IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR RE
PETITION TO AMEND RULES
REGULATING THE FLORIDA BAR

CASE NO. SC04-2246

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# COMMENT AND SUGGESTION ON PROPOSED AMENDMENT TO FLORIDA RULES OF PROFESSIONAL CONDUCT BY CARLTON FIELDS, P.A.

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COMMENT AND SUGGESTION ON PROPOSED AMENDMENT TO FLORIDA RULES OF PROFESSIONAL CONDUCT BY CARLTON FIELDS, P.A.[1]

COMMENT ON RULE 4-1.10 AND PROPOSAL TO AMEND TO PERMIT SCREENING OF LATERALLY HIRED LAWYERS TO AVOID IMPUTED DISQUALIFICATION

**POINT ASSERTED: LATERAL SCREENING SHOULD BE PERMITTED TO AVOID IMPUTED DISQUALIFICATION OF A LAW FIRM DUE TO THE PERSONAL DISQUALIFICATION OF A NEWLY HIRED LAWYER FROM PRIVATE PRACTICE JUST AS IT IS PERMITTED WHEN A LAWYER IS HIRED FROM GOVERNMENT PRACTICE.**

**The Problem** experienced daily by lawyers and law firms large and small in this state can be illustrated by the following:

Young Lawyer has done well in law school, and takes an interesting job with Attorney General in its civil division. She works very extensively on a case seeking damages from Acme Corporation in connection with its failure to deliver to the state the promised computer system in accord with bid documents. Acme is represented by Big Firm.

Young Lawyer's good work favorably impresses the Big Firm team handling Acme's defense, to the extent that after her four-year commitment to Attorney General expires, Big Firm offers Young Lawyer a job, which she accepts.

[1] Carlton Fields has been authorized to represent to the Court that the views expressed herein are also the views of the firms of Shutts & Bowen LLP and Trenam, Kemker, Scharf, Barkin, Frye, O'Neill & Mullis, P.A.

The Acme case is ongoing, but under Rule 4-1.11, Young Lawyer is screened from any participation, communication and contact with that case from the day she joins Big Firm.

Four years later, Young Lawyer has done well, but has been unable to get the first chair and client responsibilities she was promised. She learns of an opportunity with Great Firm, who needs an associate lawyer in the area in which Young Lawyer is most interested, and the first chair responsibilities at Great Firm are legendary. Young Lawyer considers this a dream job.

But Big Firm and Great Firm litigate against each other from time to time, and in her first year with Big Firm, Young Lawyer helped draft the complaint in a case that Acme filed against Great Firm's client HAL. She has done no work on it since, but she did have confidential information, stale though it is. Even though Young Lawyer has much less familiarity with the Acme v. HAL matter than she did with the State v. Acme matter 4 years earlier, she will be unable to join Great Firm [Rule 4-1.10(b)] without Acme's consent [Rule 4-1.10(d)].

Acme's refusal to consent need not be reasonable, but can be arbitrary or for the purpose of inconveniencing the lawyer for the opponent. Further, knowing that Acme has a reputation for not granting waivers, Young Lawyer may be hesitant to ask – she has an opportunity for her dream job, but if it is not available because of the waiver requirement, she does not want to jeopardize the good job she has.

Under the present state of the law, Great Firm cannot hire Young Lawyer, because she once worked on the current matter between Acme and HAL, and therefore presumptively has confidential information. If Great Firm hires Young Lawyer, her disqualification will be imputed to all lawyers in Great Firm, and Great Firm is subject to a motion to disqualify. Only if Acme waives the conflict can the employment take place, and that waiver requirement provides Acme with an absolute veto which it can exercise arbitrarily, or on the theory that harming the lawyer for the opponent is desirable. This result is the same even though Young Lawyer would be screened from the pending case, even though she is ethically bound, and bound by the screening instruction of Great Firm, not to disclose any information about Acme, and in many cases even though she will be working in a different office in a different city than the lawyers responsible for the suit.

The rule is designed to protect Young Lawyer's duty to preserve confidences, and Young Lawyer's duty of loyalty to the client of her former firm, both of which duties are deserving of protection. But if there is a way to protect those duties without giving Acme a veto, the following benefits will obtain:

1. Great Firm's clients will benefit from the firm's chance to hire an associate with exactly the skills and experience the clients in that area badly need.

2. Young Lawyer can take advantage of the opportunity for an attractive new job with a higher salary and an opportunity to work in her desired specialty that not many firms can offer.
3. The opportunity for arbitrary refusal to consent, as a litigation or pressure tactic, is removed from Acme, who in the past has used the privilege arbitrarily.

**A Solution to the Problem.** Lateral Screening would both protect the legitimate interest of former clients in the position of Acme and avoid these adverse consequences for candidates in the position of Young Lawyer and firms such as Great Firm and its clients who need the services of a lateral with Young Lawyer's qualifications. The same screening that protects the same obligations in the case of a lateral moving from a government position to a private firm can apply in the case of a lateral moving from one private firm to another. It is permitted in an increasing number of states. Lateral screening permits law firms to screen newly hired laterals from other lawyers in the hiring firm to prevent imputation to those lawyers of conflicts brought by the lateral. It permits the hiring firm to handle matters from which it would otherwise be disqualified by the conflict imputation rules.

In most states permitting lateral screening to avoid imputed disqualification, these procedures require notice to (but not consent from) the former client of the

lateral or the lateral's former firm, as in the case of government lawyers under Rule 4-1.11. In some states, the firm may not apportion to the lateral any of the fees derived from the matter from which the lateral is screened. In a few states, screening of laterals is possible only if the lateral did not have a significant role in the relevant matter at her former firm, or if the lateral has no information that is likely to be significant in that matter.[2]

But in all states that permit lateral screening, the former client's confidences are protected and the hiring firm is able to continue (or to begin) representations from which it would otherwise be disqualified by using procedures to insulate the new lateral from other lawyers in the firm who are working on matters that would otherwise constitute conflicts of interest.

And lateral screening appears to work. There have been very few instances in which a former client has claimed that a screened lateral improperly participated in a matter from which the lateral was personally disqualified, or otherwise prejudiced the former client's interests. We are also not aware of any case in which allegations of improper conduct by a screened lawyer have been proven, or in which a lawyer has been disciplined for failing to observe screening procedures.

[2] The experience with the problem derives from the undersigned's duties as General Counsel of Carlton Fields. Much of the factual research for this submission was accomplished by the Loss Prevention Counsel of Attorneys' Liability Assurance Society, Inc. ("ALAS"), a mutual insurance group of which Carlton Fields is a member/owner. Portions reproduced are with permission.

It should not be ignored that screening is a very common occurrence even without a rule change because screening is a very common condition of a party's consent to hiring a lateral with potential conflicts. For example, Carlton Fields has erected and administered more than 200 conflict screens over the last 4 years. Thirty-eight of those are created to comply with Rules 4-1.11 or 4-1.12, former government lawyers, judges, or clerks. About half of the remainder were erected as a condition of consent for lateral hires and the rest as conditions to consented conflicts involving unrelated matters in which clients are adverse. There has been no problem in following the requirements of the screens, and they are effective to achieve the purpose of preserving the duties to all clients of loyalty and preserving confidences. Screening is not difficult. It is not ineffective.

**What States Allow Lateral Screening?** There are currently 16 states that have ethics rules allowing some form of lateral screening. As of the fall of 2004, the sixteen states that allow some form of lateral screening are Arizona, Delaware, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Jersey, North Carolina, Oregon, Pennsylvania, Tennessee and Washington. In addition, committees on revising lawyers' rules of professional conduct have recommended lateral screening to the state supreme courts in Iowa and Nevada. On September 13, 2004, the Iowa Supreme Court published for comment proposed new Iowa Rules of Professional Conduct that omit the lateral

screening provision in Rule 1.10(b) that had been recommended on June 8, 2002, by the Iowa Rules of Professional Conduct Drafting Committee. The court offered no explanation for its rejection of the committee's lateral screening recommendation, but did state that its proposal "closely follows the Model Rules," which as noted below omit the Ethics 2000 Commission's lateral screening recommendation.

The following chart is copied with permission from the 2004 ALAS *Loss Prevention Manual*, Tab II, Section 7.6. It reflects in table form which states allowed lateral screening by rule as of March 1, 2004. The basic chart is inserted here. For a full understanding of the chart, however, the Court should refer to the chart, with preface and notes included, a copy of which is in the Appendix to this Comment And Suggestion.

**Lawyer Screening**

| **Jurisdiction** | **Applicable Rules** | **Screening by Rule?** | **Rule Provision** |
|---|---|---|---|
| | Model Rules of Professional Conduct | No | 1.9(b) and 1.10 (a) |
| | Model Code of Professional Responsibility | No | 5-105(D) |
| **Restatement** | | Limited[3] | § 124(2) |

[3] "Limited" screening as used in this chart refers to significant limitations as to which laterals can be screened. Some states permit screening except when the proposed newly hired lawyer was "substantially involved" in the disqualifying

| | | | |
|---|---|---|---|
| **AL** | Rules of Professional Conduct | No | 1.10(b) |
| **AK** | Rules of Professional Conduct | No | 1.9(b) and 1.10(a) |
| **AZ** | Rules of Professional Conduct | Limited | 1.10(d) |
| **AR** | Rules of Professional Conduct | No | 1.10(b) |
| **CA** | Rules of Professional Conduct | No | |
| **CO** | Rules of Professional Conduct | No | 1.9(b) and 1.10(a) |
| **CT** | Rules of Professional Conduct | No | 1.10(b) |
| **DE** | Lawyers' Rules of Professional Conduct | Yes | 1.10(c) |
| **DC** | Rules of Professional Conduct | No | 1.10(b) |
| **FL** | Rules of Professional Conduct | No | 4-1.10(b) |
| **GA** | Rules of Professional Conduct | No | 1.9(b) and 1.10(a) |
| **HI** | Rules of Professional Conduct | No | 1.9(b) and 1.10(a) |
| **ID** | Rules of Professional Conduct | No | 1.10(b) |
| **IL** | Rules of Professional Conduct | Yes | 1.10(b)(2) and 1.10(e) |
| **IN** | Rules of Professional Conduct | No | 1.10(b) |
| **IA** | Code of Professional Responsibility for Lawyers | No | 5-105(E) |
| **KS** | Rules of Professional Conduct | No | 1.10(b) |
| **KY** | Rules of Professional Conduct | Yes | 1.10(d) |
| **LA** | Rules of Professional Conduct | No | 1.10(b) |
| **ME** | Code of Professional Responsibility | No | 3.4(k) |
| **MD** | Rules of Professional Conduct | Yes | 1.10(b) |
| **MA** | Rules of Professional Conduct | Limited | 1.10(d)(2) |
| **MI** | Rules of Professional Conduct | Yes | 1.10(b)(1) |

matter, for example. See discussion below at **Types of State Lateral Screening Rules.**

| | | | |
|---|---|---|---|
| **MN** | Rules of Professional Conduct | Limited | 1.10(b) |
| **MS** | Rules of Professional Conduct | No | 1.10(b) |
| **MO** | Rules of Professional Conduct | No | 1.10(b) |
| **MT** | Rules of Professional Conduct | Yes | 1.10(c)(1) |
| **NE** | Code of Professional Responsibility | No | 5-105(D) |
| **NV** | Rules of Professional Conduct (Nevada Supreme Court Rule 160) | No | 160(2) |
| **NH** | Rules of Professional Conduct | No | 1.10(b) |
| **NJ** | Rules of Professional Conduct | Limited | 1.10(c) |
| **NM** | Rules of Professional Conduct | No | 16-110(B) |
| **NY** | Code of Professional Responsibility | No | 5-105(D) and 5-108 |
| **NC** | Rules of Professional Conduct | Yes | 1.10(c) |
| **ND** | Rules of Professional Conduct | No | 1.10(b) |
| **OH** | Code of Professional Responsibility | No | 5-105(D) |
| **OK** | Rules of Professional Conduct | No | 1.10(b) |
| **OR** | Code of Professional Responsibility | Yes | 5-105(I) |
| **PA** | Rules of Professional Conduct | Yes | 1.10(b)(1) and (2) |
| **RI** | Rules of Professional Conduct | No | 1.10(b) |
| **SC** | Rules of Professional Conduct | No | 1.9(b) and 1.10(a) |
| **SD** | Rules of Professional Conduct | No | 1.9(b) and 1.10(a) |
| **TN** | Rules of Professional Conduct | Limited | 1.10(c) and (d) |
| **TX** | Disciplinary Rules of Professional Conduct | No | 1.09(b) |
| **UT** | Rules of Professional Conduct | No | 1.10(b) |
| **VT** | Rules of Professional Conduct | No | 1.9(b) and 1.10(a) |
| **VA** | Rules of Professional Conduct | No | 1.9(b) |
| **WA** | Rules of Professional Conduct | Yes | 1.10(b) |

| | | | |
|---|---|---|---|
| **WV** | Rules of Professional Conduct | No | 1.10(b) |
| **WI** | Rules of Professional Conduct for Attorneys | No | 20:1.10(b) |
| **WY** | Rules of Professional Conduct for Attorneys at Law | No | 1.10(b) |

Most important, the states that allow lateral screening are increasing.[4] Since the ABA Ethics 2000 Commission recommended lateral screening in 2001, of the nine states that have revised their ethics rules, none of which previously had lateral screening rules, five have opted for a version of Rule 1.10 that permits some form of lateral screening. (See below for the form of lateral screening provision recommended by the Ethics 2000 Commission.) In two other states that did not previously recognize lateral screening, rules revision commissions have recommended to the state's supreme court that lateral screening be included in the state's version of Rule 1.10.

**The Ethics 2000 Commission Recommendation.** During deliberations of the ABA Ethics 2000 Commission, the Commission majority became convinced that lateral screening was a sensible way to balance the interests of former clients, current clients, law firms, and lawyers who increasingly need or want to migrate between private law firms. (Judges, judicial clerks and other lawyers leaving

[4] States that have recently revised their versions of Model Rule 1.10 to allow lateral screening are Arizona, Delaware, Indiana, Montana, New Jersey and North Carolina. Idaho, Louisiana, South Dakota and Virginia also recently revised their ethics rules, but did not include a lateral screening provision.

government service to work in private law firms have long had the benefit of a screening rule to facilitate their entry into private practice. *See* ABA Model Rules 1.11(b) and 1.12(c), both of which have been part of the Florida Rules for more than a decade.) The commission heard witnesses from larger law firms about how lateral screening worked in states like Illinois, Oregon and Washington that already allowed it, and about the difficulties for clients, lawyers and law firms in states that did not allow it. The Commission heard evidence from disciplinary authorities in lateral screening states that such a procedure had not produced charges of abuses from clients whose former lawyers were screened from related matters when they joined new firms.

As a result, the Ethics 2000 Commission included the following lateral screening provision in the Model Rule 1.10 it recommended to the ABA House of Delegates in June of 2001:

> (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.[5]

[5] In addition, recommended Model Rule 1.0, Terminology, contained a definition of the term "screened," and proposed comments [6] through [9] to Model Rule

**ABA House of Delegates Rejects Lateral Screening.** Although the ABA Ethics 2000 Commission recommended lateral screening, the ABA House of Delegates in August 2001voted 176-130 to remove that provision from Model Rule 1.10.

From the debate in the House of Delegates, that decision appeared to be based on three often repeated – but unsupportable – assertions about lateral screening: (1) that lateral screening harms former clients, (2) that lawyers can't be trusted to comply with lateral screening limitations; and (3) that courts and judges don't like lateral screening.

While these concerns are the tradition on which Rule 1.10 is based, they are illusory, as demonstrated by decades of experience with lateral screening of government lawyers and former judges under Rules 4-1.11 and 4-1.12. An excellent discussion of these concerns appears in Creamer, Robert A., "Three Myths about Lateral Screening," 13 THE PROFESSIONAL LAWYER 20 (Winter 2002), a copy of which is in the Appendix. In addition to debunking these myths, Mr. Creamer's article points out the practical advantages of lateral screening for clients, law firms and lawyers moving between private law firms.

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1.10 provided further explanation of how lateral screening is intended to work. Comment [6] made clear that when a lateral is timely and properly screened, the consent of the former client to the new firm's adverse representation is not required.

Despite the action of the ABA House of Delegates, at least seven states or state commissions have chosen to follow the Ethics 2000 Commission's recommendation in favor of lateral screening rather than adopt the version of Model Rule 1.10 approved by the House of Delegates. For this reason, it may be useful to review the lateral screening approaches adopted by those states and commissions.

**Types of State Lateral Screening Rules.** There are several ways to classify lateral screening rules currently in effect in the states that already have or are considering such rules. Some states permit only some, but not all, laterals to be screened. Most, but not all, require notice to former clients of the screening procedures adopted by the lateral's new firm, as the Ethics 2000 Commission recommended. Still others require that no portion of the fees generated by a matter may be paid to a lateral who is screened from that matter.

Lateral screening states that limit which laterals may be screened do so in several different ways.[6] Some have quite severe limitations on laterals who may be screened. Massachusetts, for example, provides that a lateral may be screened only if she "had neither substantial involvement nor substantial material information relating to the matter." Massachusetts Rule of Professional Conduct 1.10(d)(2). In

[6] Because ALAS regards this type of limitation as the most significant restriction on lateral screening, in the chart in Tab II, Section 7.6 of the ALAS *Loss Prevention Manual* copied above, ALAS designated states with such limitations on who can be screened as states with "limited" screening.

Minnesota, lateral screening is not available unless "any confidential information communicated to the lawyer [about the matter at her former firm] is unlikely to be significant in the subsequent matter." Minnesota Rule of Professional Conduct 1.10(b)(1). Case law is developing in Massachusetts and Minnesota on what constitutes "substantial information" and what information is "unlikely to be significant."

Other states that limit lateral screening to only certain laterals have a narrower limitation. In Arizona, for example, lateral screening is unavailable only if "the personally disqualified lawyer had a substantial role" in the matter at her former firm. Arizona Rule of Professional Conduct 1.10(d) (1). In New Jersey, lateral screening is not available if the matter from which screening is sought "involves a proceeding [presumably meaning litigation] in which the personally disqualified lawyer had primary responsibility." Tennessee imposes a tri-partite test that disallows lateral screening if (1) the lateral "was substantially involved in the representation of a former client," (2) the prior representation was a litigation matter directly adverse to a current client of the hiring firm, and (3) that litigation matter is still pending.

Other requirements such as notice of screening to the former client and prohibition on the screened lawyer sharing in fees generated by a matter have not proved problematic in states that have those requirements. Three states, Illinois,

Maryland and Michigan, permit lateral screening without notice to an affected client of the lateral's former firm, although in Michigan notice of the screening procedures must be given to "the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule." This Michigan notice requirement would presumably be inapplicable when screening is used in a matter not involving pending litigation, since in such a matter there would be no "appropriate tribunal."

**The Future of Lateral Screening.** As noted above, five of nine states that have completed revising their rules of professional conduct in response to recommendations of the ABA Ethics 2000 Commission, and that did not previously have lateral screening rules, have opted for lateral screening. Rules revision commissions in two more such states have recommended lateral screening to their state supreme courts. In at least three other states that previously had lateral screening – Illinois, Maryland and Oregon – rules revision committees have used the revision process to recommend simplification or improvement of their state's lateral screening rules. According to the ABA Center for Professional Responsibility, more than thirty other states have commissions or committees that are studying ethics rules revisions or have already made recommendations to their state supreme courts. Clients, individual lawyers and law firms – particularly large or growing law firms that most often encounter lateral conflicts – will benefit from such a rule.

## CONCLUSION

Lateral screening is a common sense solution to a problem created by a conflict imputation as applied to lawyers newly joining a firm. Imputation simply need not apply in the case of a newly hired lawyer screened from the time she crosses the threshold of her new firm. The current rule does not take into account the changed nature of the law practice, wrongly assumes that private lawyers can't be trusted to comply with their ethical obligations, and unnecessarily penalizes clients, lawyers and law firms. Rule 4-1.10 should be amended in accordance with the Ethics 2000 recommendation, and as consistent with Rules 4-1.11 and 4-1.12 that find screening appropriate for former government lawyers, arbitrators, and judges.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Comment And Suggestion On Proposed Amendment To Florida Rules Of Professional Conduct and the Appendix thereto have been furnished by Federal Express, to

John F. Harkness, Jr.
Executive Director
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661 East Jefferson Street
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this 28th day of December, 2004.

by: _____
Peter J. Winders

## CERTIFICATE OF COMPLIANCE REGARDING TYPE SIZE AND STYLE

I HEREBY FURTHER CERTIFY, this 28th day of December, 2004, that the type size and style used throughout the foregoing Comment And Suggestion On Proposed Amendment To Florida Rules Of Professional Conduct is Times New Roman 14-Point Font.

by: _____
Peter J. Winders