Some Practical Thoughts on Private Lateral Screening

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I. INTRODUCTION

The ABA Model Rules of Professional Conduct contain a number of provisions under which, notwithstanding a client’s (or former client’s, or erstwhile prospective client’s) objection, an ethical screen can be erected in order to resolve an otherwise disqualifying problem. These situations include private lawyers moving from one law firm to another (Model Rule (“MR”) 1.10), government lawyers moving to private practice (MR 1.11), adjudicative personnel and neutrals moving to private practice (MR 1.12), and lawyers having received confidential information from prospective clients (MR 1.18). Nonlawyer assistants can be screened as well. See MR 1.10 cmt. [4].

This article addresses one particular genre of screening recognized under the rules: private lateral screening under MR 1.10. To ease the discussion, consider our base case as involving a lawyer (“Lawyer”) who wants to move from current firm (“Firm C”) to target firm (“Firm T”). The problem is that Firm C and Firm T oppose one another in a piece of litigation (the “Matter”) — Firm C on behalf of “Client C,” and Firm T on behalf of “Client T” — and Lawyer did some work for Client C while at Firm C.

The ABA’s adoption in 2009 of private lateral screening, allowing Lawyer to move to Firm T without disqualifying the Firm from continuing to represent Client T in the Matter, even without Client C’s consent, caused some hand-wringing from dissenters, the tenor of which was,

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1 This article was prepared for the program Ethics for Lawyers on the Move, to be presented on September 18, 2015, at the ABA Business Law Section Annual Meeting in Chicago, Illinois. Thanks to Doug Richmond and Pat Sallen for their comments on an earlier draft, and to Peter Montecuollo for his research help.

2 By “disqualifying,” I mean that term in its ethical sense, rather than in the sense of a court disqualifying a lawyer or firm from representing a client in a court proceeding. Of course, an ethics violation can influence a bid to disqualify a lawyer or law firm from an engagement, but it doesn’t necessarily do so. See MR Preamble ¶ [20] (“[V]iolation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation.”).
“You can’t trust a screen, and even if you can, the affected client won’t believe it.”

We experienced similar sentiments recently in Arizona, which in 2003 adopted as its own private lateral screening rule a relic of the ABA’s Ethics 2000 Model Rules revision effort (more on this below) but which, at this writing, is considering changing that rule to make private lateral screening more widely available, and its availability more predictable. Empirical evidence supporting these negative sentiments appears in short supply. And understandably, non-empirical commentaries on screening tend to generalize across its several different contexts, rather than focusing specifically on private lateral screening as I do here.

So, after a look at the ABA’s history with private lateral screening, I here offer a practical perspective on that particular kind of screening. I believe the practicalities bear out the ABA’s decision to adopt private lateral screening. I base this view upon my in-depth involvement in Arizona’s recent rule revision efforts, as well as years of experience serving as the chair of my

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4 Subject to certain fee apportionment and notice requirements, current Arizona Ethics Rule (“ER”) 1.10(d) permits private lateral screening unless the disqualifying matter “involve[s] a proceeding before a tribunal in which the personally disqualified lawyer had a substantial role.” ER 1.10(d)(1). Both a rule change proposal advanced by the State Bar of Arizona in the fall of 2013, see Rule Change Petition R-13-0046, Petition to Amend ERs 1.10, 1.11, 1.12, and 1.18, and ER 1.0 Comment [8], Rule 42, Ariz. R. Sup. Ct. filed Oct. 25, 2013, available at http://www.azcourts.gov/Rules-Forum/aft/427, and one advanced by the Arizona Supreme Court Committee on the Review of Supreme Court Rules Governing Professional Conduct and Practice of Law in early 2015, see Rule Change Petition R-15-0018, Petition to Amend Rules 31, 34, 38, 39, and 42, Rules of the Supreme Court filed Jan. 9, 2015, available at http://www.azcourts.gov/Rules-Forum/aft/501, would drop this “litigation exception,” which is the only one of its kind in the United States.

5 Susan Shapiro presented the results of a very thoughtful effort to marshal empirical evidence regarding conflicts of interest in her article Bushwhacking the Ethical High Road: Conflict of Interest in the Practice of Law and Real Life, 28 LAW & SOC. INQUIRY 87 (2003). But the effort “was not designed to provide systematic experimental data on the efficacy or impact of ethical screens.” Id. at 160 n.93. Similarly, Shapiro disclaimed that the study presented in her article, If It Ain’t Broke . . . An Empirical Perspective on Ethics 2000, Screening, and the Conflict-of-Interest Rules, 2003 U. ILL. L. REV. 1299, was “not designed to test the competing claims and hypotheses bandied about in the debate over screening.” Id. at 1316. While crediting the results of the study presented in Lee Pizzimenti’s Screen Verité: Do Rules About Ethical Screens Reflect the Truth About Real-Life Law Firm Practice?, 52 U. MIAMI L. REV. 305 (1997), as “instructive,” Shapiro also described the study’s methodology as “tainted.” See Shapiro, 2003 U. ILL. L. REV. at 1315-16.

6 In addition to Shapiro’s articles, supra, see Michael Downey, Elements of an Effective Ethics Screen, ABA/BNA LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT, Vol. 27, No. 19, Sept. 14, 2011.

7 I participated substantially in the formulation of Arizona’s Rule Change Petition R-13-0046, and filed a comment supporting it.
AmLaw 200 law firm’s Ethics Committee. I conclude with some brief comments on private lateral screening practices.8

II. HISTORICAL BACKGROUND – THE ABA’S EVOLUTION ON PRIVATE LATERAL SCREENING

A. Before Ethics 2000, the ABA Model Rules Contained No Provision for Private Lateral Screening.

The work of the ABA Commission on Evaluation of the Rules of Professional Conduct (the “Ethics 2000 Commission” or “Commission”) supplies a good place to begin recounting the ABA’s evolution to its current, pro-private lateral screening, ethics rule. Before Ethics 2000, the provisions of then-ABA Model Rules 1.9(a) and 1.10(a) operated, in the event of a lateral lawyer move, to deprive both the target firm’s client and the current firm’s client of their choice of counsel. Then-Model Rule 1.9(a) provided that absent the requisite client consent,

[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 interests are materially adverse to the interests of the former client.9

And then-Model Rule 1.10(a) provided,

(a) While 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 Rule[] . . . 1.9.10

Thus, under the pre-Ethics 2000 ABA Model Rule scheme, the Rule 1.9(a) bar precluding Lawyer from working adversely to Client C (putatively, former Client C, in the event of a lateral move to Firm T) in the Matter would, by imputation under MR 1.10(a), operate to preclude Firm T (absent Client C’s consent) from continuing to represent Client T in the Matter.

Caveat: I base these comments upon the MR 1.10 private lateral screening situation alone. In that situation, as discussed in further detail below, there are not current conflicted matters being handled by the same law firm absent the consent of all involved clients. Thus, this piece may not fairly be invoked as supporting use of screening to avoid imputation of law firm conflicts generally, as some have advocated. See, e.g., Robert A. Creamer, Expanding Screening Further, THE PROF. LAW., Vol. 20, No. 3, at 3 (2010).


Firm T would have to choose between hiring Lawyer or continuing to represent Client T. Keep the client, lose the lawyer. Hire the lawyer, lose the client.


Given this conundrum, the Commission proposed in August 2001 that the ABA adopt a new Model Rule 1.10(c) to supply a special imputation rule for private lateral moves:

(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. 11

The Model Rules already included nearly identical screening provisions for laterally moving government lawyers (MR 1.11) and former judges, adjudicative officers, and staff (MR 1.12). 12

Regarding private laterals, the Commission observed,

A number of jurisdictions now provide that former-client conflicts of lawyers who have moved laterally are not imputed to the new law firm if the personally disqualified lawyer has been timely screened from participation in the matter and the former client is notified of the screen. The Commission is recommending that current Rule 1.10 be amended to permit nonconsensual screening of lawyers who have joined a law firm.

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 the 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

11 Id.
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
lawyers’ conduct under these Rules.13

The Commission also observed that there had been few significant complaints regarding
screening in the seven jurisdictions whose rules then permitted it.14

A proposed amendment to the Commission’s proposal, to qualify the availability of
screening based on the level of the lawyer’s involvement in the matter at the old firm, was
withdrawn before debate.15 The proposed amendment would have added a subsection (1) to
proposed new Rule 1.10(c), as follows:

(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 matter does not involve a proceeding before a
tribunal in which the personally disqualified lawyer had a
substantial role . . . .16

At this writing, Arizona’s qualified private lateral screening rule reflects, word-for-word, the
full private lateral screening rule proposed by the Ethics 2000 Commission in 2001, as qualified
by this proposed, then withdrawn, litigation exception.

After debate at the August 2001 ABA Annual Meeting, the ABA House of Delegates
rejected the Commission’s proposal.17

13 See ETHICS 2000 COMMISSION REPORT, Rule 1.10 Reporter’s Explanation of Changes, available at
http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule110rem.ht
ml.
14 See ETHICS 2000 COMMISSION REPORT at 6, available at http://www.americanbar.org/content/
dam/aba/administrative/professional_responsibility/report_hod_082001.authcheckdam.pdf.
15 See id.
16 See A LEGISLATIVE HISTORY, supra note 12, at 255-56.
http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_summary_200
2.html.
C. The ABA Adopts Full Private Lateral Screening.

Seven years later, at the 2008 ABA Annual Meeting, the ABA Standing Committee on Ethics and Professional Responsibility ("ABA Standing Committee") proposed adoption of a rule substantially similar to that proposed by the Ethics 2000 Commission in 2001.18 That proposal culminated in the ABA’s adoption, on February 16, 2009, of the following full — as opposed to qualified — private lateral screening rule:

(a) While 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, unless

\[\ldots\]

(2) the prohibition is based upon Rule 1.9(a), (or (b)), and

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

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm’s and of the screened lawyer’s compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client’s written request and upon termination of the screening procedures.

The Standing Committee offered the following facts, among others, in recommending adoption of the proposed rule:

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Twelve states had by then adopted full private lateral screening rules consistent with the Committee’s proposal.\textsuperscript{19}

The Committee had made inquiry of states permitting screening and received feedback suggesting screening effectively protects client confidentiality.\textsuperscript{20}

Similarly, the Model Rules’ quarter century of permitting screening in public-private lateral moves for 25 years had yielded not “even a handful of instances in which confidentiality ha[d] been breached.”\textsuperscript{21}

As noted, the ABA not only adopted private lateral screening, but full private lateral screening, unencumbered by a “substantial involvement” or similar qualifier based upon the moving lawyer’s involvement in the disqualifying matter at the old firm. The Committee “received persuasive comments expressing concern that such a ‘substantial involvement’ limitation constitutes a vague standard to adopt in a situation where clear guidelines are necessary for disciplinary purposes.”\textsuperscript{22} The Committee observed,

Clarity is required when a lawyer and a firm decide whether to consider associating with each other, at which time no tribunal is available to decide the “substantial involvement” question. Law firms are often appropriately very conservative in evaluating such standards, making a disciplinary rule with a vague test of limited value in removing bars to lawyer mobility.\textsuperscript{23}

The Committee continued:

\textsuperscript{19} \textit{Id.} at 9. The states were, according to the Standing Committee, Delaware, Illinois, Kentucky, Maryland, Michigan, Montana, North Carolina, Oregon, Pennsylvania, Rhode Island, Utah, and Washington.

\textsuperscript{20} \textit{Id.} at 11.

\textsuperscript{21} \textit{Id.}

\textsuperscript{22} \textit{Id.} at 14.

\textsuperscript{23} \textit{Id.} at 14-15. Of course, as demonstrated below, a reviewing court may in fact be available to decide the substantial involvement question, but generally, only where there is pending litigation. See Ronald Barusch, \textit{Dealpolitik: Mylan-Kirkland Decision Should Give Big Law Firms Shivers}, \textit{WALL ST. J.}, June 12, 2015, available at \url{http://blogs.wsj.com/moneybeat/2015/06/12/dealpolitik-mylan-kirkland-decision-should-give-big-law-firms-shivers/}.
the proposed tests for “substantial involvement” all involved balancing a series of facts and circumstances. Such balancing tests do not provide clear guidance for prospective behavior, although courts may use them in making disqualification judgments.

The Committee believes that adoption of a substantial involvement test implies that lawyers in private practice cannot be trusted to adhere to the Model Rules and to report honestly that they have conducted themselves in accordance with both the Rules and with established screening procedures. It suggests that screening should be sanctioned only where it is not likely to be needed (the transferring lawyer has no material confidential information or had only a slight involvement in the matter). This limitation to screening is not the rule in the situations governed by Rules 1.11(b) or 1.12, or with respect to nonlawyers moving from one firm to another.24

Comments to the State Bar of Arizona’s pending rule change proposal similarly noted the stifling impact the murky (and therefore unpredictable) language of current ER 1.10(d)(1) has on lateral lawyer movement.25 The impact, it was argued, is especially pronounced for litigators newly admitted to practice. Generally speaking, a senior litigator with portable business is likelier to self-select away from firms that will cost the litigator business such as, in our base case, the representation of Client C in the Matter. Not so, typically, the junior litigator who — together with the prospective employer — is relatively likely to be ambivalent about whom the litigator has worked for in the past. But the more ambiguous the screening rule, the less assurance Lawyer can give the prospective new firm — absent premature revelation of job change plans for purposes of seeking Client C’s consent to Firm T’s continued participation in the Matter — that joining the new firm will not lead to its disqualification from the pending matter. Any private lateral screening rule that qualifies the ability to screen with cryptic language based on the level of the moving lawyer’s involvement in or knowledge of the disqualifying matter causes similar problems.

24 Id. at 15.
D. Where We Are Today

With one modest amendment, the full private lateral screening rule adopted by the ABA in February 2009 remains in place today.26

And, the national trend approving private lateral screening is unmistakable. When the Ethics 2000 Commission first proposed private lateral screening, only seven states permitted it.27 By 2008, when private lateral screening was again introduced at the ABA, the number had increased to 12.28 As of May 2014, by my count, the number was 29. And by June 2015, Wyoming since having joining the parade, there were 30.29

III. PRIVATE LATERAL SCREENING IN THE REAL WORLD

Practical considerations bear out the wisdom of the ABA’s decision to adopt private lateral screening six years ago, as well as the wisdom of the now clear majority of American jurisdictions that permit private lateral screening.30 Given the dearth of empirical evidence that

26 Today, the prefatory language of Rule 1.10(a)(2) provides, “the prohibition is based upon Rule 1.9(a) or (b), and arises out of the disqualified lawyer’s association with a prior firm.”
27 See ETHICS 2000 COMMISSION REPORT, supra note 9, at 6.
29 See Order Amending the Rules of Professional Conduct for Attorneys at Law, Aug. 5, 2014, at 36, In the Matter of the Amendments to Wyoming Rules of Professional Conduct for Attorneys at Law (Wyoming Supreme Court), available at https://www.courts.state.wy.us/Documents/CourtRules/Orders%5Cproconatt%5Cproconatt_2014080500.pdf. As of June 2015, the full private lateral screening jurisdictions were poised to nose ahead of the qualified private lateral screening jurisdictions in number, with Arizona considering switching from the latter to the former category. For full private lateral screening rules as of June 2015, see Conn. R. Prof’l Conduct 1.10(a)(2); Del. R. Prof’l Conduct 1.10(c); Idaho R. Prof’l Conduct 1.10(a)(2); Ill. R. Prof’l Conduct 1.10(e); Ky. R. Prof’l Conduct 1.10(d); Md. R. Prof’l Conduct 1.10; Mich. R. Prof’l Conduct 1.10(b); Mont. R. Prof’l Conduct 1.10(c); N.C. R. Prof’l Conduct 1.10(c); Or. R. Prof’l Conduct 1.10(c); Pa. R. Prof’l Conduct 1.10(b); R.I. R. Prof’l Conduct 1.10(c); Utah R. Prof’l Conduct 1.10(c); Wash. R. Prof’l Conduct 1.10(c); Wyo. R. Prof’l Conduct 1.10(a)(2). For qualified private lateral screening rules as of June 2015, see Ariz. R. Prof’l Conduct 1.10(d); Colo. R. Prof’l Conduct 1.10(e)(1); Haw. R. Prof’l Conduct 1.10(c)(1); Ind. R. Prof’l Conduct 1.10(c)(1); Mass. R. Prof’l Conduct 1.10(d)(2); Minn. R. Prof’l Conduct 1.10(b)(1); Nev. R. Prof’l Conduct 1.10(e)(1); N.D. R. Prof’l Conduct 1.10(b)(1)-2(2); N.H. R. Prof’l Conduct 1.10(c)(3); N.J. R. Prof’l Conduct 1.10(c)(1); N.M. R. Prof’l Conduct 1.10(c)(1); Ohio R. Prof’l Conduct 1.10(c); Tenn. R. Prof’l Conduct 1.10(d)(1); Vt. R. Prof’l Conduct 1.10(a)(2); Wis. R. Prof’l Conduct 1.10(a)(2)(i).
30 I focus here on screening itself, not other provisions — relating to fee apportionment, notice to the formerly represented client, certification of compliance — that often accompany screening rules. As the foregoing history illustrates, these provisions appearing in MR 1.10 may best be understood as internal political accommodations made to finally secure ABA passage of private lateral screening in 2009. But some of them make little sense as a practical matter. For example, MR 1.10(a)(2)(ii)’s requirement that the written notice contain “a statement that review may be available before a tribunal” is not only misleading where the screen is applied in a non-litigation matter, but also uncomfortably mixes disqualification and ethical standards. See supra note 2. For another example, MR 1.10(a)(2)(iii)’s requirement that “certifications of compliance with the[,] Rules and with the screening procedures [be] provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client’s written request and upon termination of the screening procedures,”
lawyers violate ethical screens, I focus on the practical realities, set in context, to stress test the likelihood that these violations nevertheless occur in the private lateral screening context.

A. The Basic Hypothetical

Again, our base case involves Lawyer, who wants to move from Firm C to Firm T. Firm C and Firm T oppose one another in the Matter — Firm C on behalf of Client C, and Firm T on behalf of Client T — and Lawyer did some work for Client C while at Firm C.

Lawyer obviously may not ethically take Client C’s representation in the Matter itself to Firm T.31

And if Lawyer wants to take other work of Client C’s to Firm T, then given the pendency of the Matter, Lawyer may do so only with both Client C’s and Client T’s consent,32 necessarily encompassing resolution of any concerns on Client C’s part over potential information flow to Client T or its lawyers at Firm T.

Thus, the only situation our hypothetical need address is the one in which Lawyer leaves Client C behind as a client — conferring “former client” status on Client C — and joins Firm T.33

When Lawyer arrives at Firm T, Lawyer can never work on the Matter against (now former) Client C, absent Client C’s consent.33 This reality underscores why the “side switching” bogeyman offered by opponents of private lateral screening,34 first in the Ethics 2000 debate, and then before the ABA’s adoption of private lateral screening in 2009, was just that. Absent client consent, a lawyer never gets to “switch sides” from one party to an opposing party in the same matter. It is disingenuous to suggest otherwise.

So to be even more precise, the key hypothetical is the one in which Lawyer leaves Client C behind as a client and joins Firm T, but does not work on the Matter at Firm T. What

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31 See MR 1.7(b)(3).
32 See MR 1.7(b)(4).
33 See MR 1.9(a).
reasoned, practical basis does Client C have to be concerned that, if Lawyer is screened from the Matter at Firm T, Client C’s confidential information about the Matter nevertheless will be compromised?

**B. Intentional Information Sharing Is Not a Material Reason to Distrust Private Lateral Screening.**

Focusing first on the prospect that Lawyer will improperly share Client C’s confidences, the primary answer is that Lawyer has a continuing duty of confidentiality to Client C — a duty that arguably renders unnecessary any screening at all. Under MR 1.9(c),

A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

1. use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

2. reveal information relating to the representation except as these Rules would permit or require with respect to a client.

This rule transcends our hypothetical: Lawyer would owe a broad duty of confidentiality to (now former) Client C to not reveal information relating to Lawyer’s former representation of Client C in any event.\(^\text{35}\) This duty is a core legal duty, instilled by law school education and reinforced by CLE. It is widely understood. To assume that Lawyer would intentionally violate that duty, simply to ingratiate himself to his new colleagues at Firm T or to otherwise benefit\(^\text{36}\) by arming them with Client C’s confidences, is to assume such a level of venality as to call into question the entire confidentiality framework of, if not all, the ethics rules. The same is true of

\(^{35}\) See MR 1.9 cmt. [7] (“Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented.”).

\(^{36}\) It is theoretically possible that, with or without Client T’s input, Firm T might hire Lawyer simply to learn Client C’s secrets. But were either Lawyer or Firm T that corrupt, they would have little reason to include an attention-dawing job change in the scheme.
the premise that the lawyers at Firm T will “blandish” Lawyer to reveal Client C’s confidences. After all, lawyers are called — and expected — to maintain their clients’ (and former clients’, and even prospective clients’) confidences in a wide variety of situations. Lawyers have even allowed the innocent to remain wrongly incarcerated in order to satisfy their ethical duty of client confidentiality. And lawyers know well that purposefully getting another lawyer to do something unethical is, itself, unethical.

In this regard, it is noteworthy that Comment [4] to MR 1.10 excludes from the general imputation rule’s ambit nonlawyers, such as paralegals or legal secretaries, as well as persons whose involvement would only cause the firm’s disqualification “because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however,” the comment continues, “ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) [the screening definition] and 5.3 [identifying supervisory responsibilities regarding nonlawyer assistants].” In brief, screening precludes imputation from paralegals, secretaries, and law students — even under the circumstances of our basic hypothetical. The comment thus reflects a policy judgment that other considerations trump any notional concern that the confidences of a former client such as Client C will be violated. These nonlawyer assistants, after all, may well have even less of a core understanding of the importance — and duration — of the obligation of confidentiality. Yet Comment [4] deems screening sufficient to protect such confidentiality interests.

What about the prospect, not that Lawyer might share information about the Matter with the lawyers at Firm T, but that Lawyer might attempt to learn information about Client T’s case?

37 See Enarson, supra note 34, at 15 (quoting David G. Keyko & Ronald C. Minkoff, A Debate on the New Screening Rule, 202 PLI/NY 491, at 501 (Winter 2010-2011)).
39 See MR 8.4(a); see also MR 5.1 (governing responsibilities of partners, managers, and supervisory lawyers).
Here too, practical realities intrude. In our base hypothetical, Lawyer has left behind not only the Matter, but the entirety of Lawyer’s attorney-client relationship with Client C, in moving to Firm T. There is no current attorney-client relationship between Lawyer and Client C. This is not to say that Lawyer and Client C do not remain cordial. They may. But for practical purposes, the only situation that matters is the one in which Client C is unhappy enough with Lawyer’s move to Firm T to assert that Firm T is ethically disqualified from continuing to represent Client T in the Matter. If Lawyer and Client C are more cordial than that, then there is no basis to question screening’s effectiveness — Client C will have consented to Firm T’s continued representation of Client T notwithstanding Lawyer’s move, including whatever information security arrangements regarding the Matter that Client C deemed necessary for Firm T to secure that consent. The point is that, given that Lawyer is moving to Firm T without Client C, Lawyer has no attorney-client relationship that would be benefited by attempting to learn about the Matter from Client T’s team at Firm T.

So much for the notion that “you can’t trust a screen” because the lateral will intentionally violate it. Absent extraordinary circumstances, the lateral has no incentive to share information about the former client or matter: both have been left behind at the old firm. For the same reason, the lateral has no incentive to mine her new firm or colleagues for information about the matter.

C. **Unintentional Information Sharing Is Not a Material Reason to Distrust Private Lateral Screening.**

What about unintentional information flow? Here too, practical realities challenge the premise that, as a policy matter, “you can’t trust a screen.”

Again, Lawyer has left Client C behind upon joining Firm T. Thus, it is quite unlikely that Lawyer will be taking electronic or other files regarding Matter along with Lawyer to Firm T. Indeed, as a precautionary measure, Firm T might well, as a condition of bringing Lawyer into the firm, require Lawyer to certify that Lawyer is not bringing any Matter-related
materials to the new firm, including “forms” consisting of pleadings, motions, or the like which Lawyer would like to use as guides in developing future work product.\footnote{The question of whether those materials are fair game for the lawyer to take along to the new firm is beyond this piece’s scope, but finds its answer in both ethical principles (see, e.g., MR 1.9(c), MR 1.15, MR 1.16) and substantive law including that of fiduciary duty and contract governing the relationship between the lawyer and the former firm. Many firms today have policies which proscribe lawyers from taking along such materials absent the firm’s and the client’s consent. Self-evidently, it would reflect poor judgment for Lawyer, in our hypothetical, to take along “forms” from the Matter to Firm T where others at the firm could access them.}

In any event, if Lawyer brings such materials along, it should be a simple matter to segregate those files in a manner that reasonably prevents access by the lawyers at Firm T who are working on the Matter for Client T. One possibility is to avoid entirely placing such in the firm’s central information repositories. In the alternative, one might consider limiting access to any Matter- or Client C-specific materials by anyone except Lawyer, whether by simple electronically stored information protocols (such as denial of document access absent approval of the IT department or firm counsel), simple hard copy document protocols (such as marking files or boxes with the notice, “Confidential – not to be accessed by anyone but Lawyer absent approval of _______”\footnote{The blank could be filled in with firm or conflicts counsel, the firm’s ethics committee, or others charged with screening administration.}), or both. Conventional screening memoranda to Lawyer, to Client T’s lawyers at Firm T, or both, could also be used, which would warn (a) of the existence of the confidential information and documents and that Client T’s lawyers are not to access them, (b) that Lawyer is not to discuss or share information regarding the Matter with the Firm T lawyers, and (c) that the Firm T lawyers are not to access or otherwise obtain information regarding Matter from Lawyer.

IV. PRIVATE LATERAL SCREENING BEST PRACTICES

The Model Rules laudably leave the precise contours of the screening mechanisms to the lawyers and law firms. Under MR 1.0(k), “‘Screened’ denotes the isolation of a lawyer from any participation in a matter through 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 the[] rules or other law.” The rule leaves the details to others,
allowing the lawyers and law firms to optimize procedures and mechanisms that make sense in the circumstances, including but not limited to those that optimize efficiency through use of information technology.

Model Rule 1.0 comment [9], while lacking the force of a rule, make a series of observations that inform best practices in the private lateral screening context among others. As the foregoing discussion has shown, one size does not fit all.

Some of Comment [9]’s observations apply to the screened lawyer: “The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter.” The comment also notes that it may be appropriate for the lawyer to give a written undertaking as to these communications, as well as to avoid contact with “firm files or information . . . relating to the matter.”

I would argue that in the private lateral screening context, such an acknowledgement is, as a practical matter, unnecessary. Both Lawyer and (to the extent they know of Lawyer at all) Lawyer’s new colleagues at Firm T know full well that Lawyer is ethically precluded from revealing Client C’s confidences regarding the Matter. But, Firm T’s conflict check process presumably having revealed the existence of the Matter, it would be best practice for Lawyer to acknowledge, in connection with joining Firm T, that Lawyer may not communicate with other lawyers at Firm T about it. For purposes of “the record” in the event of a later challenge to Firm T’s ability to continue in the Matter, it would be optimal for this acknowledgment to be in writing — perhaps in response to Firm T’s offer letter to Lawyer. And optimally, it might also convey Lawyer’s responsibility to make reasonable efforts to ensure that any support staff accompanying the Lawyer to Firm T similarly understand their confidentiality obligations. But neither the acknowledgment nor the writing is necessary to comply with the rule, or to ensure that the screen works. Similarly, as observed above, Lawyer has no practical incentive to have

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42 MR Preamble ¶ [21] (“The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.”).
43 See MR 5.3(b).
contact with “firm files or other information . . . relating to the matter.” But there may be little reason not to instruct Lawyer to avoid such contact and, perhaps, to obtain Lawyer’s written acknowledgment of same.

Other provisions of Comment [9] apply to others in the lawyer’s new firm: “[O]ther lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter.” The comment continues that it may be appropriate for this information to be conveyed in writing. These admonitions make sense, particularly in smaller firms where there may be more of a tendency than in large multi-office firms for all lawyers to know about all matters. In large firms, as in small, the lateral conflict check process will have revealed Lawyer’s past work for Client C on the Matter, and the lawyers who represent Client T will be well aware of their confidentiality obligations vis-à-vis Lawyer, Client C, and the Matter. But in large firms, the remaining lawyers in Firm T — the vast majority — will be ambivalent. Thus, even in the unlikely event Lawyer happens to store information regarding the Matter where other Firm T lawyers might find it, the lawyers most likely to stumble into it in search of a “form” are those least likely to use it in the Matter or against Client C. The reality is that most large firm lawyers typically have better things to do than groping through firm files in search of “forms.”

Relatedly, another provision of Comment [9] focuses on information security, positing that it may be appropriate for the screened lawyer to be denied access to firm files or other information, including electronic information, relating to the disqualifying matter. To the extent this admonition extends beyond mere instructions to the lawyers, I question its rigor in the private lateral screening context. Again, Lawyer has left both Client C and the Matter behind. To impose, for example, restrictions on the lawyer’s ability to access electronic documents in Firm T’s central database would, though perhaps easy enough to implement, serve only to solve a problem that doesn’t exist, as well as unduly suggest that Lawyer can’t be trusted to abide by any acknowledgment or written instructions, or Lawyer’s underlying ER 1.9(c) duty of confidentiality.
Finally, Comment [9] suggests that “periodic reminders of the screen to the screened lawyer and all other firm personnel may be appropriate.” As good as this sounds in theory, the notion that neither Lawyer nor Firm T can be trusted to remember screening instructions the first time is a little farfetched, particularly in the private lateral screening context. One would expect the number of matters from which Lawyer needs to be screened to be limited in number, duration, or both; the burden of compliance is best placed on Lawyer, and that burden can be satisfied in any number of ways simpler than foisting upon the Firm to repeatedly remind Lawyer of that which Lawyer already knows.

V. CONCLUSION.

The ABA’s courageous adoption of private lateral screening in 2009 reflects the triumph of reason over rhetoric. While outliers exist, there was no reason to assume the worst about the willingness and ability of lawyers generally to honor their confidentiality obligations to clients and former clients. To the contrary, the practicalities demonstrate the wisdom of the ABA’s decision then — and today, that of a clear majority of American jurisdictions — to permit private lateral screening. While full private lateral screening more ably facilitates the association of lawyers and law firms who want to work together than does qualified private lateral screening, both are superior policy alternatives to no private lateral screening at all. Perhaps the foregoing discussion of practicalities and practices will illuminate this truth to those who, as yet, remain unconvinced.