SUPREME COURT OF ARIZONA

In the Matter of	)	Arizona Supreme Court
	)	No. R-13-0046
RULE 42, ERs 1.10, 1.11, 1.12	)	
and 1.18 and ER 1.0 COMMENT [8],	)	**FILED 8/27/2015**
RULES OF SUPREME COURT	)	
	)	
	)	
	)	
	)	
_____	)	

ORDER
AMENDING ERs 1.10, 1.11, 1.12, 1.18,
COMMENTS TO ER 1.10, AND COMMENT [8] TO ER 1.0,
RULE 42, RULES OF THE ARIZONA SUPREME COURT

A petition having been filed proposing to amend ERs 1.10, 1.11, 1.12, 1.18, comments to ER 1.10, and Comment [8] to ER 1.0, Rule 42, Rules of the Arizona Supreme Court, and comments having been received, upon consideration,

IT IS ORDERED that ERs 1.10, 1.11, 1.12, 1.18, comments to ER 1.10, and Comment [8] to ER 1.0, Rule 42, Rules of the Arizona Supreme Court, be amended in accordance with the attachment to this order, effective January 1, 2016.

DATED this 27th day of August, 2015.

_____
SCOTT BALES
Chief Justice

TO:
Rule 28 Distribution List
John A. Furlong
Patricia A. Sallen
Joseph Kanefield
William G. Klain
Mark I. Harrison
Keith A. Swisher
Andrew F. Halaby
Joy L. Isaacs
Amanda F. Jenkins
Richard Murphy

ATTACHMENT[1]

<u>RULE 42 OF THE RULES OF THE ARIZONA SUPREME COURT</u>

* * *

ER 1.0. Terminology

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Comment [2003]

* * *

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under ERs <u>1.10,</u> 1.11, 1.12 or 1.18.

ER 1.10 Imputation of Conflicts of Interest: General Rule

* * *

(d) 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 ER 1.9 unless:

(1) ~~the matter does not involve a proceeding before a tribunal in which the personally disqualified lawyer had a substantial role~~) <u>the personally disqualified lawyer did not have primary responsibility for the matter that causes the disqualification under Rule 1.9</u>;

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

(3) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule~~.~~<u>, including a description of the particular screening procedures adopted; when they were adopted; a statement by the personally disqualified lawyer and the new firm that the former client's material confidential information has not been disclosed or used in violation of the Rules; and an agreement by the new firm to respond promptly to any written inquiries or objections by the former client about the screening procedure; and</u>

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[1] Changes or additions in rule text are indicated by <u>underscoring</u> and deletions from text are indicated by ~~strikeouts~~.

(4) the personally disqualified lawyer and the new firm reasonably believe that the steps taken to accomplish the screening of material confidential information will be effective in preventing such information from being disclosed to the new firm and its client.

*   *   *

Comment [2003 amendment]

*   *   *

Comment [2016 amendment]

[9] Rule 1.10(d) removes the imputation otherwise required by ER 1.10(a), but unlike section (c), it does so in some cases without requiring that there be informed consent by the former client. In those cases and in cases where client consent is obtained, the rule requires that the procedures and requirements laid out in sections (d)(3) and (4) be followed. Factors to be considered in determining the adequacy of screening procedures include whether technology is available and has been implemented to restrict lawyer access to electronically stored information maintained by the firm. Other relevant circumstances may include the size of the matter in relation to the overall business of the firm, the number of lawyers in the firm that are actively involved in the matter that is the subject of the screening measures, or other factors that may make it difficult to implement a screen that is reasonably adequate to ensure that protected information is not disclosed, even inadvertently. Additional guidance is provided in ER 1.0, comments [8]–[10]. There may be some circumstances when, taking all factors into account, screening procedures will not be reasonably adequate to guard against inadvertent disclosure of protected information. Lawyers should also be aware that even when screening procedures have been adopted that comply with this Rule, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.

[10] Paragraph (d)(2) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but the lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[11] The requirements of ERs 5.1 and 5.3 should be considered in implementing screening procedures under this Rule. If the screened lawyer or the new firm become aware that the screening procedures have been violated or are ineffective, reasonable steps should be taken to remedy the deficiencies and prevent prejudice to the impacted client.

ER 1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially

as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

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

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule., including a description of the particular screening procedures adopted; when they were adopted; a statement by the personally disqualified lawyer and the new firm that the agency's material confidential information has not been disclosed or used in violation of the Rules; and an agreement by the new firm to respond promptly to any written inquiries or objections by the agency about the screening procedure; and

(3) the personally disqualified lawyer and the new firm reasonably believe that the steps taken to accomplish the screening of material confidential information will be effective in preventing such information from being disclosed to the new firm and its client.

ER 1.12. Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

*   *   *

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

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

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule., including a description of the particular screening procedures adopted; when they were adopted; a statement by the personally disqualified lawyer and the new firm that the parties' and tribunal's material confidential information has not been disclosed or used in violation of the Rules; and an agreement by the new firm to respond promptly to any written inquiries or objections by the parties or the tribunal about the screening procedure; and

(3) the personally disqualified lawyer and the new firm reasonably believe that the steps taken to accomplish the screening of material confidential information will be effective in preventing such information from being disclosed to the new firm and its client.

ER 1.18. Duties to Prospective Client

<p style="text-align:center">*   *   *</p>

(d) Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing, or:

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

(2) written notice is promptly given to the prospective client., including a description of the particular screening procedures adopted; when they were adopted; a statement by the personally disqualified lawyer and the new firm that the prospective client's material confidential information has not been disclosed or used in violation of the Rules; and an agreement by the new firm to respond promptly to any written inquiries or objections by the prospective client about the screening procedure; and

(3) the personally disqualified lawyer and the partners of the new firm reasonably believe that the steps taken to accomplish the screening of material confidential information will be effective in preventing such information from being disclosed to the new firm and its client.