believe that the provision requiring notice of the screening to the former client will adequately expose potential conflicts to examination, allaying concerns of former clients that their confidential information may be at risk.

The Committee notes that one of the primary objectives of the Model Rules of Professional Conduct is the achievement of uniformity in the ethical principles adopted nationwide. This objective has not yet been realized because the ABA has not provided practical, effective, and up-to-date advice on this most important aspect of practice. The effectiveness of the Rules as a unifying model will continue to be impaired if the states continue to make their own varying ways in implementing screening proposals.

Respectfully submitted,
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
Steven C. Krane, Chair

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