Ethical Screens in the Modern Age Ethics Review

Matthew Lenhardt
ETHICAL SCREENS IN THE MODERN AGE

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I. INTRODUCTION

Today attorneys work in a profession that is rapidly changing, both economically and in terms of professional culture. The United States continues to cope with a devastating recession. In December 2009, the national unemployment rate was at an astounding 9.7 percent. Of the 14.9 million Americans who were unemployed as of February 2010, 1.13 million were previously employed in the legal services industry. Within the professional culture, lateral movement of attorneys has become more prevalent over the last twenty years. As firms merge and dissolve, attorneys increasingly move laterally between firms. This

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trend has become even more common as layoffs force attorneys to change firms.\(^5\) These two developments have caused its members to advocate for change, particularly in the ethical rules that govern attorney conduct.\(^6\)

The area of conflicts of interest, specifically dealing with the use of ethical screening of lateral attorneys, is an area of particular concern.\(^7\) In 2009, the American Bar Association (ABA)\(^8\) amended rule 1.10 of its Model Rules of Professional Conduct to allow ethical screens\(^9\) when attorneys move between private sector firms.\(^10\) California, however, continues to march to the beat of its own drummer by not explicitly allowing for screens in its rules of professional conduct.\(^11\) Rather, the decision of whether to allow screening has been left largely to California courts, which have not yet

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\(^1\) The ABA, founded in 1878, is a voluntary bar association consisting of members of the legal profession that is not specific to any United States jurisdiction. See A.B.A., About the A.B.A., http://www.abanet.org/about/?gnav=global_about_lead (last visited April 3, 2010). The ABA’s most important activities are the setting of academic standards for law schools, and the formulation of model legal codes. Id.

\(^2\) ABA Model Rules of Professional Conduct defines “[s]creened” as “isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.” MODEL RULES OF PROF’L CONDUCT R. 1.0(k) (2002) (amended 2009).

\(^3\) Jeffrey B. Tracy, Model Rule 1.10 Amendments Affect Lateral Moves, A.B.A. LITIG. NEWS, Feb. 26, 2009, http://www.abanet.org/litigation/litigationnews/top_stories/model-rule-1.10.html. With regard to attorneys moving to and/or from government offices, the ABA Model Rules of Professional Conduct were amended in 1983 to allow the use of screens in relation to such movement. See infra Section III.B (discussing the ABA’s decision to allow for screening in the context of government employment); see also Wittman, supra note 5, at 1220–21.

recognized screening in all contexts. As a result, many migrating attorneys in California who need a job or seek to migrate laterally between firms are left without recourse.

This article will examine the current state of the law and how the law addresses the use of ethical screens for lateral attorneys. Section II provides a background of the basic conflicts of interest rules as set forth in both the California Rules of Professional Conduct and the ABA Rules of Professional Conduct. Section III analyzes both the ABA's and California's position on the use of screens in the context of both the public and private sectors. This section also discusses whether or not California should and will evolve to be consistent with the ABA and other jurisdictions that allow screening. Section IV sets forth two recommendations for a California rule on screening. Finally, Section V concludes that California should follow the ABA's lead in allowing for screening in the private practice context, but not at the expense of destroying the attorney client relationship.

II. BACKGROUND

A. General Conflict of Interest Rules

A conflict of interest arises when there is a "substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interest or by the lawyer's duties to another current client, a former client, or a third person." Thus, a conflict may arise when a

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12. Buckner & Sall, supra note 6, at 46.
13. See id.
14. See infra Part II. Although divergent in many respects, the California Rules of Professional Responsibility and the ABA Model Rules of Professional Responsibility are similar in terms of general conflict of interest rules for purposes of this article.
15. See infra Part III.
16. See infra Part III.
17. See infra Part IV.
18. See infra Part V.
19. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 (2000). Although this paper primarily discusses conflicts of interest between two clients, the rules also discuss conflicts between an attorney and his or her client, including prohibiting an attorney from entering into business transactions with clients, such as making or negotiating an agreement giving the attorney literary or media rights to a portrayal based in substantial part on information relating to the representation. MODEL RULES OF PROF'L CONDUCT R. 1.8(a), (d) (2002).
lawyer simultaneously\textsuperscript{20} or successively represents two or more clients with adverse interests.\textsuperscript{21} Two competing policies have shaped the rules that govern conflicts of interest.\textsuperscript{22} The right of a party to employ the counsel of his or her choice is balanced against the legal profession's desire to preserve the public's confidence in the judicial system.\textsuperscript{23}

1. Simultaneous and Successive Conflicts of Interest

A simultaneous or "concurrent" conflict occurs when:

The representation of one client will be directly adverse to another client; or there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.\textsuperscript{24}

This rule preserves the attorney's duty of loyalty to the client.\textsuperscript{25} This is worthy of preservation because attorneys have a duty to maintain undivided loyalty and trust to their clients and also to avoid undermining public confidence in the legal profession.\textsuperscript{26}

Conversely, Model Rule 1.9(a) defines a successive conflict of interest as: "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interest are materially adverse to the interests of the former client."\textsuperscript{27} Here, the Model Rules seek to maintain client confidentiality.\textsuperscript{28} The purpose of preserving client confidentiality is "ensur[ing] the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper

\textsuperscript{20} Model Rules of Prof'l Conduct R. 1.7(a); Cal. Rules of Prof'l Responsibility R. 3–310(c) (1992) (amended 2009).

\textsuperscript{21} Model Rules of Prof'l Conduct R. 1.9; Cal. Rules of Prof'l Responsibility R. 3–310(e).

\textsuperscript{22} See Gillers, supra note 11, at 213.

\textsuperscript{23} See id.

\textsuperscript{24} Model Rules of Prof'l Conduct R. 1.7(a)(1)–(2).

\textsuperscript{25} Flatt v. Superior Court, 885 P.2d 950, 955 (Cal. 1994).

\textsuperscript{26} See People ex rel. Dep't of Corp. v. SpeeDee Oil Change Sys, Inc., 980 P.2d 371, 378 (Cal. 1999).

\textsuperscript{27} Model Rules of Prof'l Conduct R. 1.9(a).

\textsuperscript{28} Flatt, 885 P.2d at 954.
defense."

In California, when ruling on a motion to disqualify counsel for a conflict, the courts apply different tests depending on the nature of the conflict. For simultaneous representation, courts apply a more stringent test. Because a key foundation of the attorney client relationship is loyalty and trust, a client who learns that his or her lawyer is also representing an adversary, even in a wholly unrelated matter, will not likely have the same level of confidence and trust in the legal system let alone his or her counsel. Consequently, although two matters may have nothing in common and there is no risk that confidences from one case will have any relation to the other, disqualification may nevertheless be required.

Conversely, for successive representations, the court will ask whether there is a "substantial relationship" between the subjects of the former and current representation. This

29. SpeeDee Oil Change, 980 P.2d at 378 (quoting Mitchell v. Superior Court, 691 P.2d 642, 646 (Cal. 1984)).
30. "A trial court's authority to disqualify an attorney derives from the power inherent in every court" to control the conduct of its officers in the furtherance of justice. Id. "The paramount concern [is to] preserve the public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process." Id.
32. Flatt, 885 P.2d at 955.
33. Id.
34. "Something seems radically out of place if a lawyer sues one of the lawyer's own present clients [o]n behalf of another client. Even if the representations have nothing to do with each other, so that no confidential information is apparently jeopardized, the client who is sued can obviously claim that the lawyer's sense of loyalty is askew." Id. 955-56 (quoting CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 7.3.2 (West 1986)) (emphasis in original).
35. City & County of San Francisco v. Cobra Solutions, Inc., No. A107148, 2005 WL 3008770, at *2 (Cal. Ct. App. Nov. 10, 2005). "Successive representations are substantially related where . . . [t]he information material to the evaluation, prosecution, settlement or accomplishment of the former representation given its factual and legal issues is also material to the
substantial relationship test balances two interests that are often at odds in such a context: "the freedom of the subsequent client to counsel of choice, . . . and the interest of the former client in ensuring the permanent confidentiality of matters disclosed to the attorney in the course of the prior representation."36 Where a substantial relationship between the subjects of the prior and the current representation is found, courts will presume that the attorney had access to confidential information from the first representation and the attorney in the subsequent matter must be disqualified.37

2. Vicarious Disqualification

"When a conflict of interest requires an attorney's disqualification from a matter, the disqualification normally extends vicariously to the attorney's entire law firm."38 Model Rule 1.10(a) states that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9."39 This "vicarious disqualification rule is based upon a doctrine of imputed knowledge' which posits that the knowledge of one attorney in a law firm is the knowledge of all attorneys in the firm."40 This doctrine recognizes that lawyers who practice law together in a professional organization share each other's confidential information.41 Moreover, the vicarious disqualification rule safeguards clients' legitimate expectation that their attorneys will protect their confidences, thus preserving the public's confidence in the legal profession.42
3. Waiver of Conflicts

Disqualification, however, is not always required when an attorney conflict of interest arises.\textsuperscript{43} Because the values of confidentiality and loyalty are for the client's benefit, an attorney is permitted to continue the conflicted representation if "full disclosure is made and both clients agree in writing to waive the conflict."\textsuperscript{44} Notwithstanding informed consent, however, a lawyer may not represent a client if: (1) the representation is prohibited by law; (2) one client asserts a claim against the other in the same litigation; or (3) in the circumstances, the lawyer does not reasonably believe that he or she will be able to provide adequate representation to one or more of the clients.\textsuperscript{45} Therefore, regardless of waiver, an attorney may never represent two clients who are adversaries in the same litigation.\textsuperscript{46}

III. ANALYSIS: SCREENING

Should a lawyer's conflicts from a previous employer disqualify all the members of his or her new firm? This question has caused considerable debate over the years, especially now that the economy has forced law firms to downsize and merge, resulting in an increase in involuntary lateral movement of attorneys.\textsuperscript{47} In addition, restrictions on

\textsuperscript{43} Sharp v. Next Entm't, 163 Cal. App. 4th 410, 429 (2008) ("[A]utomatic disqualification is not required in all circumstances where representation of one client creates actual or potential conflicts of interests with another client ... ").

\textsuperscript{44} Flatt v. Superior Court, 885 P.2d 950, 956 n.4 (Cal. 1994); see also MODEL RULES OF PROF'L CONDUCT R. 1.7(b); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 (2000); CAL. RULES OF PROF'L CONDUCT R. 3–310(A)(2) (1992). "In order for there to be valid consent, clients must indicate that they 'know of, understand and acknowledge the presence of a conflict of interest.'" Sharp, 78 Cal. App. 4th at 429 (quoting Gilbert v. Nat'l Corp., 71 Cal. App. 4th 1240, 1255 (1999)). As defined in the ABA Model Rule 1.0(e), 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." MODEL RULES OF PROF'L CONDUCT R. 1.0(e).

\textsuperscript{45} See MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(1)-(4).

\textsuperscript{46} See id. R. 1.7(b)(3). See also SpeeDee Oil Change, 980 P.2d at 379 (stating that "[t]he most egregious conflict of interest is representation of clients whose interests are directly diverse in the same litigation. Such patently improper dual representation suggests to the clients—and to the public at large—that the attorney is completely indifferent to the duty of loyalty and the duty to preserve confidences.").

\textsuperscript{47} See Cassandra Melton, Model Rule 1.10: Imputation of Conflicts and Private Law Firm Screening, A.B.A LITIG. NEWS, 2009,
attorney mobility also affect the interests of clients because their choice of lawyer is limited.

The debate harkens back to the balancing of the two fundamental values that shape conflict of interest rules: (1) the need to preserve the public's confidence in the judicial system and client's expectations of loyalty and confidentiality, and (2) allowing clients to employ the counsel of their choice. In the context of screening, however, the freedom of attorneys to choose their career path is also balanced. Given that California and the ABA are somewhat incongruent with respect to their rules of professional conduct, it is not surprising that both have somewhat divergent positions with respect to the use of ethical screens.

A. The ABA's Position

1. History of Screening

The ABA first addressed screening in 1983 by formally adopting Model Rule 1.11. This rule allowed for screening, but only when lateral attorneys moved between the government and private sectors. That same year, the ABA further extended the use of screening to instances where private law firms hired former judges, judicial law clerks, arbitrators, mediators, or other third party neutrals with Model Rule 1.12. In the years following the adoption of 1.11 and 1.12, there was no evidence that screening of government attorneys led to disciplinary actions or breaches of confidentiality.

Additionally, as of 2009, twenty-three states already allowed the use of ethical screens in the private attorney

http://www.abanet.org/litigation/litigationnews/trial_skills/pretrial-model-rule-110.html; see also McGahan & Burkart, supra note 3.

48. See GILLERS, supra note 11, at 213.

49. See Wittman, supra note 5, at 1218 (suggesting that a rule which presumes communication between a lateral attorney and his or her new law firm about previous clients restricts lawyer mobility because the clients preferred counsel is disqualified).

50. GILLERS, supra note 11, at 10–11.
52. See MODEL RULES OF PROF'L CONDUCT R. 1.12 (2002).
53. Id. R. 1.12. In 2002, the ABA amended Rule 1.12 to include the reference to an arbitrator, mediator, or other third-party neutral in Model Rule 1.12(a). Buckner & Sall, supra note 6, at 44.
54. Melton, supra note 47.
Within these states, there is no evidence that screening had been unable to protect client confidentiality or that the lateral attorney had engaged in litigation adverse to his former client despite the use of a screen. These positive experiences, coupled with the intent to seek uniformity in the law throughout the nation, prompted members of the legal profession to wonder whether the ABA should reconsider its position on screening in the private sector. It was not, however, for another sixteen years that the ABA would be willing to extend the use of screening to private sector attorneys.

2. Amendment 1.10

On February 16, 2009, the ABA's House of Delegates voted 226–191 to amend Model Rule 1.10 to permit screening when an attorney moves from one private law firm to another. In approving the amendment, the ABA noted that a driving purpose behind the rule was to achieve "uniformity in the ethical principles adopted nationwide." Also, it noted that such a change was necessary because, as a result of law firms downsizing and the decreasing number of new job opportunities, lateral movement by attorneys was increasingly involuntary. In formulating the amended rule, the ABA sought to balance the former client's interest in confidentiality and loyalty against the attorney's freedom to

56. Id. at 15.
57. See generally Melton, supra note 47.
58. Id.
59. The House of Delegates is the policy-making body of the association. It is vested with the control and administration of the ABA and action taken by the House of Delegates on specific issues becomes official ABA Policy. American Bar Association, http://www.abanet.org/leadership/delegates.html (last visited Jan. 30, 2010).
60. GILLERS, supra note 11, at 331. The ABA Standing Committee on Ethics and Professional Responsibility proposed a substantially similar change at the 2008 Annual Meeting that was postponed for subsequent consideration due, in part, to the late introduction of significant amendment proposals. MUNDHEIM, supra note 55, at 10. After careful consideration of the submitted amendments, the Committee issued a new discussion draft for comment on September 18, 2008. Id.
61. MUNDHEIM, supra note 55, at 15.
62. See id. at 11.
choose his or her career path and the subsequent client's interest in having the counsel of choice. Under the amended Model Rule 1.10, a firm is not required to obtain the former client's consent to enact an ethical screen. The rule does, however, provide for several safeguards to ensure the screen is effective and to provide greater protection to the former client.

Model Rule 1.10 requires that the conflicted attorney or his or her former law firm represented a client, and the attorney's new firm represents another client in the same or a substantially related matter. The purpose is simple—imputation only occurs where a lateral attorney has a conflict. Thus, if the subsequent matter was not the same or substantially related to the prior matter, then the lateral attorney can directly represent the subsequent client, regardless of imputation. Further, assuming substantial relation, the conflicted attorney must be "timely screened from any participation in the [conflicted representation]." Timely screening ensures that confidential information does not reach the members of his or her new law firm. Additionally, the disqualified attorney must not be apportioned any part of the fee from the matter. This ensures that the new attorney will not have a financial incentive to disclose confidential information.

As amended, Model Rule 1.10 provides certain procedural safeguards that must be followed in order to establish an effective screen. The rules require five steps. First, the firm must provide the client with prompt written notice to ensure compliance with Model Rule 1.10 as well as a

63. Id.
64. MODEL RULES PROF'L CONDUCT R. 1.10 (2002).
65. See id.
66. Melton, supra note 47.
67. MODEL RULES OF PROF'L CONDUCT R. 1.10(a) (stating that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9"). Therefore, if an attorney would not be conflicted under 1.7 or 1.9, then no other attorney at the new firm would be either. See id.
68. See id.
69. Id. R. 1.10(a)(2)(i).
70. See Wittman, supra note 5, at 1216.
71. MODEL RULES OF PROF'L CONDUCT R. 1.10(a)(2)(i).
72. Wittman, supra note 5, at 1223.
73. See MODEL RULES OF PROF'L CONDUCT R. 1.10(a)(2)(i).
description of the screening procedures in place. Second, the firm must provide the former client with "a statement of the firm's and the screened lawyer's compliance with [Model Rule 1.10]." Third, the firm must provide the former client with a statement that review of the screen may be available before a tribunal. Fourth, the firm must agree "to respond promptly to any written inquiries or objections by the former client about the screening procedures." Lastly, amended Model Rule 1.10 requires that the firm provide the former client with certifications of compliance with the rule and the procedures at reasonable intervals of time. The purpose of these safeguards is to assure the former client that his or her previous attorney has not breached his or her duty of confidentiality and/or loyalty. Therefore, with amended Model Rule 1.10 the ABA has sought to balance the former client's expectation of loyalty and confidentiality and the public's confidence in the profession, against the attorney's career choice, and the interest of subsequent clients to the counsel of choice.

By amending Model Rule 1.10, the ABA made significant progress towards accomplishing its goal of creating uniformity of national law. The screening rules in the twenty-three states that allow screening are fairly consistent with the amended Model Rule 1.10, with some variance. For example, Ohio's version of Model Rule 1.10 permits screening of a lateral attorney only if the attorney did not have a substantial role in the matter. The ABA Committee rejected such a requirement, concluding that

74. Id. R. 1.10(a)(2)(ii).
75. Id.
76. Id.
77. Id.
78. Id. R. 1.10(a)(2)(iii).
79. Melton, supra note 47.
80. Id.
82. MUNDHEIM, supra note 55, at 14.
disqualification adequately protects a client's interest in cases where the amount of material confidential information possessed by a lateral "lawyer raises legitimate doubts about the efficacy of screening." Additionally, some believe that such a requirement would be too unworkable and vague to help law firms decide whether or not to hire a lateral attorney. In contrast, some states have set less stringent standards than Model Rule 1.10. For example, Illinois Rules of Professional Conduct 1.10(b)(2) allows for the use of screening without requiring the law firm to notify the former client of the screen.

Lastly, the ABA's Standing Committee's report further provides that disqualification motions can still protect former clients in exceptional cases. The report states:

[If] a substantial number of lawyers on one side of a litigation move to the law firm representing the other side, a tribunal might disqualify the other side's law firm, because it would be reasonable to doubt the efficacy of screens established for so many lawyers who possess so much material confidential information.

Therefore, the ABA allows for parties to continue bringing disqualification motions in instances where the facts of a given case suggest that the screen will not properly protect a former client's interest of confidentiality and loyalty.

3. The Great Debate

The amendment to Model Rule 1.10 caused a heated debate. Critics of the amendment argue that it tips the balance too far in favor of attorneys. Further, it may cause clients to question their attorneys, leaving them less forthcoming during their representation. Also, it may cause the general public to question the legal profession as a
As a result, opponents argue that the amendment signals a deterioration of the fabric that holds together the profession. This may be particularly the case where an attorney changes firms during the course of ongoing litigation. In such an instance, the attorney may have literally switched sides and stand adverse to his or her previous client in the same matter.

The Standing Committee on Ethics and Professional Responsibility, however, foresaw such an instance. It stated that "[e]ven if in a rare case the lead lawyer in a litigation moves to the opposing party's law firm, the court may disqualify that firm rather than authorize it to screen the disqualified lateral lawyer." Therefore, the ABA meant for disqualification motions to still be used in situations where it is reasonable for the "former client to fear that a screen may not be effective." Additionally, supporters of the amendment assert that, although screening may weaken the attorney client relationship in some ways, prohibiting the use of ethical screens could also destroy the relationship by depriving parties to the counsel of their choice.

Another issue in this debate involves how ethical screens will affect smaller firms. With smaller firms, the opponents who argue that screening will not be effective have a stronger position. Attorneys in smaller firms are likely to have closer contact with other lawyers in the firm. Therefore, screening is less likely to be effective than in larger firms where contact between attorneys is easier to prevent because they generally have more resources to detect conflicts and erect a more effective screen. This contrast is sharpened by the
fact that larger firms are typically broken into numerous offices and divisions which allow the firm to better ensure that the conflicted lateral attorney did not have contact with the firm members working on the matter. 102

Taking into consideration not only the size of the new firm but also the size of the previous firm can add another dimension to the analysis. For instance, imagine that a lateral attorney did not directly work on any conflicting matters while employed with his or her previous firm yet a colleague at the previous firm did. Under Model Rule 1.10, that other attorney's conflict would be imputed onto the lateral attorney. In such a situation, if the previous law firm was small, then it is more likely that even if the lateral attorney did not personally work on the matter, he heard the other attorneys discussing it or maybe even stumbled upon some related documents in the office hallways. 103 Therefore, where the previous firm is small, with only one office, it is more likely that the lateral attorney has at least some information about the case. Consequently, the former client is somewhat justified in feeling that their information is unsafe, notwithstanding the timely institution of screening mechanisms at the new firm. 104

Now, imagine that the previous firm has multiple offices that span the nation or the world. Also, imagine that the colleague was working on the conflicting matter in the Berlin office, but our lateral attorney always worked in the San Francisco office. 105 Here, it does not seem fair to disqualify his new firm because his former colleague, who worked at a distant location, was the source of his conflict. 106 There is little chance that the lateral attorney ever spoke with any member of his previous firm about the former client’s matter, let alone ever spoke with or met the colleague with the original conflict. Thus, larger firms tend to give a reason for a screening rule whereas smaller sized firms tend to show

102. Id. Certain considerations include whether the size and structure of the firm can sufficiently isolate the conflicted attorney to safely minimize the risk of contact. Id.
104. Id. at 817.
105. See, e.g., Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975).
106. Id. at 753–54.
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that effective screening can never truly accompany the former client's interests.

B. California's Position

California diverges drastically from the ABA and other states with respect to its rules of professional responsibility because it tends to be more protective of client confidentiality. Because confidentiality is a central pillar supporting the rules governing conflicts of interest, it is not surprising that California has not formally adopted screening provisions for either public or private attorney movement. Similarly, California's Rules of Professional Conduct are silent on vicarious disqualification of attorney conflicts within a firm. As such, the development of rules pertaining to the use of screens and imputation has been left to the courts.

1. Government Attorney Migration

California, like most jurisdictions, permits screening for government attorneys who move between the public and private sectors. In Santa Barbara v. Superior Court, the appellate court examined whether screening was permissible for an attorney who moved from a private firm to the city attorney's office in the midst of a concurrent representation. There, the Stensons' family home sustained flood damage. In bringing suit against the City of Santa Barbara, the Stensons retained the firm of Hatch & Parent to represent them. One Hatch & Parent attorney named Sarah Knecht had performed over thirty hours of legal

107. See Gillers, supra note 11, at 38. California's Business and Professional Code states that a California attorney has a duty "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Cal. Bus. & Prof. Code § 6068(e)(1) (2009) (emphasis added).


110. See id. (stating that "the California Rules of Professional Conduct do not specifically address the question of vicarious disqualification, and for that reason the vicarious disqualification rules have essentially been shaped by judicial decisions").


112. Id. at 21.

113. Id.
services for the Stensons. During the course of representation, Ms. Knecht informed Hatch & Parent that she had accepted a job in the city attorney's office, which was simultaneously defending the city against the Stensons' suit.

The city, informed of the conflict, constructed an ethical screen to prevent Knecht's access to any information, documents, or other materials related to the Stensons' litigation. The issue was whether the use of such a screen could prevent the vicarious disqualification of the entire city attorney's office. No California court had ever allowed screening where an attorney had direct, personal knowledge of the former client's confidences and now works for the client's direct adversary during pending litigation. Nevertheless, the court held that the ethical screen was permissible. The court noted that "public sectors attorneys have the same ethical duties of confidentiality and loyalty as their" private sector counterparts. It held, however, that the interests at stake were different and thus the rules governing vicarious disqualification of a public law office should also differ.

In discussing these differences, the court first noted that unlike private sector attorneys, public sector attorneys do not

114. Id. The work that Ms. Knecht had performed for the Stensons represented about forty-percent of the total time billed by Hatch & Parent for the matter. Id.
115. Id.
116. Id. The measures taken by Janet McGinnis, the assistant city attorney responsible for the litigation, included instructing everyone in the office to prevent Knecht from being involved in communications about this case or having access to any records or documents related to the case. Id. Further Knecht did not have access to any of the filing cabinets containing the litigation files. Id.
117. Santa Barbara v. Superior Court, 122 Cal. App. 4th 17, 24 (2004). The court noted that if the case involved a private law firm the answer would be clear that Knecht's disqualification would be mandatory and would extend to her entire law firm. Id. However, it noted a difference in the instant case because Knecht was employed by a public law office and not a private law firm. Id.
118. The Santa Barbara court took note of several cases that have accepted the use of ethical screens for public lawyers who did not personally work on the matter in which the conflict was raised. See People v. Christian, 41 Cal. App. 4th 986 (1996); Chambers v. Superior Court, 121 Cal. App. 3d 893 (1981).
119. Santa Barbara, 122 Cal. App. 4th at 27.
120. Id. at 24.
121. Id.
have a financial interest in the matters that they work on. Accordingly, private sector attorneys have less of an incentive to breach client confidences. Next, the court noted that public sector attorneys do not recruit clients or accept fees, and thus have no incentive to favor one client over another. Further, it stated that vicarious disqualification in the public sector imposes unique burdens on the affected public entities, attorneys, and clients. It noted that, without the use of screening, public law offices would have trouble recruiting competent attorneys. Individual private sector attorneys may be hesitant to accept public sector jobs that may limit their future career opportunities in the private sector due to conflicts.

In addition, the court reasoned that because disqualification issues raise costs, this may affect public sector entities even more than private sector entities. It may force public sector entities to be driven more by financial considerations than by the public interest that they are meant to uphold. Finally, clients whose interests are adverse to a public entity may be deprived of their chosen counsel, or find it difficult to retain counsel at all.

Therefore, even in a situation where an attorney who directly represented the former client becomes that client's adversary in the same matter, the courts are willing to accept screening in the public sector. Because of the aforementioned reasons, courts feel that, although a former client's expectation of loyalty may be shattered along with public confidence in the profession, the balance tips in favor of attorney migration and allowing parties to have access to the counsel of their choice. However, notwithstanding these interests, there are certain contexts where the courts

122. Id.
123. Id.
124. Id.
126. Id.
127. Id.
128. Id. at 24-25.
129. Id.
130. Id. at 24.
132. See id.
have not allowed for screening in the public sector.

In an unpublished decision of City and County of San Francisco v. Cobra Solutions, Inc., the California Court of Appeals for the First District held that screening in the public sector was not appropriate given the specific facts of the case. While in private practice, Dennis Herrera represented the defendants Cobra and Telecon. Subsequently, Herrera began working as the head of San Francisco's Office of the City Attorney. The city began a fraud investigation and eventually filed suit against defendants. The defendants then moved to disqualify the entire city attorney's office because Herrera obtained confidential information relating to the defendant's business. In response, the city argued that although Herrera was disqualified from the subsequent representation, the city attorney's office as a whole should be able to continue to represent the city in the matter because it had properly constructed an ethical screen.

Unlike Knecht from Santa Barbara, Herrena was the head of the city attorney's office. As such, the court held that the use of an ethical screen was not adequate and the entire office was vicariously disqualified. It reasoned that, where the disqualified attorney is the head of a public law office, special concerns are raised that even a properly instituted screen cannot sufficiently address. As the head of the city attorney's office, Herrera had the authority to set agency policy and to influence the decisions made by those in the office that handled the matter. Specifically, the court acknowledged that:

134. Id. at *5.
135. Id. at *1.
136. Id.
137. Id.
138. Id.
140. Id. at *1.
141. Id. at *5.
142. Id. at *4 (citing Younger v. Superior Court, 77 Cal. App. 3d 892, 897 (1978) (holding that vicarious disqualification of an entire district attorney's office was required).
143. Id. at *5.
At the intersection of law and politics, where this head of office case lies, the preservation of the public trust in the scrupulous administration of justice and the integrity of the bar must be the paramount concern. The stakes are too high for the citizens who deserve the politician's unwavering loyalty, and for the former clients who trust him to maintain their confidences.\footnote{144. \textit{Id.} The court went on to note that "[r]easons exist to support a narrower disqualification rule in public sector cases, but those reasons are insufficient when the City Attorney himself is the disqualified attorney. An ethical screen alone cannot suffice here. The City Attorney cannot screen out all his responsibilities for setting office policy and reviewing the performance of his attorney staff." \textit{Id.}}

The \textit{Cobra} court ruled that public confidence in the judicial system outweighed the attorney's ability to move laterally into new employment when the lateral attorney was in a position of power within the public entity, and thus subject to greater public scrutiny.\footnote{145. \textit{San Francisco v. Cobra Solutions, Inc.}, No. A107148, 2005 WL 3008770, at *5 (Cal. Ct. App. Nov. 10, 2005).} In a subsequent opinion, however, the California Supreme Court held that, notwithstanding \textit{Cobra}, "an ethical screen might suffice to shield a senior supervisory attorney with a personal conflict and thus avoid vicarious disqualification of the entire government legal unit under that attorney's supervision."\footnote{146. \textit{In re Charlisse C.}, 194 P.3d 330, 342 (Cal. 2008). The court laid out three factors a trial court should analyze when determining a motion to disqualify a public supervisory official in a government office, including (1) his or her actual duties with respect to those attorneys who will be screened, (2) his or her responsibility for setting office policies that may affect subordinate attorney's decisions in handling the conflicted representation, and (3) whether public awareness of the case is likely to cause doubt to be cast upon the integrity of the governmental law office. \textit{Id.}} Thus, the California Supreme Court has signaled its willingness to permit screening in public sector cases where the lateral attorney assumes a position of authority in the public entity.\footnote{147. \textit{See id.}}

2. \textit{Private Attorney Migration}

In California, the use of ethical screens in the private sector has not yet been judicially accepted.\footnote{148. \textit{All Am. Semiconductor, Inc. v. Hynix Semiconductor Inc.}, No. C 07-1200, 2008 WL 5484552, at *9 (N.D. Cal. Dec. 18, 2008).} The cases that have considered the issue have held, without exception, that no matter how impenetrable such a screen may appear, law
firms cannot avoid disqualification by instituting an ethical screen. At least in some instances the courts have considered the criticism of these decisions, but have not been willing to fully accept the use of screening.

Two California district court opinions from December 2008 acknowledge a slow and steady shift in California towards accepting screening in the private sector. In All American Semiconductor, Inc. v. Hynix Semiconductor, Inc., the court considered the defendant's motion to disqualify attorney John Vandevelde and his firm Crowell & Moring LLP from representing the plaintiffs. Vandevelde represented defendant Infineon Technologies' Vice President of Sales, Gunter Hefner, in an investigation by the Department of Justice and in a related civil matter. Vandevelde's representation in the civil matter was limited to preparing Hefner for a deposition. While still representing Hefner, Vandevelde's firm merged with Crowell, which was representing the plaintiffs. The defendant's requested Crowell to withdraw as counsel because Vandevelde joined Crowell after representing Hefner in prior litigation substantially related to the current litigation. In response, Crowell decided to erect an ethical screen to protect against the inadvertent disclosure of confidential information by Vandevelde to other members of the firm.

After finding that Vandevelde was disqualified because a substantial relationship existed between his representation of Hefner and Crowell's representation of plaintiffs, the court

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149. Id.
151. All Am. Semiconductor, 2008 WL 5484552, at *1; Plumley, 2008 WL 5382269, at *1.
152. All Am. Semiconductor, 2008 WL 5484552, at *1.
153. Id.
154. Id.
155. Id. at *2.
156. Id. at *3.
157. Id. Crowell issued an Ethics Wall Notice which directed Vandevelde and other members of Vandevelde's previous firm, Lightfoot Vandevelde, to not discuss or share with anyone at Crowell any confidential information they may have received from their representation of Hefner. Id.
158. All Am. Semiconductor, Inc. v. Hynix Semiconductor Inc., No. C 07-1200, 2008 WL 5484552, at *7 (N.D. Cal. Dec. 18, 2008) (stating that "it is undisputed that Vandevelde received confidential information from Infineon in the course of his representation of Hefner that is material to plaintiffs' claims in
considered whether Crowell had instituted a screen that was sufficient to prevent disqualification of the entire firm.\textsuperscript{159} The court began by noting that the rule in California is that when an attorney is disqualified from representing a client the attorney’s entire firm must also be disqualified as well, regardless of efforts to erect an ethical screen.\textsuperscript{160} Nonetheless, the court acknowledged that the law in California was likely headed towards allowing screening in the private attorney context.\textsuperscript{161} In doing so, it reasoned that given the realities of today’s legal climate with increased attorney mobility and frequent mergers of law firms, mandatory vicarious disqualification may be both unfair and unnecessary in some cases.\textsuperscript{162} In the absence of any controlling authority to the contrary, the court ruled that Crowell was disqualified in its entirety.\textsuperscript{163}

In \textit{Plumley v. Doug Mockett & Company},\textsuperscript{164} the second 2008 district court case, the Central District of California considered a motion to disqualify, but there, it had to determine whether the defense’s expert Gerald Mossinghoff and defendants’ lead counsel Miles & Stockbridge should be disqualified.\textsuperscript{165} In deciding whether the firm should be disqualified, the court cited an opinion from the Ninth Circuit that stated “the California Supreme Court was ‘sending a clear signal’ . . . that it would accept ethical screening of conflicted lawyers rather than demand strict disqualification of the entire law firm.”\textsuperscript{166} Nonetheless, the court went on to rule that the screening procedures used were not effective, and thus disqualification of the entire firm was in order.\textsuperscript{167} In

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{159}]
Id. at *8.
\item[\textsuperscript{160}]
Id. (citing Hitachi, Ltd. v. Tatung Co., 419 F. Supp. 2d 1158, 1164 (N.D. Cal. 2006) (holding that established law in California rejects the use of ethical screens)).
\item[\textsuperscript{161}]
Id. at *9.
\item[\textsuperscript{162}]
Id.
\item[\textsuperscript{163}]
Id. at *12.
\item[\textsuperscript{164}]
\item[\textsuperscript{165}]
Id. The court held, over defendant’s objections, that the imputation rule could apply to an expert witness for disqualification purposes. Id. at *3.
\item[\textsuperscript{166}]
Id. at *2 (citing \textit{In re County of Los Angeles}, 223 F.3d 990, 995 (9th Cir. 2000)).
\item[\textsuperscript{167}]
Id. at *3.
\end{enumerate}
\end{footnotesize}
doing so, however, the court never explicitly rejected the use of ethical screens.168 Rather, it narrowly held that in the present case, even assuming that screening was permitted, the defendant's did not undertake effective screening mechanisms.169

C. Will California Evolve?

California's state bar has a Rules Revision Commission that is charged with evaluating the current California Rules of Professional Conduct.170 One of its primary objectives is to eliminate and avoid unnecessary differences between the California rules and the ABA Model Rules.171 In order to accomplish this objective, it seems likely that the Rules Revision Commission will propose a rule that would allow for some type of screening for private attorneys. This seems to be a good idea because lateral employment changes are more prevalent in the legal profession and attorneys are not restricted to strict state boundaries in their practice.
fact, today, an attorney can practice nationally and even internationally.\textsuperscript{173} Therefore, it makes sense for California to adopt a similar screening provision to that of Model Rule 1.10 in order to eliminate uncertainty for out-of-state attorneys who practice in California.

Given the current state of both the profession and the economy, it seems that it is only a matter of time until ethical screens in the private sector are permitted in California. One of the reasons that the ABA was ready to implement screening in 2009 was because of the present economic situation.\textsuperscript{174} Lawyers are no longer moving between firms for their own economic incentive; they have been forced to leave and seek new employment.\textsuperscript{175} This is particularly significant in California, where the state unemployment rate as of March 2010 was 12.6 percent, significantly higher than the national average.\textsuperscript{176} Therefore, California should allow for the use of ethical screens, either by judicial determination or amendment to the California Rules of Professional Conduct.

IV. PROPOSAL

In the event that California is prepared to adopt a screening rule for private attorneys, then what should that rule require? One solution would be for California to adopt all of the provision of Model Rule 1.10. This conforms with the Rules Revision Committee's objective of making the California Rules consistent with the national standard as possible.\textsuperscript{177} But, given how protective California is of the attorney client relationship, it also seems likely that California would want further protections in its rule to protect a client's confidences.

One way to provide additional protection would be to require informed written consent from the former client. If the former client refused to consent, then the screen would not be permitted. This would allow clients to feel that they

\textsuperscript{173} Id.
\textsuperscript{174} Melton, supra note 47.
\textsuperscript{175} Id.
\textsuperscript{177} See Commission for the Revision, supra note 169.
had a say in whether or not their attorney could represent an adverse party. Consequently, such a requirement would permit the former client to maintain the level of confidence and trust in his or her attorneys, thus preserving the bedrock values of the professional relationship. Clients would not necessarily, however, have a duty to consent in reasonable cases, so this proposal may result in unduly hindering attorney mobility and the ability of subsequent client’s to have the counsel of their choice. Nonetheless, screening would still be permitted in cases where consent was given. Accordingly, more screening would be permitted with such a rule than if no screening rule were in place, so it would preserve the former client’s trust and confidence in his or her attorney while still allowing attorney migration where consent was given.

Another way to give additional protections would be if California prohibited screening where a migrating attorney directly worked on a matter and then moved to the firm that represented the former client’s direct adversary in the same matter. In such an instance, California would only allow for screening where the attorney did not personally work on the previous matter. This solution would better preserve the public’s confidences in the integrity of the system because clients would be less likely to feel as if their attorney betrayed them by switching sides to the proverbial “enemy.”

Because these types of conflicts are viewed as egregious, the balance tips in favor of preserving public confidence in the system and away from attorney interest. Prohibiting this type of representation may be important to preserve the public’s confidence. Upon seeing an attorney change sides to their client’s direct adversary, people would likely believe that the reason the attorney obtained a position with the adversary’s firm was a direct result of his or her representation of the former client.

The ABA’s Standing Committee’s report acknowledges

178. The court in SpeeDee Oil referred to such conflicts as “patently improper” and that it “suggests to clients—and to the public at large—that the attorney is completely indifferent to [his or her] duty of loyalty and the duty to preserve confidences.” People v. SpeeDee Oil Change Sys., Inc., 980 P.2d 371, 379 (Cal. 1999).
179. Such concerns may raise liability questions in the related field of agency law.
that screening may not be effective in cases where an attorney in litigation moves to the opposing party's law firm.\footnote{180} It notes that in these situations, a court can disqualify a firm when it is reasonable in the particular circumstances for the former client to fear that a screen may not be effective.\footnote{181} A rule that strictly prohibits an attorney from switching sides during an action would, however, provide a more bright line rule than allowing courts to rule on such cases.

Another possible screening rule would permit screening only where the confidential client information communicated to the lawyer to be screened was unlikely to be significant in the subsequent matter.\footnote{182} This would allow greater attorney migration than the aforementioned rule, which would never permit screening in cases where the attorney switches sides. Unfortunately, such a rule may be unworkable for two reasons. First, it would likely lead to greater uncertainty for law firms and attorneys when determining what any given court may consider "unlikely to be significant in the subsequent matter" because any such determination would be subject to a judge's discretion.\footnote{183} Second, it would require courts to inquire into the nature of the confidential information. As a result, such an inquiry into the confidential information would defeat the purpose because it would lead to the exposure of the client's confidential information.\footnote{184}

\section*{V. CONCLUSION}

On February 16, 2009, the ABA House of Delegates voted 226–191 to permit lateral lawyer screening.\footnote{185} In doing so, the ABA sought to provide the nation with a standard approach to screening. Regardless of the ABA's momentous decision to amend Model Rule 1.10, California continues to march to the beat of its own drummer by not explicitly recognizing the use of ethical screens in the private sector.\footnote{186}

\footnote{180} See Mundheim, supra note 55, at 11.
\footnote{181} Id.
\footnote{183} Restatement (Third) of the Law Governing Lawyers § 124(2)(a).
\footnote{184} Wittman, supra note 5, at 1221.
\footnote{185} Gillers, supra note 11, at 10–11.
\footnote{186} Id. at 213.
It seems it is only a matter of time until California recognizes the use of ethical screens in the private attorney context.\textsuperscript{187} Two federal cases from 2008 acknowledged such a shift in California law towards ethical screens, while noting that the shift was not yet complete.\textsuperscript{188} Also, the economic crisis has had a devastating effect on California attorneys who are left with fewer choices as a result of a narrow rule that does not permit screening in the private sector.\textsuperscript{189}

When California adopts the use of ethical screens, it is likely that they will at least adopt the provisions of Model Rule 1.10 given the State Bar's goal of unifying California law with the ethical laws across the nation.\textsuperscript{190} But California is also likely to adopt some of the more stringent requirements that various other states place on law firms in imposing ethical screens due to its pro-client rules.\textsuperscript{191} First, California could require both clients written informed consent to the ethical screen.\textsuperscript{192} Second, California could prohibit screening either in situations where a migrating attorney directly worked on the matter for the former client or where the confidential client information communicated to the attorney was likely to be significant in the subsequent matter.

Although it is time for California to allow for the use of screening in the private sector, it is important to not unduly infringe upon a clients expectation of loyalty and confidences. In other words, it is up to the courts or the California State Bar to enact a rule that balances the attorney's interest in choosing his or her career, the client's interest in choosing his or her counsel, the former client's interests, and the public's confidence in the legal profession.

\textsuperscript{187} See supra Part III.C.
\textsuperscript{189} See supra Part I.
\textsuperscript{190} See supra note 170.
\textsuperscript{191} See supra note 107.
\textsuperscript{192} See supra Part IV.