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# Migrating Lawyers and the Ethics of Conflict Checking

Paul R. Tremblay

*Boston College Law School*, [paul.tremblay@bc.edu](mailto:paul.tremblay@bc.edu)

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# MIGRATING LAWYERS AND THE ETHICS OF CONFLICT CHECKING

*Paul R. Tremblay\**

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## MIGRATING LAWYERS AND THE ETHICS OF CONFLICT CHECKING

*Paul R. Tremblay*

### Abstract

*Lawyers often leave one practice setting and move to new employment as their career paths advance or change. The incidence of lawyer migration has increased dramatically in the past decade, as law firms recruit more lateral hires and offer fewer partnership opportunities to their associates. As a lawyer prepares to change employment settings, her prospective new law firm will undoubtedly ask her about the clients she has represented in the past. The new law firm must insist on this information, for without it the firm could not screen for possible conflicts of interest. Were the firm to hire a lawyer without such conflict screening, the new lawyer's "taint" could disqualify the firm from important and lucrative work, and cause great harm to its clients.*

*At the same time, the migrating lawyer owes her clients a strong confidentiality commitment under the Model Rules of Professional Conduct and the law of lawyering. When the prospective new firm asks for information about her clients, the lawyer faces a delicate quandary. Her career interests and her respect for the new firm's conflict policies demand that she provide the requested information; her confidentiality duties seem to require her not to reveal her clients' information without their permission. Seeking such permission is often impossible or impractical.*

*This Article investigates this difficult and widespread ethical issue. It identifies five distinct types of facts which a new law firm is likely to want from a prospective hire, including several levels of information about the prior firm's work as well as details regarding the lawyer's client billings. The Article looks carefully at the Model Rules, the Restatement (Third) of the Law Governing Lawyers, and other authority for insights about which of those disclosures are lawful and which are not. It concludes that the existing doctrinal and regulatory authority in fact supports surprisingly little information sharing, but argues that such authority ought to permit carefully defined disclosures which will not present hardships or embarrassment to the migrating lawyer's clients. The Article develops distinctions within information-sharing which can protect the moving lawyer's client confidences while allowing law firms to protect their clients' interests, and offers protocols for performing conflict checks when a lawyer cannot reveal her client's*

*identities without causing the clients some harm. Finally, the Article proposes several discrete changes to the Model Rules which, if adopted, would provide far better guidance and protection to lawyers and law firms engaged in the lateral hiring process.*

Ideally, a lawyer who changes law firms will take to the new firm complete information on the clients presently and previously represented by the former firm. Particularly when the former firm is large, it may be impossible for the lawyer's new firm to assess the potential for conflicts without this information.<sup>1</sup>

"See, I can't ask an associate, 'What clients have you worked on?' That would be a breach of ethics for them to disclose it to me. I don't know how to do that. That's a good question."<sup>2</sup>

## INTRODUCTION

Most lawyers change jobs at some time during their careers. Lateral hiring, of both associates and partners, has burgeoned in recent years as the business and economics of law firm practice have rapidly changed.<sup>3</sup> On any given day, some lawyers, whether voluntarily or otherwise, will prepare to leave their existing employment and apply for work at another firm.<sup>4</sup> Very often, the migrating lawyers hope to bring with them some

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<sup>1</sup> ROBERT W. HILLMAN, HILLMAN ON LAWYER MOBILITY: THE LAW AND ETHICS OF PARTNER WITHDRAWALS AND LAW FIRM BREAKUPS 2:132, §2.7.5 (2d ed. 2005 Supp.). The author continues: "Practical considerations, however, limit the usefulness of this suggestion." *Id.* A goal of this Article is to assess the most significant of those practical (and ethical) considerations.

<sup>2</sup> SUSAN SHAPIRO, TANGLED LOYALTIES: CONFLICT OF INTEREST IN THE LEGAL PROFESSION 330 (2002)(quoting the comments of a Chicago law firm hiring partner about how he might screen for conflicts).

<sup>3</sup> Lawyers have always moved around and changed firms, of course, but in the past two decades lawyer mobility among law firms has increased dramatically. The economics of firm management and survival has changed significantly since the 1980s. Law firms now realize economic benefit in hiring experienced laterals, associates are accepted into partnership less frequently, and law firm mergers are commonplace. For a description of these phenomena and discussion of their implications for the profession, see MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM (1991); HILLMAN, *supra* note , at 1:3, § 1.1 ("law firms ... are in turmoil"); MILTON C. REGAN, JR., EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER 31-42; SHAPIRO, *supra* note , at 198-219; Lee A. Pizzimenti, *Screen Verité: Do Rules About Ethical Screens Reflect the Truth About Real Life Law Firm Practice?*, 52 U. MIAMI L. REV. 305 (1997)("As law firms have grown markedly through mergers and lateral hiring, the probability of disqualifying conflicts of interest has exponentially increased.").

<sup>4</sup> This Article will focus on stories of lawyers leaving a private law firm and joining a new firm, but the principles developed here apply with similar, and perhaps equal, force to a law school graduate joining a firm for the first time after having worked during law school as a law clerk or having participated in a law school clinical program. See Boston Bar Association, Op. 2004-1 (2004), available at [http://www.bostonbar.org/sc/ethics/op04\\_1.pdf](http://www.bostonbar.org/sc/ethics/op04_1.pdf) [hereinafter "Boston Bar Op. 2004-1"] (inquiry triggered by a law student). Its analysis also applies to the more complicated stories of two law firms merging practices. See, e.g., SHAPIRO, *supra* note , at 212 ("If lateral hiring creates an ethical quagmire, mergers and acquisitions are accomplished on an ethical minefield."). On the other hand, this Article does not address

of their existing clients, and clients frequently wish to follow the lawyers.<sup>5</sup> The firms to which these lawyers apply for work may wish to hire them and would welcome the new clients, but those firms also wish not to lose the business on which they may be working at the time, or expect to acquire in the future. So, being responsible fiduciaries and honorable lawyers, the new firms screen for actual or potential conflicts of interest. They ask the proposed incoming lawyers about the work they did at their old firms, and about their former and existing clients. There would be hell to pay, in some quarter somewhere, if a law firm hired a new lawyer without checking on such potential conflicts, only to learn afterwards that the presence of the new lawyer had disqualified the firm from important and lucrative work.<sup>6</sup>

When a career-changing lawyer offers to a prospective new firm her list of clients and some depiction of the work she has done for those clients, she reveals facts which qualify presumptively as confidential client information. In order for her to engage in the screening process that will precede her career change, the migrating lawyer must identify some exception to the usual mandate that lawyers keep all of their clients' information secret. It is striking, though, how little guidance and authority exists to assist a lawyer or a law firm through this process.<sup>7</sup> The American Bar Association's Model Rules of

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the mobility of lawyers in and out of government employment, which of course is a very common phenomenon known colloquially as the "revolving door." See, e.g., Brooke Parker, *Dangers of the "Revolving Door": Disqualification of Attorneys Because of Prior Government Public Service*, 22 J. LEGAL PROF. 317 (1998). While much of what is covered here would apply to that kind of lawyer migration, the fact that the conflict of interest rules and the screening rules are different for former and present government lawyers cautions against including them in this discussion. See, e.g., Grant Dawson, *Working Guidelines for Successive Conflicts of Interest Involving Government and Private Employment*, 11 GEO. J. LEGAL ETHICS 329, 333 (1998); Geoffrey C. Hazard, Jr., *Conflicts of Interest in Representation of Public Agencies*, 9 WIDENER J. PUB. L. 211, 217 (1999).

<sup>5</sup> See HILLMAN, *supra* note , at 1:14, §1.5; Linda Sorenson, *Agreements Restricting the Practice of Law: A New Look at an Old Paradox*, 26 J. LEGAL PROF. 1, 14-15 (2001-02).

<sup>6</sup> For one striking example of such hell having been paid, see *S.K. Handtool Corp. v. Dresser Indus.*, 619 N.E.2d 1282 (Ill. App. 1993). In that case, the Chicago law firm of Winston and Strawn was disqualified from a significant litigation matter after a tainted lateral associate joined the firm. The firm had invested more than 10,000 hours, spent 85 days in depositions, and exchanged 70,000 documents in the litigation when it was ejected from the case, forfeiting most, if not all, of its fees. See SHAPIRO, *supra* note , at 272 n.2; Cornelia Honchar Tuite, *Lawyers Called to the Witness Stand May Witness Their Own Dismissal*, CHICAGO DAILY LAW BULLETIN 5 (February 7, 2002).

See also *Stratagene v. Parsons Behle & Latimer*, 315 F. Supp.2d 765 (D.Md 2004)(malpractice claims filed against law firm by unhappy former client after disqualification ordered); *Healthnet, Inc. v. Health Net, Inc.*, 289 F. Supp. 2d 755 (S.D. W.Va. 2003)(disqualification after failed screen of new employee); *Henriksen v. Great American Sav. & Loan*, 14 Cal. Rptr. 2d 184 (Cal. Ct. App. 1992)(firm disqualified after hiring associate who former represented opposing party); *Dill v. Superior Court*, 205 Cal. Rptr. 671 (Cal. Ct. App. 1984)(disqualification where defendant law firm's associate once represented the plaintiff).

<sup>7</sup> The research for this Article has uncovered no scholarship addressing directly the ethical implications of the conflict check. While much has been written about imputed conflicts of interest generally, see, e.g., Amon Burton, *Migratory Lawyers and Imputed Conflicts of Interest*, 16 REV. LIT. 665 (1997); Charles W. Wolfram, *Restatement of the Law Governing Lawyers: Former Client Conflicts*, 10 GEO. J. LEGAL ETHICS

Professional Conduct<sup>8</sup> include nothing explicit, and very little implicit, about how this sharing of client information ought to be done. The Restatement (Third) of the Law Governing Lawyers,<sup>9</sup> an elaborate treatise covering the many intricacies of the law of lawyering and developed after years of painstaking deliberation,<sup>10</sup> does not address the question at all. Apart from locating a few bar association ethics opinions addressing the scope of permissible conflict checking,<sup>11</sup> thoughtful lawyers and law firm administrators engaged in the lateral hiring business encounter great ambiguity about the ethical propriety and the limits, if any, of sharing information about the migrating lawyer's previous work life.

This Article aims to address those ethical ambiguities and to begin to suggest some explicit guidance to migratory lawyers and law firms engaged in lateral hiring. It proceeds on the overt premise that *some* foundational authority for conflict checking disclosures must exist, because without it lawyers could not ethically change firms. The legal profession values lawyer mobility quite highly, and rightfully so.<sup>12</sup> Lawyers must

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677 (1997), and much about lawyers seeking to bring clients with them when they move to a new firm, *see, e.g.*, HILLMAN, *supra* note , at *passim*; Kevin T. Caiaccio, Comment, *Howard v. Babcock, The Business of Law Versus the Ethics of Lawyers: Are Noncompetition Covenants Among Law Partners Against Public Policy?*, 28 GA. L. REV. 807, 831 (1994); Theresa A. Gabaldon, *Miles from Home and Not Where We Thought We'd Be: A Map Through the Forest and a Light Through the Trees*, 9 GEO. J. LEGAL ETHICS 195, 195 (1995); Mark W. Bennett, Note, *You Can Take It with You: The Ethics of Lawyer Departure and Solicitation of Firm Clients*, 10 GEO. J. LEGAL ETHICS 395, 395-96 (1997), virtually nothing has been written about the ethical implications of sharing client information while proceeding to find new employment. But occasionally scholars have noted the worry. *See, e.g.*, Charles W. Wolfram, *Ethics 2000 and Conflicts of Interest: The More Things Change ...*, 70 TENN. L. REV. 27, 59 (2002)("Even the exotic lawyer leaving a firm with such a detailed description of all matters on which the lawyer had worked would have to consider carefully the confidentiality implications of releasing such a list into the conflict-checking computers at a prospective firm. In short, there are significant and inherent limitations on the ability of laterally-moving lawyers and their new firms to conduct a thorough and complete conflict check before the lawyer joins the new firm."); Marcy G. Glenn, *Conflict Issues When Attorneys Switch Jobs*, 27 COL. LAWYER 49, n.20 (May 1998)("There is a tension between (1) the hiring firm's need to know the identities of the moving attorney's former clients, in order to comply with the conflict rules, and (2) the moving attorney's obligation under [Colorado's Rule] 1.6(a) not to reveal information relating to representation of clients, which in some engagements will include the mere identity of those clients."). *See also* the quotes which introduced this Article, at notes 1 and 2 *supra*.

<sup>8</sup> MODEL RULES OF PROF'L CONDUCT (2003) [hereinafter MODEL RULES].

<sup>9</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000) [hereinafter RESTATEMENT].

<sup>10</sup> *See* Lawrence J. Latta, *The Restatement of the Law Governing Lawyers: A View From the Trenches*, 26 HOFSTRA L. REV. 697 (1998)(review of the deliberation and debate); Judith A. McMorrow, *The (F)Utility Of Rules: Regulating Attorney Conduct in Federal Court Practice*, 58 SMU L. REV. 3, 37 (2005)(Restatement took 15 years to complete).

<sup>11</sup> *See* text accompanying notes *infra*.

<sup>12</sup> *See* Dorothy M. Gibbons-White, *Migratory Lawyers in Private Practice: Should California Approve the Use of Ethical Walls?*, 33 LOY. L.A. L. REV. 161, 165 (1999)("The legal profession is in a state of perpetual motion, and thus lawyer mobility must also be considered, not as a policy issue, but simply as an important reality of today's legal profession."); Robert W. Hillman, *The Property Wars of Law Firms: Of Client Lists*,

be able to change jobs both for the sake of their careers and for the sake of clients' rights to retain the lawyers of their choice. In order for lawyers to move laterally, new employers must learn from them enough information to avoid harming the firm's existing client base and its future business prospects. The first goal of this Article, then, is to articulate the most coherent ethical foundation on which lawyers may justify sharing client information to permit that conflict checking process to take place.

At the same time, this Article will consider the contours, and limits, of permissible revelation of client information for the sake of lateral career changes. It seems sensible for a lawyer to tell a prospective employer that she once represented several corporate clients in some perfunctory SEC-related matters, for instance, but what if her previous practice involved exclusively white collar criminal defense? Or lawyer discipline matters? Revealing the names of the clients from those practices may cause considerable harm to those clients' interests. Because not all client information is innocuous, lawyers need some useable guidance on what they faithfully may reveal, and ought not reveal, and what happens to their lateral move if they may not reveal information necessary to screen for conflicts. A lawyer may also wish to reveal, in addition to the identity of her clients and the nature of her work for them, the amount of money that she brought to her law firm from those clients. Law firms are exquisitely interested in that kind of advance discovery. Is this a lawful practice? Should it be? The Article addresses that question as well.

This Article concludes that the existing doctrine on all of these questions is frustratingly opaque, if indeed any real authority exists at all. Much clearer authority and better guidance is needed, and this Article attempts to craft suggestions to that end. The Article proposes changes to the Model Rules to provide answers to the practicing bar. The proposals developed below would establish explicit permission for lawyers to reveal some limited, if otherwise confidential, information in order to effect conflicts checks; describe the kinds of information which ought not be revealed, even if disclosure is necessary to screen for conflicts; and suggest commentary about how to avoid conflicts when information sharing is restricted.

The Article proceeds as follows. Part I establishes the underlying framework for the forthcoming analysis. It begins with a somewhat typical scenario involving a law

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*Trade Secrets and the Fiduciary Duties of Law Partners*, 30 FLA. ST. U. L. REV. 767, 769 (2003); Milton C. Regan, *Law Firms, Competition Penalties, and the Values of Professionalism*, 13 GEO. J. LEGAL ETHICS 1, 3 (1999). To note the profession's valuing of lawyer mobility is not to overlook the serious difficulties presented by the recent changes in law firm practices. Many of the forces which are encouraging greater lawyer mobility—including the fierce competition for corporate clients, the attenuation of partnership stability, the destabilization of mid-size firms, and the diminished investment in associate training—are indeed troublesome. See HILLMAN, *supra* note , at §1.5, 1:14-1:23; Douglas N. Frenkel, Robert L. Nelson & Austin Sarat, *Bringing Legal Realism to the Study of Ethics and Professionalism*, 67 FORDHAM L. REV. 697 (1998); Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Foundation of the Novice Attorney*, 82 MINN. L. REV. 705 (1998). These worries are substantial, but the fact remains that lawyers must have the opportunity to change firms, and clients deserve the opportunity to maintain their lawyers at a new location if they wish.

firm associate who chooses voluntarily to leave her corporate litigation practice and transfer laterally to a larger corporate firm across town. That Part then reviews the doctrine and ethical considerations establishing the target law firm's fiduciary and legal duties to its existing clients to avoid conflicts of interest which the new lateral hire might trigger. It concludes that the target law firm must check for conflicts by asking the lateral for some minimal but essential information. It identifies five distinct categories of information which the law firm either must or might wish to learn about the lateral's previous work. Those five categories are the identity of those clients whom the lateral has represented in the past; the nature of the work she did for those clients; the identity of clients of the lateral's prior firm whom she did not represent but about whom she learned information; the information she learned about her firm's clients; and the amount of money the lateral earned from her prior clients, especially those who might follow her to the new firm. These distinct categories of information receive different ethical treatment in the analysis.

Part II is the heart of the Article. It explores with some care all possible sources of authority for the lateral and the new firm to share with one another otherwise confidential client information, including the Model Rules, the Restatement, ethics opinions and common law. This Part concludes that the sources of authority are equivocal at best and nonexistent at worst, even as it concedes that for at least two of the five categories of information *some* authority must exist, because the profession must check for conflicts and sharing information is the only way to do so. Part II also explores the ethics and best practices for those situations where the lawyer's very sharing of client identity reveals harmful information—say, when the lawyer's practice specializes in embarrassing kinds of trouble. It seeks to understand what, if anything, a lawyer might do to balance her need to change firms with her need not to harm her former and existing clients. It offers concrete suggestions for alternative kinds of conflict checking processes.

Finally, Part III proceeds to suggest an improved set of standards for lawyers, to make the source of authority both explicit and tailored in a way that lawyers might understand what information may be revealed and what ought not be revealed. It suggests changes to the Model Rules of Professional Conduct adequate to guide lawyers who must grapple with these decisions.

## I. THE FRAMEWORK

### A. A Typical Lateral Move



Imagine the following lawyering story:<sup>13</sup> Lisa Penn is an associate at the mid-size, 45-lawyer downtown firm of Stevenson, Ransom & Norman. That employer might be referred to as "the Source Firm." She has worked for the Source Firm for six years. For the sake of simplicity, assume that she has worked for five corporate clients during her spell at the Source Firm, all involving litigation matters. For some of the work she has served as lead counsel; in much of the remaining work she has worked within a team of lawyers led by one or more of the litigation partners from the Source Firm. The litigation has involved commercial disputes, patent infringement, product liability defense, and employment issues. Some of her work has resulted in reported appellate decisions; some of her work has led to press coverage, both in the business media and in the daily newspapers.

Penn now decides that she may wish to move to a different firm, and hopes to join a larger firm in her same city. She hopes that if and when she moves she may entice some of her clients to follow her to her new firm. She makes some discreet inquiries among her lawyer colleagues, and she watches the want ads in the local weekly legal journal. She sends her résumé to a few hiring committees, and she receives a few productive responses.

She then has a meaningful conversation with the head of recruitment at English & Jones (referred to here as "the Target Firm"), a 125-lawyer firm across town. The Target Firm has a vibrant litigation department covering many of the same subject areas in which Penn has developed some expertise and something of a reputation. The Target Firm is very interested in Penn; Penn is very interested in the Target Firm. They come to tentative agreement about salary, benefits and partnership opportunities. It looks like the move will happen. But first, the Target Firm needs some critical information from Penn: it needs the names of each of her previous clients at the Source Firm, as well as any clients she may have represented pro bono while at the Source Firm and as a clinic student when she was in law school; and it would like to know how much she has billed over the past five years to any clients whom she thinks might follow her to the new firm.

Penn then prepares a list of her clients and a short précis on each litigation matter Penn has worked on in the past five years. She also prepares a separate chart showing the hours, and the dollars, billed to each client over that period of time. Penn's plan is to share this information with the Target Firm before she reveals her plans to the partners and others at the Source Firm.<sup>14</sup>

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<sup>13</sup> Several colleagues practicing in private law firms in Boston have confirmed with me that this lateral career change story, while simplified, is not atypical for the kind of move described—not headhunter-driven, not prompted by a failed partnership vote or a firm's demise, and not resulting from the merger of two firms. The same analysis would apply, however, at least in general, if the lawyer were a partner instead of an associate; if the lawyer were an associate who had been denied partnership; if the lawyer were a recent law school graduate looking for her first full time employment; or if the two firms were merging. In each such case the logistics and risk analysis would vary considerably, but the basic ethical underpinnings would remain the same.

<sup>14</sup> Penn might consider asking a trusted paralegal in her department to assist her in this tedious administrative task, but there is some serious question whether a paralegal, while being paid by the law

To complete this story, assume also that the Source Firm and the Target Firm practice in a jurisdiction that follows the Model Rules of Professional Conduct, precisely as they have been adopted by the American Bar Association.<sup>15</sup>

## B. The Obligation to Screen for Conflicts

The most important questions for Penn are whether she has authority to share each of her lists (the client identity list, the précis list, and a summary of her billings for some important clients) with the Target Firm, and what her responsibilities might be to her colleagues at the Source Firm if and when she does share the lists. But before reaching those central questions, we must first establish the ethical underpinnings of the conflict-checking practices of the Target Firm. It is precisely because the Target Firm must screen for conflicts that Penn faces her questions and challenges. That ethical obligation drives the ethical analysis of Penn's proposed actions. This brief discussion will be neither profound nor creative, for the conflict-checking doctrine is well established and hardly controversial.

To begin at the beginning, the Target Firm owes its clients a fiduciary and professional duty not to engage in conflicts of interest. Each client of the Target Firm must understand and trust that its lawyers will serve the client's needs unfettered by commitments to or sympathies for the client's adversaries, or by interests otherwise incompatible with the client's goals.<sup>16</sup> That obligation is established in the Model Rules at Rule 1.7.<sup>17</sup>

It turns out, though, that the Target Firm's worry about Penn joining its firm has little to do with conventionally-understood concurrent conflicts of interest. Rule 1.7 and its accompanying doctrine prohibit the Target Firm from, say, representing the client

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firm, may use his time to aid Penn to search for new work. A paralegal, like other law firm employees, arguably owes a fiduciary responsibility to the law firm. *See, e.g.,* Williams v. Trans. World Airlines, 588 F. Supp. 1037, 1044 (W.D. Mo. 1984)(disqualification standard same for secretaries and attorneys); *Glove Bottled Gas Corp. v. Circle M. Beverage Barn, Inc.*, 514 N.Y.S.2d 440 (1987)(paralegal's former work disqualifies firm).

<sup>15</sup> This assumption is obviously necessary to set the stage for the proceeding analysis, which will use the Model Rules as its baseline source of authority. In fact, no state in the nation (except possibly Delaware) follows the Model Rules in such a lockstep way, so the analysis may—or will—differ in many jurisdictions. Where a variation of the Model Rules will make a significant difference in the analysis of Penn's duties, the discussion will note that. *See, e.g.,* text accompanying notes *infra*.

<sup>16</sup> *See, e.g.,* Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2nd Cir. 1976); Aronson, *Conflicts of Interest*, 52 WASH. L. REV. 807 (1977); *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244 (1981)[hereinafter *Harvard Conflicts Note*].

<sup>17</sup> MODEL RULES, *supra* note , at R. 1.7.

PRT, Inc. while at the same time opposing PRT, Inc. on behalf of a different client.<sup>18</sup> While this *may* be the Target Firm's concern with respect to any new client Penn brings with her to the Target Firm (a new client, say, with interests adverse to PRT, Inc.), it is not the primary focus for the conflict-checking that the Target Firm must do with any lateral hire. Instead, that checking has more to do with a worry about protecting the confidences of Penn's soon-to-be former clients. If the Target Firm does not address those concerns, then its current clients could be harmed significantly.

If the Target Firm were to hire Penn without checking into her former client base, it might have to withdraw from some ongoing matters, prejudicing the interests of those clients, forfeiting the income and business from those engagements, and possibly paying malpractice damages to the affected clients who then would have to hire replacement counsel in the middle of an ongoing project.<sup>19</sup> An example might help make this straightforward point. Assume that the Target Firm were to hire Penn without learning that Penn worked actively and prominently for the entity Marblehead Sailboats, Inc. (MSI) while at the Source Firm. Penn knows MSI's business in exquisite detail, and has represented it both as a plaintiff and as a defendant in litigation. After Penn joins the Target Firm, she learns that the Target Firm represents a long-standing client, Finn Management, in a feisty lawsuit against MSI involving many of the same issues covered by the Source Firm's work for MSI.<sup>20</sup> Having Penn on board in the Target Firm could be quite an advantage for the Target Firm in this litigation, given her intimate understanding of MSI. But precisely because of that perceived advantage, Penn would be disqualified from working on that matter at the Target Firm, applying a textbook Rule 1.9 analysis.<sup>21</sup>

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<sup>18</sup> See *Int'l Bus. Mach. Corp. v. Levin*, 579 F.2d 271, 280 (3rd Cir. 1978) (disqualifying plaintiff's counsel because his large law firm represented defendant in an ongoing unrelated matter); *Gen-Cor, LLC v. Buckeye Corrugated, Inc.*, 111 F. Supp. 2d 1049 (S.D. Ind. 2000) (direct conflict when law firms represents corporate subsidiary in one matter while concurrently representing plaintiffs suing subsidiary's parent corporation in unrelated litigation); *State ex rel. Neb. State Bar Ass'n v. Frank*, 631 N.W.2d 485 (Neb. 2001) (lawyer disciplined for conflict of interest in representing client in workers' compensation claim against employer's insurer, while also representing insurer in unrelated litigation).

<sup>19</sup> See, e.g., *Damron v. Herzog*, 67 F.3d 211 (9th Cir. 1995)(malpractice liability for conflict of interest); *Healthnet, Inc. v. Health Net, Inc.*, 289 F. Supp. 2d 755 (S.D. W.Va. 2003)(disqualification of law firm after screening efforts found inadequate); *Healy v. Axelrod Co.* 155 F.R.D. 615, 621-22 (N.D. Ill. 1994)(disqualification); *SK Handtool Corp. v. Dresser Indus., Inc.*, 619 N.E.2d 1282 (Ill. App. Ct. 1993)(disqualification after lawyer formerly employed by opposing law firm joined firm).

<sup>20</sup> Note that in this story, Penn has not moved from one side of ongoing litigation to the other side of that same case. Many reported conflict of interest cases involve that obvious and direct worry. See, e.g., *Papyrus Technology Corp. v. New York Stock Exchange*, 325 F. Supp. 2d 270 (S.D.N.Y. 2004). In the story developed here, Penn did not even know about the Finn Management lawsuit against MSI until she applied for work at the Target Firm, showing that she cannot rely simply on identifying any ongoing disputes between the two law firms as she checks for conflicts.

<sup>21</sup> MODEL RULES, *supra* note , at 1.9. See, e.g., *U. S. Football League v. Nat'l Football League*, 605 F. Supp. 1488 (S.D.N.Y. 1985)(well-known case where law firm disqualified because of prior representation of the opposing party in substantially related matter); Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 *FORDHAM L. REV.* 71, (1996)(summarizing the doctrine).

The long-standing doctrine captured by Rule 1.9 holds that a lawyer may not oppose a former client in a matter which is substantially related to the work done by the lawyer for that client.<sup>22</sup> The "substantial relationship" test, while varying in gradation in different jurisdictions, serves as a proxy for whether the lawyer possesses information about the former client which might be used in the new representation to harm the former client.<sup>23</sup> Here, because Penn learned relevant information about MSI during her representation of that company, she would be disqualified from opposing MSI on this substantially related matter, unless MSI consented to her (or members of her firm) opposing it.<sup>24</sup>

Of course, once Penn is disqualified, all of the Target Firm's lawyers will also be disqualified under Rule 1.10.<sup>25</sup> The prevailing common law doctrine, which Rule 1.10 captures, holds that if one lawyer in a law firm is disqualified from representing a client because of the former client conflict of interest principle, every lawyer in that firm is also disqualified.<sup>26</sup> The Model Rules do not permit screening of lateral hires as a way to protect the confidences of the previous client and the integrity of the ongoing case handled by the new firm.<sup>27</sup> While many courts, even those in states with a "no screening" version of Rule 1.10, will permit the establishment of screening protocols to avoid disqualification,<sup>28</sup> the availability of such "ethical walls" or "cones of silence"<sup>29</sup> would

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<sup>22</sup> Freeman v. Chicago Musical Instrument Co., 689 F.2d 715 (7th Cir. 1982); T.C. Theater Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265 (S.D.N.Y. 1953).

<sup>23</sup> Solow v. W.R. Grace & Co., 83 N.Y.2d 303, 632 N.E.2d 437 (1994). *See generally* Susan Shapiro, *Bushwhacking the Ethical High Road: Conflict of Interest in the Practice of Law and Real Life*, 28 LAW & SOC. INQUIRY 87 (2003)[hereinafter, Shapiro, *Bushwhacking the Ethical High Road*]; Charles Wolfram, *Former Client Conflicts*, 10 GEO. J. LEG. ETHICS 677 (1997).

<sup>24</sup> MODEL RULES, *supra* note , at 1.9(b).

<sup>25</sup> *Id.*, at R. 1.10(a).

<sup>26</sup> *See, e.g.*, Freeman v. Chicago Musical Instrument Co., 689 F.2d 715 (7th Cir. 1982); W.E. Bassett Co. v. H.C. Hook Co., 201 F. Supp. 821 (D. Conn. 1961), *aff'd per curiam* 302 F.2d 268 (2d Cir. 1962); Cardinale v. Golinello, 372 N.E.2d 26 (N.Y. 1977). *See generally* Kenneth L. Penegar, *The Loss of Innocence: A Brief History of Law Firm Disqualification in the Courts*, 8 GEO. J. LEGAL ETHICS 831 (1995).

<sup>27</sup> MODEL RULES, *supra* note , at 1.10, Cmt. [4] (permitting screening only for non-lawyer staff).

<sup>28</sup> *See, e.g.*, In re County of Los Angeles, 223 F.3d 990 (9th Cir. 2000); Schiessle v. Stevens, 717 F.2d 417 (8th Cir. 1983); Nemours Found. v. Gilbane, Aetna, Fed. Ins. Co., 632 F. Supp. 418 (D. Del. 1986); Solow v. W.R. Grace & Co., 632 N.E.2d 437 (N.Y. 1994). *See generally* JUDITH A. MCMORROW & DANIEL R. COQUILLETTE, THE FEDERAL LAW OF ATTORNEY CONDUCT, MOORE'S FEDERAL PRACTICE § 808.06[2][b][iv] (2001)(reviewing screening permitted by federal courts); Susan Martyn, *Conflict About Conflicts: The Controversy Concerning Law Firm Screens*, 46 OKLA. L. REV. 53 (1993); Peter Moser, *Chinese Walls: A Means of Avoiding Law Firm Disqualification When a Personally Disqualified Lawyer Joins the Firm*, 3 GEO J. LEGAL ETHICS 399 (1990); Pizzimenti, *supra* note .

<sup>29</sup> The terms "cone of silence" or "ethical wall" have become preferred to the culturally sensitive and historically-puzzling term "Chinese wall." *See* Nemours Found. v. Gilbane, Aetna, Fed. Ins. Co., 632 F. Supp. 418 (D. Del. 1986)(employing the "cone of silence" term); Peat, Marwick, Mitchell & Co. v. Superior Court, 245 Cal. Rptr. 873 (App. 1988)(Low, J. concurring)("The term ['Chinese wall'] has an ethnic focus which many would consider a subtle form of linguistic discrimination.").

not affect Penn's nor the Target Firm's obligations to perform the conflicts check. Each would need to identify otherwise disqualifying conflicts of interest in order to discern whether a screen ought to be established within the firm if the Target Firm were to hire Penn. Those courts which permit screening will still disqualify a firm which delays in implementing a screening system.<sup>30</sup>

It is, without question, a bad thing for the Target Firm to risk its work for Finn Management. It is bad for the firm's success and livelihood. It is also bad for its client Finn Management, who deserves to be able to maintain continuity with its counsel, especially in the midst of litigation.<sup>31</sup> As a matter of professional duty, then, the Target Firm must create a reliable, workable method of checking for possible conflicts when it hires new lawyers. It is obviously not an acceptable answer to say that the Target Firm may never hire any new lawyers, or that it may only hire new law school graduates who have never represented any client before.<sup>32</sup>

The conclusion is therefore unsurprising and universally accepted: the Target Firm must make sure that Penn's history will not infect its ongoing work if it hires her. The Target Firm therefore must know Penn's history well enough to ward off the infection.<sup>33</sup> The question, addressed below, is how it may know enough about that history to make its conflict-checking systems work.

### C. Information for the Conflict Check: A Taxonomy

Whether Penn's sharing of information with the target Firm is justified may well depend on the type of information she shares. This section will identify five distinct types of matters which the migrating lawyer and the new law firm believe they must, or wish to, share before the Target Firm hires Penn.

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<sup>30</sup> See, e.g., *Cobb Publishing, Inc. v. Hearst Corp.*, 891 F. Supp. 388 (E.D. Mich. 1995)(firm disqualified after waiting two weeks to establish a screen); *S.K. Handtool Corp. v. Dresser Indus.*, 619 N.E.2d 1282 (Ill. App. 1993)(firm disqualified after creating a screen several weeks after a tainted lawyer joined the firm).

<sup>31</sup> Courts regularly stress the importance of clients maintaining lawyers of their choice, and the harm caused by forcing a change in lawyers in the middle of a case. See, e.g., *United States v. Miller*, 624 F.2d 1198, 1201 (3rd Cir. 1980) (court should only order disqualification after it has considered the public policy implications including client's right to retain counsel); *Kitchen v. Aristech Chemical*, 769 F. Supp. 254, 256 (S.D. Ohio 1991) (when considering a disqualification order, court must balance the requirement of professional conduct by an attorney with right of party to retain counsel of its choice); *Bhd. Ry. Carmen of U.S. & Can. v. Delpro Co.*, 549 F. Supp. 780, 786 (D. Del. 1982) (refusing disqualification because of the closeness of the parties to reaching settlement).

<sup>32</sup> See REGAN, *supra* note , at 32-37 (discussing the emerging preferences of sophisticated corporate clients to insist upon experienced lawyers to handle their work, thus enhancing the prevalence of lateral hiring).

<sup>33</sup> One might argue here that the Target Firm needn't know Penn's history—Penn needs instead to know the Target Firm's client base. As we see as we develop the categories of information needed to complete the conflict checking, that argument does not survive. See *infra* text at notes .

## 1. Client Identity

The Target Firm needs to know, for starters, the identity of the clients whom Penn represented and worked for while at the Source Firm, her source firm. The MSI example from above<sup>34</sup> shows why this is so. If Penn worked actively for a client who is an opposing party to one of the Target Firm's current clients, a potential problem arises, because Penn may have access to information beneficial to the Target Firm's current client.

## 2. Client Précis

The Target Firm wants to learn more than just the identity of Penn's clients, however. In order to conduct its conflict-checking inquiry most effectively and efficiently, a target firm prefers to know whether Penn's work with her clients will create any disqualifying situations. The mere fact that Penn once represented a client now opposed by the Target Firm does not, by itself, create any problem for the Target Firm. Only if the work that Penn did for her previous clients at the Source Firm is substantially related to the work ongoing at the Target Firm will there be a problem.<sup>35</sup> For prior connections which have no substantial relationship to the Target Firm's work, Penn may join the firm without any effect on the firm's representations and business at all.<sup>36</sup>

Therefore, to determine whether to hire Penn, or how to proceed when it hires her, the Target Firm wants to know more than the name of her former (or current at the Source Firm) clients. It is for this reason that, as described earlier, Penn prepared her précis about each of her disclosed clients. Call this category "the précis."

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<sup>34</sup> See text accompanying notes *supra*.

<sup>35</sup> See, e.g., *Hughes v. Paine, Webber, Jackson & Curtis, Inc.*, 565 F. Supp. 663 (N.D.Ill. 1983); *T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265, 268-69 (S.D.N.Y. 1953); *Berkowitz v. Estate of Roubicek*, 471 N.Y.S.2d 208 (N.Y. Sup. 1983). See also text accompanying notes *supra*.

<sup>36</sup> So, for instance, assume that Penn's work for MSI involved active litigation of many employment disputes, and the Target Firm now represents Finn Management in a patent infringement lawsuit against MSI fully unrelated to its employment practices. Under most understandings of the substantial relationship test, Penn would not be disqualified, after moving from the Source Firm to the Target Firm, from opposing her former client MSI on the patent matters. See, e.g., RESTATEMENT, *supra* note , at §132 cmt. *d(iii)*; *Adoption of Erica*, 686 N.E.2d 967, 972 (Mass. 1997) (disqualification unwarranted due to lack of substantial relationship); *ABKCO Indus. Inc. v. Lennon*, 284 N.Y.S.2d 781, 785 (N.Y. 1976) (plaintiff's counsel not disqualified due to a lack of exchange of confidential information and no substantial relationship, despite previous representation of defendants John Lennon and The Beatles); *Howard Hughes Medical Inst. v. Lummis*, 596 S.W.2d 171 (Tex.Civ.App.1980) (firm not disqualified because no substantial relationship between matters). Even the most liberal interpretations of the substantial relationship test agree that some former client matters would not be related to the current adverse representation. See, e.g., *Unified Sewerage Agency v. Jelco*, 646 F.2d 1339 (9th Cir. 1981) (even under Ninth Circuit's strict approach to substantial relationship test lawyer not disqualified based solely on general information lawyer gained in prior representation).

A critical preliminary question arises, though, about this précis category. It is no doubt helpful to the Target Firm to know something about the nature of Penn's work for the clients that show up as adverse to the Target Firm's work. Some of that prior work would cause Penn to infect the Target Firm; other work for that same client would leave her free to join without a problem. But is it *necessary* for the Target Firm to know that further information, aside from being convenient and helpful? If the Target Firm *must* have access to this additional information from Penn in order to meet its fiduciary and professional duties to its current clients, then some authority ought to be found for its disclosure. Otherwise, much lawyer mobility and client choice of counsel would be restricted. If, by contrast, disclosure by Penn of the additional information is not necessary but merely helpful, then much will turn on how apparently authorized Penn is to make the disclosures.

It seems difficult to argue with full integrity that the Target Firm *must have* the Penn précis along with the Penn client list. Consider the following scenario: The Target Firm negotiates with Penn, is ready to offer her a position, asks for her client lists only, finds some "hits" (names which appear as opposing entities on the Target Firm's database), and turns her down, in an excess of risk aversion. The Target Firm then moves to the next name on its lateral applicant roll (its second-rated candidate for its opening, if you will), does the same client list-comparing, and hopes for no hits this time. Except in the smallest of communities or the most incestuous of practice areas,<sup>37</sup> it seems unimaginable that the Target Firm will never find a clean, hit-free candidate. Thus, the argument for the necessity of the précis is a weak one. It remains true, though, that without the availability of précis-type disclosures, lawyer mobility would be far more restricted. That appears to be an unfortunate result from a policy perspective.

So this is the best one can conclude at this juncture: The Target Firm cannot function as a practicing, effective law firm without some access to the client lists of its new hires, and it of course will need new hires from time to time. But the Target Firm could function conceivably, albeit in a substantially hobbled fashion, without access to the précis about each client on those lists from prospective hires.

### 3. Firm Clients Known to the Migrating Lawyer

The third (and, coming, a closely related fourth) category of information which the Target Firm must have from Penn is the identity of those clients of the Source Firm whom Penn did not represent but about whom she learned information. It helps to differentiate this information from Category 1 information above. The risks that the Target Firm assumes in hiring Penn run not only to those clients for whom she served as some kind of explicit attorney of record, or on whose cases she actively worked, but also to those clients from her prior firm whose information she in fact learned.<sup>38</sup> Because the

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<sup>37</sup> See SHAPIRO, *supra* note , at 67-68, 75 (describing the difficulty of lawyers in rural, small communities in Illinois to avoid entanglements).

<sup>38</sup> Note that some states offer a law firm the opportunity to screen Penn in a circumstance such as that described here. See, e.g., ARIZ. RULES PROF. CONDUCT R. 1.10(b)(2)(2000); MASS. RULES. PROF'L

risks faced by the Target Firm in hiring Penn are almost entirely information-based,<sup>39</sup> the Target Firm must be just as concerned with Penn's knowledge about the Source Firm's clients as it is about Penn's own former clients.

Another example may help with this point. Assume that while working at the Source Firm Penn never performed any legal work at all on the Rockport Associates matter, which was a very big deal involving many of her colleagues at the Source Firm. Assume further, for the sake of this point, that Rockport Associates shows up as an important opposing party in some elaborate business negotiations which the Target Firm has been conducting on behalf of its client Susan Moran. If Penn merely released her client lists to the Target Firm, even with a précis about each client, the Rockport Associates name would never appear—because she never worked for that client. But if, once Penn joins the firm, Susan Moran challenges the Target Firm's integrity because of Penn's presence and her likely information about Rockport, most authority (including the plain language of Model Rule 1.9(b)(2)) holds that the Target Firm may have to forfeit its place at the negotiating table with Moran.<sup>40</sup>

For this reason the Target Firm wishes to know from Penn the identities of those clients about whom she learned protected information while serving as a lawyer at the Source Firm.<sup>41</sup>

#### 4. Information Known to the Migrating Lawyer

This next category is both self-evident but profoundly complicated for any analysis of Penn's responsibilities. The Target Firm will want to know something about what it is that Penn has learned about the Source Firm's clients. One might think, at first glance, that this Category 4 information matches that of information from Category 2 above (the précis list for each of Penn's clients), which the earlier discussion concluded

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CONDUCT R. 1.10(d)(1998). The Model Rules, though, permit no such screening of Penn, even if she never represented the firm's client about which she had information. *See* MODEL RULES, *supra* note , at R. 1.10.

<sup>39</sup> *See, e.g.*, *Analytica v. NPD Research*, 708 F.2d 1263, 1266 (7th Cir. 1983); *Maritrans GP Inc. v. Pepper, Hamilton, & Scheetz*, 602 A.2d 1277 (Pa. 1992). *See also Harvard Conflicts Note, supra* note , at .

<sup>40</sup> *See* MODEL RULES, *supra* note , at 1.9(b)(2); *Cardinale v. Golinello*, 372 N.E.2d 26 (N.Y. 1977)(law firm disqualified after hiring associate who did not previously represent, but who was deemed to know facts about, the firm's client's adversary).

<sup>41</sup> The discussion elides for the moment the more complicated question about Penn's effect on the Target Firm's work if Penn simply knew about an adversary's general corporate atmosphere and culture, and focus instead on Penn's having information more reliably covered by Rule 1.6. For a discussion of the former possibility, see *Maritrans G.P. Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277 (Pa. 1992)(firm disqualified from representing a member of an industry because of its deep knowledge about a competitor member of that same industry); Geraldine Rowe, Comment, *Maritrans G.P., Inc. v. Pepper Hamilton & Sheetz: Is Economic Competition Enough to Create a Conflict of Interest?*, 8 GEO. J. LEGAL ETHICS 1171 (1995).



ought to be shared with the Target Firm but in fact need not be shared. But this Category 4 information requires a very different treatment from that afforded Penn's précis.

Penn's sharing Category 3 data (the Source Firm clients about whom she learned information) is helpful to the Target Firm but on its own is of little use to the Target Firm. Consider again the Rockport Associates story. Penn never worked for Rockport Associates while at the Source Firm; others in the Source Firm did. The fact that the Penn's firm represented Rockport Associates, standing alone, does not disqualify the Target Firm's work for Susan Moran against Rockport if the Target Firm were to hire Penn. Only if Penn has learned *material information* about Rockport would the Target Firm risk disqualification.<sup>42</sup> Thus, the nature of the information learned by Penn while working at the Source Firm and not representing Rockport Associates seems critical to the Target Firm's calculus about the risks it faces in hiring Penn.

But note the difference between Category 2 information and Category 4 information. With Category 2, Penn can respond to a "hit" matching her client with a Target Firm opponent by offering to the Target Firm her précis about the nature of her work for that client while at the Source Firm. If the subject matters are close, then the Target Firm has a problem; if not, then the substantial relationship test likely permits Penn (and hence the Target Firm) to proceed.<sup>43</sup> At Category 4, however, Penn has acknowledged that she indeed has information about the adverse entity, Rockport Associates. Here, the Target Firm may only proceed if it knows *the information*, not a précis about the kind of work Penn did for Rockport Associates (indeed, she did none). This is a much more challenging burden on Penn. In order for the Target Firm to discern reliably and responsibly that it may hire Penn without conflicting itself out of its work for Susan Moran, the Target Firm needs to know what Penn knows, more or less. It would like Penn to say something like this:

Listen, prospective colleagues, I never represented Rockport Associates, but people at my firm spoke about the client all the time, since just about everybody but I worked on its matters. I really don't know all that much about the company, but I do know that their business opportunities went straight downhill after its president, Steve Krom, was arrested for soliciting that prostitute ....

May Penn reveal that information? The answer, developed below, is an obvious no. Is it fair for the Penn to answer more obliquely, perhaps along the lines of the following?

I know some stories about the recent financial successes or lack thereof, and I know a bit about the personalities of the principals. I know nothing substantive about their

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<sup>42</sup> See MODEL RULES, *supra* note , at 1.9(b)(2).

<sup>43</sup> See, e.g., *Dietter v. Regents of the Univ. of Cal.*, 963 F. Supp. 908 (E.D. Cal. 1997); *In re Del-Val Fin. Corp. Sec. Litig.*, 158 F.R.D. 270 (S.D.N.Y. 1994); *U.S. Football League v. National Football League*, 605 F. Supp. 1448, 1461 (S.D.N.Y. 1985).

patents or their parking garage businesses, which seems to be what your work addresses most directly.

The Target Firm might make a reliable and prudent decision about hiring Penn based on this kind of disclosure. The question addressed in the next Part is whether Penn may make it. Under existing doctrine and prevailing rules, it is difficult to find authority for Penn to do so.<sup>44</sup>

## 5. The Lawyer's Billables

The fifth category of information is of an entirely different quality, but is nearly as important to the Target Firm in its hiring decisions. Law firms hire laterally not only to acquire talented and experienced practitioners, but also to attract new clients who will follow the laterally hired lawyers.<sup>45</sup> Clients often want to follow the lawyers with whom they have a long-standing relationship and history.<sup>46</sup> Penn's attractiveness to the Target Firm will be based on a combination of her lawyering skills and her rainmaking potential.<sup>47</sup> One available proxy for the latter quality is the amount of billings that Penn's

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<sup>44</sup> This discussion invites a potentially critical clarification here. There are two ways in which Penn might be disqualified (and thus trigger the Target Firm's disqualification or its need to set up a screening device if it's jurisdiction so permitted) because of an the Source Firm client for whom she did no work, and did not ever represent. In the story as it is told here, Penn's risk comes from the straightforward reading of Model Rule 1.9(b), which says:

- (b) A lawyer shall not knowingly represent a person in the same or substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
  - (1) whose interests are materially adverse to that person; and
  - (2) about whom the lawyer had acquired information protected by Rule 1.6 and 1.9(c) that is material to the matter.

MODEL RULES, *supra* note , at 1.9(b)(2). The overlapping client, Rockport Associates, fits the Rule 1.9 definition, but Penn may not proceed only if she "had acquired information protected by Rule 1.6 and 1.9(c) that is material to the matter." This inquiry led to the analysis in the text, as Penn and the Target Firm try to discern whether she "had acquired" such information.

But that analysis and the story as told thus far missed another risk for Penn and the Target Firm, the risk faced (and suffered) by the associate in *Cardinale v. Golinello*, 372 N.E.2d 26 (N.Y. 1977). In *Cardinale*, the associate who changed firms had (he asserted) learned nothing about the former client who was now an adversary of his new firm. But, because the prior firm was so small, the associate faced an *irrebuttable* presumption that he knew whatever the partners and associates knew when he was at the firm. *Id.*, 372 N.E.2d at . Because the Source Firm is a larger firm than that in *Cardinale* (45 lawyers at last count), Penn's actual knowledge will control rather than an irrebuttable presumption, so the text's discussion makes sense. If Penn were moving from a smaller firm, her inquiry about the information she learned would be simpler, but of course she would be disqualified more often.

<sup>45</sup> See, e.g., SHAPIRO, *supra* note , at 200; Caiaccio, *supra* note , at 827-28.

<sup>46</sup> See HILLMAN, *supra* note , at § 2.3.1.1.

<sup>47</sup> See Robert Hillman, *Professional Partnerships, Competition, and the Evolution of Firm Culture: The Case of Law Firms*, 26 J. CORP. L. 1061 (2001).

work has generated from her clients, especially those clients whom Penn believes may follow her from the Source Firm to the Target Firm. From all reliable indications, experienced lawyers regularly share billing information with prospective employers, just as they share the client identity and précis data described above.<sup>48</sup> The question, explored in the next Part, is whether the common practice of sharing of billing information is ethically permitted. The assessment there will show that Penn generally may not disclose her billings if tied to a specific client, but may do so if undifferentiated by specific client.<sup>49</sup>

## II. THE SOURCES OF AUTHORITY

Laterally migratory lawyers either do, or would like to, share the five kinds of information just described. The question is whether those lawyers breach any confidentiality duties to their clients when they do so. This Part will review each category of information separately. The first category's analysis will necessarily be thorough, but later items will build off the first and as a result their discussion may be briefer.

### A. Authority to Reveal Client Identities

#### 1) Authority Under the Model Rules

The analysis starts with the text of the Model Rules of Professional Conduct, which are in effect in Penn's state. Rule 1.6 seems to be the source of authority that will cover this question. In its most recent 2003 iteration, Rule 1.6(a) reads as follows:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).<sup>50</sup>

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<sup>48</sup> See, e.g., Stephanie Francis Cahill, *Ideas That Work: Is That Lateral a Liar?: It Pays to Confirm a Lateral Partner's Promised Client List*, 1 NO. 39 A.B.A. J. E-REPORT 5, WL 1 No. 39 ABAJEREP 5 (October 11, 2002) (quoting a law firm partner discussing lateral hiring: "The most frequent thing you hear is, "I have between \$500,000 and \$1 million in business," Grossman says. 'That can mean anything, including nothing.'"); Ronald Russell, *Gauging a Lateral Partner's Worth*, NATL. L.J., Nov. 16, 1992, at 24 ("When a firm is considering hiring a lateral partner, a key issue is the partner's portfolio, or portable business. In order for a lateral hire to be viable for a law firm, a portfolio should range from \$300,000 to \$1 million or more."); *Questions To Help Spot Unprofitable Lateral Candidates*, 02-11 LAW OFF. MGMT. & ADMIN. REP. 11 (2002) WL 02-11 LOFFMAR 11 (collection of focus items for law firm managers, including: "Possible responses of clients to their lawyers' move to your firm. Will they follow the candidate when he or she changes firms? If so, which clients does the candidate expect to follow him or her? What are their annual billings?").

<sup>49</sup> See text accompanying notes *infra*.

<sup>50</sup> MODEL RULES, *supra* note , at R. 1.6(a).

Paragraph (b) lists the limited exceptions to this general rule of confidentiality, of which only one, subparagraph (b)(6) ("to comply with other law or a court order"), has any relevance to Penn's questions.<sup>51</sup>

Several possible bases within Rule 1.6 might justify Penn's disclosure of her client lists to the Target Firm. An assessment of each follows.

a) *Is Client Identity Covered by Rule 1.6?*

The first and most obvious question is whether Penn's client list (and not, for the moment, any précis about each client's case) is covered by Rule 1.6. If client identity is not covered by the rule, then presumably Penn is free to reveal her client list, subject to her duties under the laws of agency addressed below.<sup>52</sup>

Rule 1.6 covers "information relating to the representation of a client ...."<sup>53</sup> That phrase is quite broad, and the Comment to Rule 1.6 emphasizes that breadth. Comment [3] states that "The confidentiality rule ... applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law."<sup>54</sup>

Because Penn learned her client's identity through her representation (a truism, to be sure), her client list seems presumptively within the ambit of Rule 1.6.

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<sup>51</sup> *Id.* at R. 1.6(b), which reads as follows:

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to comply with other law or a court order.

<sup>52</sup> See text accompanying notes *infra*.

<sup>53</sup> MODEL RULES, *supra* note , at R. 1.6(a).

<sup>54</sup> *Id.*, at cmt. [3].

Before this section moves on to search for some possible exception to Rule 1.6 which may authorize Penn's sharing of her list, it will address three possible misunderstandings that occur at this point, one related to the "non-privileged" nature of client identity, a second related to matters where Penn has appeared publicly on behalf of her client, and a third reflecting the broader implications of this conclusion.

i) Client Identity As Not Privileged

The conclusion that Penn's clients' identities are presumptively covered by Rule 1.6 may seem inconsistent with the established doctrine that client identity is not "confidential" for purposes of the attorney-client privilege. A widely accepted tenet of evidence law holds that the identity of a client generally is not privileged, and a lawyer may not refuse to produce that information when faced with a proper tribunal-based inquiry.<sup>55</sup> The reasoning is that a client's identity does not satisfy the definition of a privileged communication, because it is not "for the purpose of securing primarily either an opinion on law or legal services or assistance in some legal proceeding."<sup>56</sup> In rare cases the disclosure of client identity is equivalent to disclosure of plainly protected communications,<sup>57</sup> but aside from that narrow exception a lawyer may not assert the confidentiality of her client's identity when asked for it during court testimony or a deposition.<sup>58</sup>

The attorney-client privilege doctrine, however, is different from a lawyer's ethical obligations, and different rules and principles apply to each.<sup>59</sup> While some may

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<sup>55</sup> See, e.g., *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 451 (6th Cir. 1983); *Goddard v. United States*, 131 F.2d 220, 221 (5th Cir. 1942); *F.T.C. v. Ill. State Bar Ass'n*, 711 F. Supp. 445, 446 (N.D. Ill. 1989).

<sup>56</sup> The generally accepted definition of matters covered by the attorney-client privilege is as follows:

(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed by his client without the presence of strangers for the purpose of securing primarily either an opinion on law or legal services or assistance in some legal proceeding and not (4) for the purpose of committing a crime or tort. Also the privilege must be claimed and must not have previously been waived.  
*United States v. U.S. Shoe Machinery Corp.*, 89 F. Supp 357, 358 (D. Mass. 1950).

<sup>57</sup> See, e.g., *United States v. Strahl*, 590 F.2d 10 (1st Cir. 1978); *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960).

<sup>58</sup> For a helpful discussion of this doctrine, see PAUL R. RICE, *ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES*, §6.13-6.21 (2d ed. 1993). The doctrine has been incorporated into the Restatement of the Law Governing Lawyers. See *RESTATEMENT*, *supra* note , at §69 cmt. g.

<sup>59</sup> See, e.g., *MODEL RULES*, *supra* note , at R. 1.6, cmt. [3]; *United States v. White*, 970 F.2d 328, 336 (7th Cir. 1992); *United States v. Stepney*, 246 F. Supp.2d 1069, 1073 (N.D. Cal. 2003);

assume that a client's identity is not confidential because of the established evidence doctrine, that assumption is simply incorrect.

## ii) Clients in Public Proceedings

The other source of confusion arising from the conclusion that client identity is protected by Rule 1.6 is the fact, included in Penn's story above,<sup>60</sup> that Penn has represented some of the clients on her list in public litigation. Certainly, the objection goes, if Penn appeared in a public court room and announced to the court (and the listening audience) that she was appearing on behalf of her client, it makes no sense to hold now that the client's identity is a secret protected by Rule 1.6.

That objection is an understandable one, but it is misplaced. The only available reading of the language of Rule 1.6 and its comment is that information acquired by Penn in the course of her representation of a client is protected unless some exception applies. Again, Comment [3] to Rule 1.6 "*all information relating to the representation, whatever its source.*"<sup>61</sup>

Penn's clients' status as parties to litigation is, then, irrelevant for purposes of the Rule 1.6 analysis.<sup>62</sup>

## iii) The Breadth of this Limitation

This sub-section addresses an impossible-to-avoid worry arising from the analysis just completed. If Rule 1.6 indeed covers client identity presumptively and across-the-board, what does that imply about lawyers telling others who their clients are? Is a lawyer forbidden, at a social event, from telling a friend that she represents some person whose name has just come up in conversation? Is Rule 1.6 really that strict?

The short answers are no, she may not tell the friend that she represents the person whose name has come up, and yes, the rule is that strict.<sup>63</sup> It is true that some authorities, most notably the Restatement,<sup>64</sup> interpret this element of Rule 1.6 more liberally (and more pragmatically), but there is no textual support for that interpretation. At the same

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<sup>60</sup> See text accompanying notes *supra*.

<sup>61</sup> MODEL RULES, *supra* note , at R. 1.6 cmt. [3] (emphasis added).

<sup>62</sup> In my discussions with practitioner (and some academic) colleagues about the conflict-checking business the colleagues frequently make the understandable leap described in the text—if the party is listed in some court papers, its identity cannot be considered confidential. That experience demonstrates how widespread the misunderstanding is.

<sup>63</sup> Besides the text of Rule 6.1, see also Texas Comm. on Prof'l Ethics, Op. 464, 52 TEX. B. J. 1200 (1989)(implying that client identity is protected information in context of sale by lawyer of delinquent accounts receivable).

<sup>64</sup> See RESTATEMENT, *supra* note , at § 60. See discussion at notes *infra*.

time, one exception to Rule 1.6's blanket coverage is when "the client gives informed consent" to disclosure,<sup>65</sup> and since such informed consent seemingly can be implicit,<sup>66</sup> lawyers may justifiably make contextual judgment calls about when it is permissible to share with a third person the fact that a lawyer represents an individual.<sup>67</sup>

b) *Is Client Identity Subject to an Exception Under Rule 1.6?*

If client identity falls comfortably within the ambit Rule 1.6, the next question is whether it then falls within an exception which would permit Penn to reveal her client list to the Target Firm. This section canvasses the possible exceptions which might apply.

i) "The Client Gives Informed Consent"

The simplest way of reconciling Rule 1.6's coverage and Penn's need to share the information is to look to clients for consent. Not surprisingly, a lawyer may reveal information otherwise protected by Rule 1.6 to third parties if the lawyer's client "gives informed consent,"<sup>68</sup> which the Rules define as "the agreement by a person to a proposed

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<sup>65</sup> MODEL RULES, *supra* note , at R. 1.6(a).

<sup>66</sup> The Comment to Model Rule 1.6(a) supports this argument. *See* MODEL RULES, *supra* note , at R. 1.6 Cmt. [7] ("Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter."). Ordinarily, the very notion of "informed" consent evokes explicit conversation and an active assent by the individual giving it. Commentary from other contexts supports that idea. As one author has written in a consumer protection context, "The problem with implicit consent is that it may not afford a broad enough protection to consumers.... It would thus be questionable whether implicit consent would constitute informed consent. Black's Law Dictionary defines informed consent as 'a person's agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives.'" Jeanette Teh, Note, *Privacy Wars in Cyberspace: An Examination of the Legal and Business Tensions in Information Privacy*, 4 YALE SYMP. ON L. & TECH. 1 (2001-02). *See also* William G. Ross, *An Ironic and Unnecessary Controversy: Ethical Restrictions on Billing Guidelines and Submission of Insurance Defense Bills to Outside Auditors*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 527 (2000) ("ethics opinions have tended to take the position that informed consent requires explicit rather than implicit authorization to release billing records to auditors [in insurance defense contexts]," *citing* D.C. Bar Legal Ethics Comm., Op. 290 (1999); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Ethics Op. 716 (1999)).

It defies logic, however, to assert that a lawyer may never confidently, and accurately, conclude that she has "informed consent" from her client to take some action for which such consent is required, even absent an articulated discussion. A lawyer may know, with a high degree of certainty, from her many interactions with her client that the client will not object to the lawyer's disclosing some fact. That reasoning supports the Rule's Comment's allowance of inferred informed consent.

<sup>67</sup> *See, e.g.*, ABA Comm. on Ethics and Prof. Resp., Formal Op. 01-421 (2001) (lawyer hired by insurance company to defend insured normally has implied authorization to disclose to insurer information about representation of insured that will advance insured's interests and not adversely affect material interest of insured); Haw. Ethics Op. 38 (1999) (lawyer may disclose information relating to representation of deceased client when doing so would effectuate client's estate plan); RESTATEMENT, *supra* note , at §61 (permitting disclosure that advances client's interests).

<sup>68</sup> MODEL RULES, *supra* note , at R. 1.6(a).

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."<sup>69</sup> If Penn asks each of her clients for such permission after the required communication and explanation, and if each client approves, then Penn may share her list with her prospective employer.

While this exception thus would cover Penn, it cannot serve as the broad authorization that lawyers like Penn need for their career moves. A moment's reflection makes this understandable. There are two plausible times when Penn might seek her clients' permission and engage in the informed consent discussion contemplated by the Rules. Penn might ask for client consent at the time when she is contemplating leaving, but that suggestion is terribly impractical and problematic. A lawyer like Penn may have many reasons not to reveal to her clients her interest in changing law firms, including the obvious one that telling her clients means (and likely requires) informing her present employer.<sup>70</sup>

The other plausible alternative is for lawyers generally, as a practice, to request this kind of prospective informed consent from clients at the moment of the initial engagement. That suggestion is equally impractical and problematic. To raise with a client at the time the client is establishing a serious professional relationship with a lawyer the possibility that the lawyer may later leave the firm is awkward at best and harmful at worst.<sup>71</sup> This alternative seems also to be an unreliable one, particularly given the definition of informed consent just quoted. Even if Penn engaged a new client in a sufficient "informed consent" conversation at the time of the client's engagement, say six years ago, she needs to worry whether that consent remains "informed" six years later. Some circumstances may have changed, either on the lawyer's end or on the client's end. With some evidence of disfavor within professional ethics of "advance waivers,"<sup>72</sup> the six (or one might imagine thirty, or more) year old consent may not withstand scrutiny.

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<sup>69</sup> *Id.*, at R. 1.0(e).

<sup>70</sup> See HILLMAN, *supra* note , at § 4.8.3 (describing the limitations on lawyers' contact with clients before the lawyers announce to their firm their intentions to depart). *But see* ABA Comm. on Ethics and Prof. Resp., Formal Op. 99-414 (1999)(a migrating lawyer "does not violate any Model Rule in notifying the current clients of her impending departure by in-person or live telephone contact before advising the firm of her intentions to resign"). Hillman points out that Op. 99-414's conclusion may be correct as an interpretation of the Model Rules, but it likely represents a violation of fiduciary responsibilities. See HILLMAN, *supra* note , at 2:23, § 2.2.4.

<sup>71</sup> See Shapiro, *Bushwhacking the Ethical High Road*, *supra* note , at 152; *cf.* Richard E. Flamm, *Importing "Taint" in Lateral Hires: How to Protect Against Conflicts of Interest When Lawyers Change Firms*. 8 CAL. LAW. 65, 65 (1988)(noting the impracticalities of conditioning employment of lateral hire on obtaining waiver of conflicts from current client).

<sup>72</sup> See RESTATEMENT, *supra* note , at §122 cmt. *d* (client waivers to future conflicts are subject to special scrutiny and are generally ineffective). See also *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 227-29 (7th Cir. 1978); *Worldspan, L.P. v. Sabre Group Holdings, Inc.*, 5 F. Supp.2d 1356, 1360 (N.D. Ga. 1998). *But see* *Visa U.S.A., Inc. v. First Data Corp.*, 241 F. Supp.2d 1100, 1106-07 (N.D. Cal. 2003) (law firm's use of an advance waiver was proper even though waiver did not specifically state the exact nature of future conflict). In a very recent opinion, ABA Comm. on Ethics and Prof. Resp., Formal Op. 05-436



It is true, of course, that impracticability and discomfort ought not serve as sufficient objections to an act if the professional ethical standards require the impractical and uncomfortable act. But the worry about using the informed consent exception to Rule 1.6 is not limited to the discomfort and practicality concerns. The worry also focuses on whether clients ought to have a veto on Penn's revealing their identity when she changes jobs.

Here is the question stated flatly: If Penn's clients own the right to disclose their identity, then Penn will be required to seek their informed consent (or rely upon an implicit permission, which is simply a variation of the same thing<sup>73</sup>). If they do not own that right, then she is not bound to ask for their leave. If the clients own that right, then they may, one presumes, withhold it for whatever reason, and could preclude Penn from moving by not giving her the authorization she needs.

It follows (although this may not be entirely self-evident) that if Penn finds a different exception to Rule 1.6 for this disclosure, then the clients will not "own" this right. Without such an exception, then the clients do own it. It makes sense, then, to proceed to a consideration of a different exception to assist to answer this critical question.

ii) "Impliedly Authorized to Carry Out the Representation"

The Model Rules also allow a lawyer to reveal information otherwise protected by Rule 1.6 without informed consent of the client if such revelation is "impliedly authorized to carry out the representation ...."<sup>74</sup> Understanding the meaning of this phrase will assist to see whether it covers Penn's client lists.

Understanding the scope of the "impliedly authorized" clause requires, initially, the resolution of an important predicate question: Does this clause serve only as a reliable surrogate for actual client consent? In other words, does this clause only cover matters which the lawyer firmly believes that the client would authorize disclosure if asked, in circumstances where explicit asking is impractical, or does it instead cover

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(May 11, 2005), the ABA's Committee on Ethics and Professional Responsibility withdrew its earlier ABA Op. 93-372, which discouraged advance waivers. Relying on a new Comment [22] to Model Rule 1.7, the Committee concluded that an "open-ended" advance waiver may be effective where the person giving it is sophisticated or represented by other counsel on the waiver issue.

<sup>73</sup> One can imagine circumstances where a lawyer is required to obtain informed consent from a client before acting but appropriately acts with reliably implicit permission from the client. *See, e.g.,* Kagel v. First Commonwealth Co., Inc., 534 F.2d 194, 195 (9th Cir. 1976) (consent maybe express or implied); *In re Richard's Estate*, 602 P.2d 122, 128 (Kan. Ct. App. 1979) (client may expressly or impliedly consent to attorney's representing adverse interests). *But see* *In re Trinidad Corp.*, 229 F.2d 423, 430 (2nd Cir. 1955) (client consent for attorney to represent adverse interest must be suitably attested and may not be implied).

<sup>74</sup> MODEL RULES, *supra* note , at R. 1.6(a).

some matters which are authorized by the nature of the lawyer's work *regardless of whether the client would approve the disclosure if polled about it?* If the former is the case, this exception adds nothing to the "informed consent" exception discussed, and provisionally rejected as Penn's authority basis, above. If, though, the latter understanding captures the clause's intent, then it might serve as the basis for authorizing Penn's release of her list.

Certain language within the Comment to Rule 1.6 lends support to the latter interpretation of this clause, that the exception is not merely a surrogate for client consent. Comment [5] to Rule 1.6 reads in part as follows:

Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot be properly disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter.<sup>75</sup>

The first sentence and the last clause of this quotation offer support for the former interpretation, one we might term the "surrogacy" construction holding that a lawyer may reveal information when she is comfortably certain that her client would approve if asking the client were convenient. The first example of the second sentence, though, seems to indicate a circumstance where a lawyer is authorized to make disclosures even if the client, if asked, would likely say "no way." The drafters' use of the example of "a fact that cannot properly be disputed" can only be understood as making that point, and not making the surrogacy point.<sup>76</sup>

One may, then, accept that Rule 1.6 contemplates revelation of certain information otherwise protected by the Rule when that revelation is necessary to carry out the lawyer's representation of the client, and even in instances where the client might prefer that revelation not occur.

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<sup>75</sup> *Id.* at R. 1.6, cmt. [5].

<sup>76</sup> This point deserves some further explanation to make it clearer. If the drafters in Comment [5] were only making the surrogacy point, they could have used the example of a *favorable fact*, which lawyers of course cannot reveal without client permission given the breadth of Rule 1.6. So if a lawyer were in a negotiation and wished to argue the client's strong facts, Comment [5] would cover the obvious but necessary point that Rule 1.6 does not preclude the lawyer from using the client's protected information to win the client what the client wants the lawyer to win. This may be a trivial point, but a necessary one given the scope of information protected by the rule. By using the example of "a fact that cannot be properly disputed," the drafters were making a far more important concession—that lawyers may reveal facts when their professional obligation requires them to, even if their client were to refuse permission to do so. Indeed, the language of Comment [5] implies that the lawyer may make such a disclosure even in the face of a client's express objection. (The use of the phrase "for example" undercuts the argument made here, following as it does a sentence that can only be read as a surrogacy principle, but that counter-implication seems too weak a basis to overcome the strong anti-surrogacy message from the example itself.)

The question then becomes whether Penn's revealing her client list to a prospective new firm such as the Target Firm fits within this exception to Rule 1.6. An immediate problem arises with an attempt to use the "impliedly authorized" clause to justify non-consensual disclosure of Penn's clients' identities. That problem is this: Penn's sharing her client list may be necessary to Penn's career and to the overall functioning of the legal profession, but it is not "necessary" to Penn's effective lawyering on her clients' behalf, unless one adopts a broad vision of what is "necessary." It is one thing for Penn to conclude that she cannot effectively represent a client without disclosing some "fact that cannot be properly disputed,"<sup>77</sup> as the Rule imagines. It is another thing entirely for Penn to conclude that she cannot effectively serve as a client's lawyer, writ large, unless she has the ability to change jobs during her career. It is not an impossibly strained argument, but it is admittedly strained.

The above arguments based on the "impliedly authorized" exception may be summarized by the following advice to a lawyer like Penn:

A laterally-migratory lawyer may only reveal her client lists, which are covered by Rule 1.6, if her clients authorize her to do so, or if she finds an exception that covers the lists within the express language of Rule 1.6. She prefers, for many reasons, not to rely on her client's explicit permission. One such exception may allow her to sidestep explicit permission. Lawyers have permission under 1.6 to disclose otherwise protected information if "impliedly authorized ... when appropriate in carrying out the representation."<sup>78</sup> A lawyer cannot function as in that capacity if she does not have permission to move around during her career. The profession requires mobility, and it requires conflict checking as a precondition to mobility. Since mobility is a necessary by-product of being an effective lawyer, and because sharing lists is a necessary condition for mobility, the lawyer's list sharing is, through that syllogistic reasoning, permitted by the language of Rule 1.6.

This summary demonstrates the existence of some non-frivolous (if perhaps a bit tortured) reading of Rule 1.6 to justify what Penn must, for all practical purposes, have permission to do. But this exception, if interpreted in the manner just described, seemingly proves too much. It makes no distinction between those revelations which would not cause Penn's client any embarrassment or harm, and those that would create such effects. If the implicit authorization arises because of the need for lawyer mobility alone, it eludes that fine but important distinction.

One final exception within Rule 1.6 remains, which may offer a more comfortable justification to Penn for her list sharing.

iii) "To Comply with Other Law"

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<sup>77</sup> See note *supra*.

<sup>78</sup> MODEL RULES, *supra* note , at R. 1.6 cmt. [5].

Rule 1.6(b)(6) permits a lawyer "to reveal information relating to the representation of a client to the extent that the lawyer reasonably believes necessary ... (6) to comply with other law or a court order."<sup>79</sup> This exception may also serve as a basis for Penn's client list sharing with the Target Firm.

As the analysis above developed, Penn must assist the Target Firm in its compliance with its fiduciary responsibility to its clients to avoid disqualifying conflicts of interest. The Target Firm has an enforceable legal obligation (that is to say, "other law") to protect its clients from that possibility. If Penn wishes to relocate to the Target Firm, she must disclose her client identities. Thus, the argument proceeds, in order to comply with her professional obligations, which have the force of "law," Penn must disclose her lists, and need not ask client consent to do so.

There are two hitches in this textual analysis, though. First, it is apparent that the analysis just outlined is not completely satisfactory. Penn is under no external obligation to transfer to the Target Firm, so it is not entirely genuine to assert that some external law requires her to make some disclosure of protected information. Her situation is different, it seems, from that of a lawyer required to comply with the Tax Reform Act of 1984<sup>80</sup> or the proposed reporting requirements of the 2002 Sarbanes-Oxley Act.<sup>81</sup> Still, once she

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<sup>79</sup> MODEL RULES, *supra* note 2, at R. 1.6(b)(6).

<sup>80</sup> See Tax Reform Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (codified as amended at 26 U.S.C. § 6050I)(requiring any person engaged in trade or business who receives \$10,000 in cash in one transaction or two or more related transactions to file a return with the IRS detailing such transaction, including the name of the person from whom the cash was received) [hereinafter Tax Reform Act]. See, e.g., *United States v. Leventhal*, 961 F. 2d 936, 940 (11th Cir. 1992)(finding attorney failed to carry his burden of proving that information requested by IRS in return was protected by attorney-client privilege); *Deguerin v. United States*, 214 F. Supp.2d 726, 739 (S.D. Tex 2002)(criminal defense lawyers' withholding of clients' names from IRS cash payment report forms was with intentional disregard for the filing requirements to extent that information was not protected under the attorney-client privilege). *But see* *United States v. Monnat*, 853 F. Supp. 1301, 1303 (D. Kan. 1994)(while reporting provision and case did not exclude lawyer from compliance, court would forward to federal court committee on attorney conduct for full review of the ethical ramifications of counsel's disclosure of name of client).

<sup>81</sup> See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended at 15 U.S.C. § 7245)(requiring SEC to adopt rules that require attorneys for corporations to report wrongdoing up the corporate ladder). Pursuant to the authority granted to it under §7245, the SEC proposed a "noisy-withdrawal" rule requiring attorneys for covered entities to withdraw from representation and to notify the SEC of such withdrawal in cases on corporate officers' malfeasance. Securities and Exchange Comm., RIN 3235-AI72, Implementation of Standards of Professional Conduct for Attorneys (January 29, 2003) at <http://www.sec.gov/rules/proposed/33-8186.htm>. As of this writing, the SEC has not adopted the noisy withdrawal rules. For a discussion of the SEC's proposals, see, e.g., Todd John Canni, *Protecting the Perception of the Public Markets: At What Cost? The Effects of "Noisy Withdrawal" on the Long Standing Attorney-Corporate Client Relationship*, 17 ST. THOMAS L. REV. 371 (2004)(discussing the likely effects of noisy withdrawal on the attorney-corporate client relationship, asserting that negative effects outweigh perceived benefits); Kaveh Noorishad, *The Sarbanes-Oxley Act and In-House Legal Counsel: Suggestions for Viable Compliance*. 18 GEO. J. LEGAL ETHICS 1041 (2005)(considering the practical effects the Sarbanes-Oxley Act will have on attorneys and their disclosure of client confidences). Cf. Richard W.

chooses to change firms, some valid external law affects her in a way which plausibly could trigger this exception to 1.6.

The second hitch may be more problematic. According to Rule 1.6, its exception for complying with some outside law is accompanied by a seeming requirement that the lawyer discuss the mandated disclosure with the client before revealing protected information. Comment [13] to Rule 1.6 includes the following two puzzling sentences:

When disclosure of information relating to the representation appears to be required by other law, the lawyer *must discuss the matter with the client* to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.<sup>82</sup>

It is difficult to understand the juxtaposition of the two sentences just quoted, and their intended meaning when read together. For Penn, the Comment's two sentences create some legitimate uncertainty. Recall that Penn's only logically plausible course of action is to share her client lists with the Target Firm without having to ask each of her clients for permission to do so. It is precisely for that reason that she looks to this exception to Rule 1.6. At first glance, it appears that the first sentence just quoted will not aid Penn in her quest for discrete authority to do what she proposes. It is a mandatory instruction, to the extent that a Comment's language can be understood as compulsory,<sup>83</sup>

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Painter & Jennifer E. Duggan, *Lawyer Disclosure of Corporate Fraud: Establishing a Firm Foundation*, 1996 SMU L. REV. 225, 263 (1996)(Prof. Painter was a leading architect of the SEC's proposals).

<sup>82</sup> MODEL RULES, *supra* note , at R. 1.6, cmt. [13](emphasis added).

<sup>83</sup> The Model Rules themselves refuse to admit that the Comments carry the weight of enforceable obligation. Consider this language from the "Scope" section of the Rules:

Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. ... Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

MODEL RULES, *supra* note , at Scope, Cmt. [14]. The Comments, then, do not create new obligations absent from the Rules, but they do, if we read the last clause correctly, inform lawyers about how to comply with the mandates of the Rules themselves. Notwithstanding the implication of the language just quoted, the Comment we are working to understand does not use the softer "should," but the much stronger "must." Given its reference to another Rule with mandatory obligations of its own (Rule 1.4), this Comment does seem to mean what it says.

For further discussion of the authority of language in the Comments to the Model Rules, see, e.g., Geoffrey C. Hazard, Jr., *Lawyers and Client Fraud: They Still Don't Get It*, 6 GEO. J. LEG. ETHICS 701, 725-27 (1993) (noisy-withdrawal Comment of Rule 1.6 conferred discretion on lawyer which black-letter rule seemed to withhold); Margaret C. Love & Lawrence J. Fox, *Letter to Professor Hazard: Maybe Now He'll Get It*, 7 GEO. J. LEG. ETHICS 145, 146 (1993) (members of the ABA Standing Committee on Ethics and Professional Responsibility respond that the noisy withdrawal Comment to Rule 1.6 cannot be relied upon as authority); Ronald D. Rotunda, *The Notice of Withdrawal and the New Rules of Professional*

that she discuss with her clients her upcoming disclosure and the "other law" that requires it. The second quoted sentence, with its odd "however," seems as if it will offer an exception to the first sentence, but no meaningful reading of that sentence supports any such implication. Indeed, it is hard to fathom what the second sentence adds at all.<sup>84</sup>

So is the "comply with other law" exception a dead end for Penn, because of this accompanying obligation to discuss her plans with her clients? Perhaps, but there remains one further interpretive turn which Penn must explore. Penn "must" discuss her impending disclosure with her clients, says the Comment, but only when Rule 1.4 requires her to do so.<sup>85</sup> Does Rule 1.4 require Penn's discussion with her clients about her pending disclosure of her list to the Target Firm?

The answer to *that* question requires a parsing of the language of Rule 1.4.<sup>86</sup> That language, frankly, does not provide Penn an obvious or easy answer. For the most part, Rule 1.4 simply does not apply to this act on Penn's part, and it absolutely does not apply to any of Penn's *former* clients.<sup>87</sup> Rule 1.4 is intended, principally, to ensure that a

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*Conduct: Blowing the Whistle and Waving the Red Flag*, 63 OR. L. REV. 455 (1984) (the noisy-withdrawal Comment to Rule 1.6 must be authoritative because it makes consistent sections of the Model Rules that would otherwise appear to be inconsistent).

<sup>84</sup> This interpretive point may be developed a bit further. The first quoted sentence's meaning is apparent: If some other law applies and "appears" to require disclosure, then under the provisions of Rule 1.4 a lawyer must discuss the implications of the lawyer's obligation with the lawyer's client. This offering may imply that the client will somehow persuade the lawyer not to make the disclosure. Viewed in the context of a rather harmful disclosure, such as the Tax Reform Act, *see supra*, note , this sentence may intend to stress the word "appears" to invite some dialogue about alternative ways to comply with the legal obligation. The following sentence, save for the "however," makes some sense while being essentially superfluous. It seems to say that if indeed the other law compels some disclosure, this (b)(6) exception permits disclosure. It is the "however" which puzzles us. Following immediately after the mandate to discuss the disclosure with the client, it seems to suggest an exception to that obligation. But it cannot, and the rest of the sentence does not. It would appear that the two sentences, read together amid some common sense, would suggest an obligation to discuss the impending disclosure with the client, at least to the extent that Rule 1.4 would require doing so.

<sup>85</sup> *See* MODEL RULES, *supra* note , at R. 1.6, cmt. [13] ("must consult ... to the extent required by Rule 1.4").

<sup>86</sup> *Id.*, at Rule 1.4.

<sup>87</sup> Rule 1.4 has very little, if any, applicability to former clients. It is a rule intended to encourage (or require) meaningful communication between a lawyer and a client about the client's ongoing case. It is a commonplace observation that at the top of clients' lists about dissatisfaction with their lawyers is the lawyers' failure to keep in touch, to return telephone calls, and to keep the client informed about the case. *See, e.g.*, Gerald C. Sternberg, *Regulating the Legal Profession*, WIS. LAWYER 25, 27 fig.2 (1998) (listing "lack of diligence" and "lack of communication" as the two largest categories for grievances against Wisconsin lawyers); Stephen G. Bene, *Why Not Fine Attorneys?: An Economic Approach to Lawyer Disciplinary Sanctions*, 43 STAN. L. REV. 907 (1991) (citing ABA report that finds "lack of communication" as the most prevalent complaint brought against attorneys). By contrast, lawyers are entirely free never to call former clients again. The only possible connection between Rule 1.4 and a former client is the "informed consent" clause which the text discusses immediately below.

lawyer keeps her client informed about the developments of the client's case, and counsels the client about the important decisions which arise in the course of the representation.<sup>88</sup> Assuming reliably that the matter at hand (Penn's search for another job) is not something which Penn must share, as a matter of professional competence, with her existing clients at this stage of her job search, then most of Rule 1.4's teachings will not apply.

The one part of this rule which Penn must understand better is Rule 1.4(a)(1), which reads as follows:

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules.<sup>89</sup>

To articulate the strand of potential duties that Penn must sort out, the reasoning looks like this: Rule 1.6(a)(6) requires Penn to discuss her list sharing with her clients only if Rule 1.4 would require that she do so as part of her responsibility to keep her clients informed. Rule 1.4, for its part, requires her to do so only if some Rule would so obligate in order for her to obtain informed consent from her client. Whether the Rules require Penn to obtain informed consent from her clients was the very question that began this circuitous romp through the Model Rules.<sup>90</sup> The inquiry has indeed come full circle, with no apparent answer from the language of the Rules themselves.

#### iv) Summary of the Model Rules' Exceptions Analysis

This section will review where Penn ends up after her careful assessment of the Model Rules, searching for permission within the Rules to share her client list with her prospective new firm, the Target Firm.

The Rules permit Penn to make the disclosure of her former and present client identity if she obtains the informed consent of those clients, but that permission is both inadequate (her former clients cannot have a veto over her ever changing firms) and impractical. The Rules might permit her to share this otherwise protected information without any advance client permission if doing so is impliedly authorized in order to carry out the representation, but to fit this disclosure into that category is something of a stretch, particularly given the fact that Penn could fully represent her existing clients, and presumably did fully represent her prior clients, without making this particular disclosure

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<sup>88</sup> See, e.g., J. Nick Badgerow, *The Lawyer's Ethical, Professional, and Proper Duty to Communicate With Clients*, 7 KAN. J.L. & PUB. POL'Y 105 (1998).

<sup>89</sup> MODEL RULES, *supra* note , at R. 1.4(a)(1).

<sup>90</sup> See text accompanying notes *supra*.

at this particular time. While the implicit authorization source may instead be the lawyers' general ethical obligation to avoid conflicts of interest, that permission does not fit the Model Rule's language very tidily and it does not allow for any distinction between revealing innocuous representations and revealing embarrassing representations.

The Rules also permit Penn to share her client list with the Target Firm if she understands that she must do so in order to comply with some other law outside of the Rules scheme. Fitting into that exception, like the previous one, is also a bit of a stretch—not entirely without foundation but not a perfect exercise of interpretive logic. That exception also seems to demand that Penn discuss the impending "obliged by law" disclosure with her clients, which of course would eliminate the benefit of the exception in the first place. And finally it, also, does not self-evidently protect the clients for whom the very notice of Penn's representation causes embarrassment or harm.

These conclusions leave Penn somewhat perplexed, or it ought to. Her options remain rather limited. She could ask for an ethics opinion from a state or local bar association,<sup>91</sup> but (with all due humility) what the bar association committee would conclude is exactly what this analysis has just concluded, leaving Penn precisely where she began.<sup>92</sup> She could, also and understandably, conclude that it makes no sense for there not to be permission for her to share her list, because a ban on that practice would immobilize the legal profession in her state, and on that basis she could share her list without any real worry that she has committed an unethical act intrinsically, or that she will be subject to bar discipline extrinsically.

This final alternative is Penn's best and only true option. She may conclude, honestly and in good faith, that *some* reading of the Model Rules has to support her doing not only what lawyers do all the time, but what lawyers must do to effect a responsible and ethical career change. She may not know, absent any further interpretation by the courts (or, perhaps, by the disciplinary authority<sup>93</sup>) of her state, which of the two exceptions to Rule 1.6 best cover her, but she can be quite certain that one of them will.

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<sup>91</sup> See Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 GEO. J. LEG. ETHICS 313 (2002) (arguing that the varying levels of authority of ethics opinions in jurisdictions lead to their uncertain authority as a source of advice for lawyers).

<sup>92</sup> Of course, the local bar association would probably conclude what the text mentions in the next sentence—that despite the absence of any explicit authority for her doing so, she has to be able to share her client list with her prospective employer, and setting up the opinion as the source of authority on which she could rely. A recent ethics opinion on this topic—indeed, the impetus for this Article—appears to have done precisely that, although with a version of Rule 1.6 which offered the lawyer an argument not available to Penn, whose Rule 1.6 matches that of the Model Rules. See Boston Bar Op. 2004-1, *supra* note (concluding that a lawyer may reveal only as much "conflict-checking information" as is necessary to accomplish a valid conflicts check, and relying on a qualification of "confidential" within Rule 1.6 not present in the Model Rule version). On the question of the risk Penn assumes by relying upon such informal advice, see Joy, *supra* note , at 382 (noting that lawyers have been disciplined despite having the support of an ethics committee opinion for the act or conduct later found improper).

<sup>93</sup> In many states, the agency authorized to discipline lawyers publishes its findings and decisions, and those precedents function as a form of *stare decisis* upon which lawyers may later rely. See, e.g., Attorney



It is surprising that some clearer authority on this point is not reflected in the Model Rules, particularly given the ABA's Ethics 2000 Commission's meticulous review of each Model Rule,<sup>94</sup> and the ABA's approval in 2003 of changes to nearly every rule.<sup>95</sup> The Commission made important changes to Rule 1.6,<sup>96</sup> but did not address the conflict checking conundrum at all. That absence seems to be attributable, per one report, to a perceived understanding that the sharing of client information is professionally acceptable.<sup>97</sup> Not only does the preceding analysis show this understanding to be problematic, but other threads within professional responsibility discourse confirm that this is indeed a troublesome topic.<sup>98</sup> A more cynical view would attribute the

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Registration & Disciplinary Commission of the Supreme Court of Illinois, at [http://www.iardc.org/rd\\_database/rulesdecisions.html](http://www.iardc.org/rd_database/rulesdecisions.html) (searchable disciplinary reports and decisions database)(last visited July 25, 2005); the Maine Board of Overseers of the Bar, at <http://www.mebaroverseers.org/Discipline/Reprimands.htm> (collection of disciplinary proceedings since 2000)(last visited July 25, 2005) the Massachusetts Board of Bar Overseers and Office of Bar Counsel, at <http://www.mass.gov/obcbbo/decisions.htm> (cataloguing all agency decisions since 1999)(last visited July 18, 2005).

<sup>94</sup> See American Bar Association, Comm. on the Evaluation of the Rules of Prof'l Conduct (summary of findings and proceedings found at [http://www.abanet.org/cpr/e2k-report\\_home.html](http://www.abanet.org/cpr/e2k-report_home.html))[hereinafter Ethics 2000 Report]. See also Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 443 (2002).

<sup>95</sup> See Lonnie T. Brown, Jr., *Foreword: Symposium—Ethics 2000 and Beyond: Reform of Professional Responsibility as Usual*, 2003 U. ILL. L. REV. 1173, 1174-75 (describing the vote of the house of delegates to the Ethics 2000 Commission's proposals).

<sup>96</sup> See Ethics 2000 Report, *supra* note . The Ethics 2000 Commission paid considerable attention to Rule 1.6 in its deliberations and its proposals, but none of the suggested changes or improvements concerned the topic of conflict checking. See generally, Amanda Vance & Randi Wallach, Comment, *Updating Confidentiality: An Overview of the Recent Changes to Model Rule 1.6*, 17 GEO. J. LEGAL ETHICS 1003 (2004).

<sup>97</sup> The Reporter for the Ethics 2000 Commission, Professor Nancy Moore, has confirmed privately that the Commission spent very little, if any, time addressing the confidentiality concerns in the conflict-checking area. E-mail communication, Nancy Moore to Paul Tremblay, July 26, 2004 (on file with author). Her supposition was that the Commission saw little need for an explicit exception, because the "impliedly authorized" language of Rule 1.6 ought to cover the topic. *Id.* As the discussion here has shown, that exception seems unable to accomplish adequately what lawyers in practice need it to accomplish.

<sup>98</sup> See SHAPIRO, *supra* note , at 330 (comments quoted at note 1 *supra*). On several occasions, the topic of revealing client information for purposes of checking for conflicts has appeared on the listserv dedicated to legal ethics (see "Legal Ethics Discussion List (restricted to lawyers, law professors, and law students only)" [legaethics@lists.washlaw.edu](mailto:legaethics@lists.washlaw.edu)). When the topic has appeared, the listserv contributors struggle to identify any authority justifying the universal and necessary practice. As one contributor wrote in 2004,

I suppose I'm suggesting that revealing to the new firm the identity of the former client is impliedly authorized by the former client absent an express prohibition because it may be to the former client's benefit. Add your suggestion that the inquiring firm has a duty to keep the [identity] confidential, and the harm to the former client is diminished even further. However, as you point out, the rule talks about implied authority to advance the representation, which, of course, has now ended. I can see where someone would say that this cuts off all notions of

Commission's silence to a fear that this topic is unmanageably complicated, and that any systematic rules-based policy would be unworkable.<sup>99</sup> These same worries apply to the next topics addressed in this Article.

## 2. The Restatement's Resolution

Penn practices in a state which has adopted the ABA Model Rules verbatim. Presumably, those Rules serve as the first-order source of guidance to Penn and her compatriot lawyers in her state, except inasmuch as the Rules have been interpreted, or overridden, by the common law of that state.<sup>100</sup> She must conduct her lawyering practice in line with the above analysis, then, with no assistance from any court in her state interpreting Rule 1.6 on the questions she faces.<sup>101</sup>

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implied authority—that this form of authority continues only as long as the lawyer is acting as the client's agent. I'm not sure I have an answer to that problem, and, like you, probably have to fall back on necessity and practicality. Not allowing disclosure of former client [identities] would stymie lateral hiring by law firms, or, at least, put the firms at a much greater risk of being conflicted out of current or future representations to the great jeopardy of the firm's clients in those cases.

Perhaps the ABA's Committee ought to be asked for an Ethics Opinion on this issue.

Fred Moss, Listserv contribution, April 12, 2004. See also listserv post of W. William Hodes, quoted at note *infra*.

<sup>99</sup> See SHAPIRO, *supra* note , at 96-103 (reporting on the tremendous difficulty for larger firms to attend to their tangled webs of connections to industries and corporate families); Jason T. Hungerford, Note, *Working with What We've Got: Toward a Modern Approach to Ethical Screens*, 18 GEO. J. LEGAL ETHICS 823, 823 (2005)(noting the "naïveté" of the ABA's approach to the use of ethical screens in light of the complexity of modern conflicts and the limitations on lawyer mobility and clients' choice of counsel).

<sup>100</sup> Many lawyers have learned starkly that the rules of professional conduct within their state are enforceable; lawyers ignore or violate those rules at their peril. See, e.g., *In re Berg*, 955 P.2d 1240 (Kan. 1998) (lawyer's sexual relations with vulnerable divorce clients violated Rule 1.7 and warranted disbarment); *In re Gabell*, 858 P.2d 404 (N.M. 1993) (disbarring lawyer who violated Rule 3.3 by forging documents). Of course, the common law of a state might create some tension between the language of some rule and the court-driven authority in a particular context, and the trend of authority is that in such cases the common law trumps the rule. See, e.g., *Klemme v. Best*, 941 S.W.2d 493, 495 (Mo. 1997) (despite what rules of professional conduct might say, attorney owes client a basic common law fiduciary duty); *Maritrans GP, Inc. v. Pepper, Hamilton, & Scheetz*, 602 A.2d 1277, 1285 (Pa. 1992) (disciplinary rules derive from the lawyer's common law duties, not the other way around); . But absent that overriding common law, lawyers are bound by the language of their state's rules. (This discussion may elude for present purposes the questions about lawyers practicing across jurisdictions, or lawyers practicing in federal courts. For a vivid example of those possibilities, see STEPHEN GILLERS, *REGULATION OF LAWYERS* 573-86 (7th ed. 2005).)

<sup>101</sup> While Penn practices in a fictitious jurisdiction, the statement in the text is nevertheless correct, because *no* state or federal court has issued any opinion about the questions this Article seeks to answer. Four state or local bar associations from three jurisdictions have issued ethics opinions authorizing lawyers to reveal certain information to effect an adequate conflict check, but all three jurisdictions have a version of Rule 1.6 (or its equivalent) which permits distinctions not available under the Model Rules language. See Boston Bar Op. 2004-1, *supra* note ; District of Columbia Bar Assn. Opinion 312 (May 2002)[hereinafter DC Op. 312]; N.Y. State Bar Assn., Committee on Prof. Ethics, Op. 720, 1999 WL 692571

But Penn cannot help but look to the Restatement<sup>102</sup> for some help in deciding what she may do. The Restatement has no independent authority in her state, or indeed anywhere,<sup>103</sup> but it is an oft-cited and quite well-respected treatise.<sup>104</sup> And it offers some helpful instruction to the questions posed here, albeit not in a deeply persuasive way.

That this authority is not more directly helpful is puzzling. The Restatement consists of two comprehensive volumes and covers the most important legal issues faced by lawyers.<sup>105</sup> It says nothing at all, though, about the ethical questions involved in revealing client information in order to check for conflicts of interest. It does, however, address some of those questions by implication.

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(1999)[hereinafter "NY State Op. 720"]; Assoc. of the Bar of the City of New York, Formal Op. 2003-2 [hereafter NY City Op. 2003-2]. The Article considers the influence of those four opinions below. See text accompanying notes *infra*.

<sup>102</sup> See RESTATEMENT, *supra* note .

<sup>103</sup> The Restatement, by its very name, seeks to summarize and capture the substantive law applicable to lawyers. "This Restatement addresses only those constraints [upon lawyers] imposed by law—that is, official norms enforceable through a legal remedy administered by a court, disciplinary agency, or similar tribunal. ... This Restatement undertakes to restate much of the law governing lawyers ...." *Id.*, at 3. Whether the treatise in fact *restates* the substantive law or whether it in fact *creates* that law has been the subject of some debate. See, e.g., *Towne Dev. of Chandler, Inc. v. Superior Court*, 842 P.2d 1377, 1381-82 (Ariz. Ct. App. 1992) (holding that matter is governed by Model Rule 1.10 as adopted by the state supreme court, not by the "countervailing line of thought" that has emerged in the Restatement); Harold G. Maier, *The Utilitarian Role of a Restatement of Conflicts in a Common Law System: How Much Judicial Deference Is Due to the Restaters or "Who are These Guys, Anyway?"*, 75 IND. L.J. 541, 548 (2000) (arguing that no restatement has any independent legal force, and can never be more than a guide); Ted Schneyer, *The ALI's Restatement and the ABA's Model Rules: Rivals or Complements?*, 46 OKLA. L. REV. 25, 30 (1993) (arguing that professional ethics law is far from uniform; any attempt to "restate" it must make policy choices, and must pass judgment on the Model Rules); Fred C. Zacharias, *Fact and Fiction in the Restatement of Law Governing Lawyers: Should the Confidentiality Provisions Restate the Law?*, 6 GEO. J. LEGAL ETHICS 903, 926 (1993) (individual states have made a conscious choice to address idiosyncratic jurisprudential differences, thus making any attempt to restate the law governing lawyers ineffective); see also Carrie Menkel-Meadow, *The Silences of the Restatement of the Law Governing Lawyers: Lawyering as Only Adversary Practice*, 10 GEO. J. LEGAL ETHICS 631, 669 (1997) (Restatement should go further in crafting new "law" for lawyers to emphasize that lawyers should discourage litigation).

<sup>104</sup> See, e.g., *Makins v. District of Columbia*, 227 F.3d 544, 550 (D.C. Cir. 2002) (permitting local court to rely upon the Restatement of Law Governing Lawyers for authority); *Attorney Grievance Comm'n of Md. v. Brooke*, 821 A.2d 414, 425 (Md. 2003) (using the Restatement of Law Governing Lawyers to support decision on attorney-client relationship issue). *But see* McMorrow, *supra* note , at 37 ("[I]t is fair to conclude that the Restatement of the Law Governing Lawyers has had relatively little influence in federal court practice. This suggests that the Rules of Professional Conduct (both state versions and the model) are the most important prescriptive generalizations to which the federal courts give initial attention when addressing attorney conduct issues.")

<sup>105</sup> The Restatement's effort represents "an event of major significance" and "a major piece of legal scholarship ...." Geoffrey C. Hazard, Foreword, RESTATEMENT, *supra* note , at xxi. See also David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 503(1990)(describing the project as a "comprehensive" restatement of the law of lawyering).

On the present question, about whether Penn may share her client identities with the Target Firm, the Restatement offers some direct support for the pragmatic conclusion that Penn may make such disclosures. The Restatement concludes that client identity is not protected information under the lawyer's ethical confidentiality obligation.<sup>106</sup> The treatise does so in three steps. First, it defines "confidential client information" broadly, much like Model Rule 1.6, as "consist[ing] of information relating to representation of a client, other than information that is generally known."<sup>107</sup> Second, it states that a lawyer may not "use or disclose confidential client information" where "doing so will adversely affect the interest of the client or if the client has instructed the lawyer not to use or disclose such information."<sup>108</sup> That interpretation, which covers a much narrower universe of information than the Model Rules' mandate,<sup>109</sup> gives a lawyer significant freedom to disclose matters such as client lists if the lawyer concludes that doing so is unlikely to harm the interests of her clients.

But the Restatement goes further than this. As a third step, in its Comments, the Restatement concludes expressly that client identity does not fit within the definition of information covered by Section 60. The Restatement begins this step by conceding that "the lawyer codes do not express the limitation" on disclosure to information either harmful to client interests or subject to a client request that it be kept secret,<sup>110</sup> but proceeds to state that "such is the accepted interpretation."<sup>111</sup> (The drafters, notably, cite no authority for that contention.)<sup>112</sup> It then uses client identity as an example of the need for its interpretation:

For example, under a literal reading of ABA Model Rules of Professional Conduct, Rule 1.6(a) (1983),<sup>113</sup> a lawyer would commit a disciplinary violation by

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<sup>106</sup> RESTATEMENT, *supra* note , at § 60, cmt. (c)(1).

<sup>107</sup> *Id.*, at § 59. Compare that definition to Model Rule 1.6, which encompasses "information relating to the representation," *see* MODEL RULES, *supra* note , at R. 1.6(a), and whose comment stresses that the Rule covers "all information relating to the representation, whatever its source." *Id.*, at cmt. [3]. Note that Rule 1.6 does not mention an exception for information which is "generally known," as the Restatement does. *But see id.* at Rule 1.9(c)(1)(creating an exception to the general prohibition against a lawyers' using a former client's information against the former client).

<sup>108</sup> RESTATEMENT, *supra* note , at § 60(1)(a).

<sup>109</sup> Compare MODEL RULES, *supra* note , at R. 1.6(a)(1)(covering all information regardless of whether disclosure of the information is harmful to the client, or whether the client has asked that the information be kept secret).

<sup>110</sup> RESTATEMENT, *supra* note , at Cmt. c(i).

<sup>111</sup> *Id.*

<sup>112</sup> *See id.* at Reporter's Note, Comment c(i)("Case law is sparse.")

<sup>113</sup> Note that the 2003 amendments to Model Rule 1.6 would not change the point being made by the Restatement's drafters here.

telling an unassociated lawyer in casual conversation the identity of a firm client, even if mention of the client's identity creates no possible risk of harm. Such a strict interpretation goes beyond the proper interpretation of the rule.<sup>114</sup>

If this interpretation is reliable, then lawyers such as Penn have established authority to share client lists in some instances. The interpretation makes sense from a policy perspective, but one nagging concern remains after the Restatement's assertions. It is obvious to anyone with a scant familiarity with the history of the Model Rules and their predecessors that the interpretation offered by the Restatement authors changes the wording of Rule 1.6 to *exactly the wording Rule 1.6 replaced in the previous Model Code of Professional Responsibility*.<sup>115</sup> The 1969 Model Code required lawyers to protect two defined categories of client information: that covered by the attorney-client privilege, which the Code referred to as "confidences,"<sup>116</sup> and "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client," which the Code called "secrets."<sup>117</sup> Information not falling into one of those two categories was, therefore, not subject to the lawyer's obligation of confidentiality.

When the Model Rules replaced the Model Code in 1969, they did away with that distinction and with those definitions. Rule 1.6, as shown above, stated simply that "[a] lawyer shall not reveal information relating to the representation," subject to its several exceptions.<sup>118</sup> As one prominent authority noted soon after the Rules' adoption, "[t]he definition in M[odel] R[ule] 1.6 transcends the Code in three important respects: ... (2) it includes information without regard to whether disclosure would embarrass or work to the detriment of a client ...."<sup>119</sup>

The Restatement, then, concludes that Model Rule 1.6 ought to be interpreted (or, perhaps more faithfully to the Restatement's claim, has been interpreted<sup>120</sup>) as if the Rule

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<sup>114</sup> RESTATEMENT, *supra* note , at § 60, Cmt. c(i).

<sup>115</sup> See MODEL CODE OF PROF'L RESPONSIBILITY, DR 4-101 (1980).

<sup>116</sup> *Id.* at DR 4-101(A) ("Confidence' refers to information protected by the attorney-client privilege under applicable law").

<sup>117</sup> *Id.*

<sup>118</sup> MODEL RULES, *supra* note , at R. 1.6(a).

<sup>119</sup> CHARLES WOLFRAM, MODERN LEGAL ETHICS 298 (1986). The other two respects noted by Professor Wolfram were "(1) it includes all information regardless of when it was learned by the lawyer; ... and (3) it provides a more limited exception for future client wrongdoing." *Id.* For purposes of this Article, the first difference has no relevance, and the third no longer seems accurate, given the amendments to Rule 1.6 since 1986.

<sup>120</sup> See RESTATEMENT, *supra* note , at Cmt. c(i) ("such is the accepted interpretation"). As noted earlier, the Restatement offers no cite nor support for such an interpretation, so one assumes that the conclusion is that of the treatise's drafters. If the drafters agree that such an interpretation makes the most sense, and no

had maintained the Code's more limited coverage. While such a policy choice might make good sense, the language of Rule 1.6 undercuts it fully, and the Restatement offers no attempt to reconcile its assertion with the language of the rule it is interpreting. This flimsy reasoning process deprives the Restatement's assertions of the authority that they might otherwise possess.<sup>121</sup>

### 3. Other Possible Authority

Might there be some other authority available to assist a lawyer such as Penn to understand what, if any, client identities she might reveal? The answer to that question is essentially no. The Restatement of Agency may seem a promising place to look,<sup>122</sup> but that treatise would not aid Penn very much. Because lawyers are agents,<sup>123</sup> the law of agency applies directly to them.<sup>124</sup> Agency law includes, among its fiduciary obligations,

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contrary authority (except, of course, the direct language of the rule itself) appears, then the drafters' assertion that "such is the *accepted* interpretation" might be said to be plausibly accurate.

The problem with that assertion, though, is that contrary evidence exists in the professional ethics world. Ethics experts do not seem to share the Restatement's supposedly "accepted" interpretation. Consider the following post to a leading legal ethics listserv (responding to a thread of conversations about the conflict-checking disclosure questions):

There is general agreement that client identity is confidential, but not privileged. At the San Antonio APRL [Association of Professional Responsibility Lawyers] meeting just past, for example, it was agreed by panelists and participants that big law firms do *not* have freedom to post client lists on their websites, without client consent.

In the moving lawyer scenario, this will indeed cause the difficulty that the new firm won't hire unless they know what the transient lawyer was working on, and the lawyer (not yet gone) can't tell them too much.

W. William Hodes, post to "Legal Ethics Discussion List (restricted to lawyers, law professors, and law students only)" [legalethics@lists.washlaw.edu](mailto:legalethics@lists.washlaw.edu), Feb. 9, 2004.

<sup>121</sup> See McMorrow, *supra* note , at 37 (documenting that federal court judges rely less on the Restatement than they do on a state's adopted version of the Model Rules).

<sup>122</sup> RESTATEMENT (THIRD) OF AGENCY §1.01 (Tentative Draft No. 1, 2000). Agency is the fiduciary relationship that arises when one person manifests consent to another person to allow that person to act on his behalf.

<sup>123</sup> See Taylor v. Illinois, 484 U.S. 400 (1988) (denying claim that client should not be held responsible for attorney's misconduct, because lawyer serves as client's agent); GILLERS, *supra* note , at 56-63; James A. Cohen, *Lawyer Role, Agency Law, and the Characterization "Officer of the Court,"* 48 BUFF. L. REV. 349, 349-50 (2000); W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 423-24 (2004); Fred Zacharias, *Lawyers as Gatekeepers*, 41 SAN DIEGO L. REV. 1387, 1393 (2004);

<sup>124</sup> See W. Bradley Wendel, *Conflicts of Interest Under the Revised Model Rules*, 81 NEB. L. REV. 1363 (2003).

a confidentiality component.<sup>125</sup> That component replicates the limitation found earlier in the Model Code<sup>126</sup> and read through some tortured implication into the law of lawyering by the Restatement—the limitation of coverage to information which the client has requested be help secret or which would be harmful to the client's interests.<sup>127</sup> The trouble with relying on the agency doctrine is that, while lawyers are agents and are covered by agency law, the more specific lawyer codes surely trump generic agency law.<sup>128</sup> Where the lawyering codes include an expansive universe of information to be covered by the confidentiality obligation, and the law of agency covers a smaller universe of information, lawyers rely on the latter to their peril. The lawyering codes apply, it is sensible to conclude, with greater authority than the agency law.

Four bar association ethics opinions have addressed directly the question presented here, but none of those opinions assists a lawyer practicing in a Model Rules jurisdiction. In New York,<sup>129</sup> the District of Columbia,<sup>130</sup> and Massachusetts,<sup>131</sup> representing the only explicit authority addressing the ethics of conflict checking, ethics committees have concluded that a lawyer such as Penn has permission to reveal *some* of her clients' identities in order to accomplish the conflict checking process. The usefulness of those precedents is diminished considerably, though, by the context of each committee's conclusions.

New York and the District of Columbia each has in place a version of Rule 1.6 less encompassing than the Model Rule. Each version includes the confidentiality limitation, formerly found in the Model Code<sup>132</sup> and then improvised by the

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<sup>125</sup> RESTATEMENT (SECOND) OF AGENCY §395 (1958)[hereinafter RESTATEMENT OF AGENCY](agent has a duty not to use or communicate information given confidentially by the principal).

<sup>126</sup> See text accompanying notes *supra*.

<sup>127</sup> RESTATEMENT OF AGENCY, *supra* note , at §395 cmt. b.

<sup>128</sup> While my research has located no direct authority for this proposition, it has to be true. Because the law of lawyering is a "fine tune[d]" version of agency law, *see* Zacharias, *supra* note , at 1393, its refinements must have the effect of overruling any contrary instructions from the more general common law. We may support this inference by reference to ordinary principles of legal interpretation. *See, e.g.*, HENRY CAMPBELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS § 53, at 116-18 (1896) (specific statutes control over more general statutes); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 43, 229, 232 (1994) (same). Although, as Herbert Wilkins points out to me, if the agency principles were found in a state or federal statute, that statute would control over the lawyering rules. *See* note *supra* .

<sup>129</sup> See NY Op. 720, *supra* note ; NY City Op. 2003-2, *supra* note .

<sup>130</sup> See DC Op. 312, *supra* note .

<sup>131</sup> See Boston Bar Op. 2004-1, *supra* note .

<sup>132</sup> MODEL CODE, *supra* note , at DR 4-101.

Restatement's drafters,<sup>133</sup> covering only that information which the lawyer's client would find embarrassing or harmful, or which the client has requested that the lawyer keep secret.<sup>134</sup> Relying on its rule's language, each of those jurisdiction's ethics committee concluded that a migratory lawyer may reveal client identity for conflict checking purposes so long as doing so did not harm the client or violate a promise to keep confidential the fact of representation.<sup>135</sup> The Massachusetts version of Rule 1.6, while otherwise tracking the ABA Model Rule in all relevant respects, adds the potentially-significant qualifier "confidential" to Rule 1.6's coverage of "information relating to the representation of a client."<sup>136</sup> With explicit attention to that added limitation, the Boston Bar Association ethics committee interpreted Massachusetts' ethics scheme to permit lawyers to reveal some limited information in order for law firms to engage in conflict checks.<sup>137</sup> The committee did acknowledge that it was taking some liberty with the plain language of the rule to reach its pragmatic conclusion, a move it considered necessary to make sense of the fact of life of lawyer mobility and avoidance of conflicts of interest.<sup>138</sup>

None of the three ethics opinions, then, serves as reliable precedent for a lawyer practicing in a Model Rules jurisdiction.<sup>139</sup> Since very few states have adopted the qualifying restrictions to Rule 1.6 on which those ethics committees relied,<sup>140</sup> most lawyers in the United States remain without authoritative guidance apart from the meanings extracted from the Rule's language.

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<sup>133</sup> RESTATEMENT, *supra* note , at ; *see* text accompanying notes – *supra*.

<sup>134</sup> *See* D.C. RULES OF PROF'L CONDUCT, R. 1.6(a)(2005); N.Y. CODE OF PROF'L RESP., DR 4-101(A). New York also, alone among the states, explicitly requires lawyers to establish conflict checking systems as a component of their ethical practice. *See* N.Y. CODE OF PROF'L RESP., DR 5-105(E).

<sup>135</sup> DC Op. 312, *supra* note , at ; NY Op. 720, *supra* note , at ; NY City Op. 2003-2, *supra* note .

<sup>136</sup> MASS. R. PROF'L CONDUCT, R. 1.6(a)(2004)("A lawyer shall not reveal confidential information relating to the representation of a client unless ....").

<sup>137</sup> Boston Bar Op. 2004-1, *supra* note , at 4 ("Given the ambiguity of the Massachusetts Rule and Comments, the Committee opts to interpret the term 'confidential information' in a way that seems most reasonable, and consistent with the protection of client interests. Following the lead of the Restatement (Third) of the Law Governing Lawyers (2000), we conclude that in most instances client identity and general subject matter of the representation should not be deemed 'confidential' under Rule 1.6.").

<sup>138</sup> *Id.*, at 2, 4. In the interests of full disclosure, I note here that, as a member of the Boston Bar Association Ethics Committee, I participated actively in the consideration and drafting of that opinion.

<sup>139</sup> The Boston Bar Association opinion, though, comes closest. Because Massachusetts does not limit its Rule 1.6 coverage to matters harmful of the client's interest or matter which the client has requested to be kept secret, the BBA ethics committee was faced with a predicament very much like that faced by any lawyer within a Model Rules jurisdiction. *See id.*

<sup>140</sup> The other jurisdictions which have continued the former Model Code's limitations on the scope of the confidentiality obligation are Virginia and Washington. *See* STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 77 (2005).



#### 4. Disclosing Client Identity: A Summary

Penn must now decide how to proceed with regard to the discrete question of sharing her client list with the Target Firm. Here is her reasoned conclusion, in light of the above analysis.

Penn will share her client list with the Target Firm, notwithstanding the absence of any clear authority to do so. She will reveal the list to the Target Firm because she concludes that no other answer makes sense given the professed importance of fostering attorney mobility within the legal profession. She relies on the exceptions to Rule 1.6 concerning "impliedly authorized"<sup>141</sup> revelations and those permitted "when required by law,"<sup>142</sup> admitting that neither exception fits her circumstance perfectly. The Restatement's authority helps, despite the *ipsi dixit* quality of its reasoning.<sup>143</sup> The three bar association opinions concluding that sharing of client lists is ethical also support the result she chooses, even though none of those opinions interprets the rule Penn must honor.

So the Target Firm will get receive Penn's client list. Because Penn works in a law firm engaged in general civil practice, the fact of representation, by itself, should not create any problem for her clients, because that disclosure tells the Target Firm nothing about what specific type of legal work Penn has done for each client. This Article addresses later what a lawyer such as Penn might do if her practice exclusively covered embarrassing kinds of problems.<sup>144</sup> Before reaching that question, the next Section asks whether Penn may share her précis list along with her client list.

#### B. Authority to Reveal Case Information

The discussion thus far has concluded that any sensible ethical scheme, understood in light of a law firm's fiduciary obligation to prevent disqualifying conflicts and the legal profession's commitment to lawyer mobility and client choice of counsel, must support Penn's disclosing her client names to the Target Firm, so that the Target Firm may compare that list to its client and opposing party database. But, as described above, the Target Firm may not be satisfied simply with the client list, and reports indicate that law firms sensibly expect lawyers to share some facts beyond the identity of the migrating lawyer's clients.<sup>145</sup> For those of Penn's clients whose identities match a danger list within the Target Firm, the Target Firm needs to know more from Penn. Only those adverse parties whom Penn previously represented in a substantially related

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<sup>141</sup> See text accompanying notes *supra*.

<sup>142</sup> See text accompanying notes *supra*.

<sup>143</sup> See text accompanying notes *supra*.

<sup>144</sup> See Part II. E. *infra*.

<sup>145</sup> See SHAPIRO, *supra* note , at 327-32; Pizzimenti, *supra* note , at .

matter,<sup>146</sup> or about whom Penn learned information while at the Source Firm "material to [a] matter" at issue in a current Target Firm representation,<sup>147</sup> will cause a disqualifying conflict of interest for the Target Firm. Penn's précis list serves as her vehicle to allow the Target Firm to conduct a more realistic and sophisticated conflicts check.

It is not apparent that a lawyer such as Penn has permission to make this disclosure, although here again the Restatement is more supportive of its permissibility than are the Model Rules. The inquiry again must begin with Rule 1.6. Unlike with the category of client identity just discussed, here it is clear that the nature of the work Penn did for her clients is "information relating to the representation of a client."<sup>148</sup> Thus, Penn's précis list may only be shared if it fits some exception to Rule 1.6. It is difficult, and perhaps impossible, to find such an exception that applies comfortably to the précis list.

Because the Target Firm may hire someone other than Penn after her preliminary conflict check shows a possible "hit," the earlier moderately compelling arguments for revealing the identity list, based on the necessity to find some exception within Rule 1.6 to foster the profession's mobility needs, are distinctly less persuasive in this context. So long as the Target Firm may perform its first level conflict check with successive lawyer applicants, thus ensuring a modicum of opportunity for lawyers to move among firms, there is no genuine argument, as there might have been above, that a lawyer is "impliedly authorized" to reveal the nature of her clients' work,<sup>149</sup> or that such disclosure is "necessary ... to comply with other law or court order."<sup>150</sup> And, no other of Rule 1.6's exceptions applies.

While the Model Rules seem to prohibit Penn from sharing her précis list, the Restatement offers her more support for doing so, albeit with the same kind questionable reasoning that the Restatement offered in the case of her disclosing client identities. Recall that the Restatement incorporates into its confidentiality scope a limitation expressly eliminated by the drafters of the Model Rules.<sup>151</sup> Because the Restatement allows Penn to disclose any client information so long as "doing so will [not] adversely affect a material interest of a client,"<sup>152</sup> its formulation permits Penn full discretion to decide, on a case-by-case basis, whether the summary within her précis list would so

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<sup>146</sup> MODEL RULES, *supra* note , at R. 1.9(a). See text accompanying notes *supra*.

<sup>147</sup> *Id.* at R. 1.9(b). See text accompanying notes *supra*.

<sup>148</sup> MODEL RULES, *supra* note , at R. 1.6(a).

<sup>149</sup> *Id.* For a discussion of the "impliedly authorized" exception, see text accompanying notes *supra*.

<sup>150</sup> *Id.*, at 1.6(b)(6). For a discussion of the "to comply with other law" exception, see text accompanying notes *supra*.

<sup>151</sup> RESTATEMENT, *supra* note , at § 60(1)(a); see discussion at text accompanying notes *supra*.

<sup>152</sup> *Id.*

affect a client. If it would not harm her client, she may include the précis; if the facts revealed there would harm the client or breach a confidentiality promise to the client, then Penn may not include the précis.

That workable formula serves as clear guidance to Penn, if the Restatement "restates" good and reliable law. While the standard may not offer a bright line "objective" test for Penn when she prepares her précis list, it allows her to exercise good faith discretion about whether her clients would be harmed by the revelation of some general facts of her representation. The trouble for a lawyer such as Penn is that the Restatement neither claims nor cites any support for its otherwise sensible proposition.<sup>153</sup> Penn, therefore, has no explicit authority to share her précis list, and any implicit authority is weaker here than it was with the client identity list.

How might Penn respond to this ambiguity? Because she wants to move to the Target Firm and that firm wants to hire her, and because she knows that précis sharing is in fact very commonplace in the profession,<sup>154</sup> Penn will likely proceed in a pragmatic fashion, as follows. First, in the instance where she has worked on a case where the Target Firm represents the other side,<sup>155</sup> Penn should feel fully comfortable disclosing to the Target Firm that fact, since the Target Firm obviously already knows of that client's connection to the Source Firm.<sup>156</sup> Second, in the case of other "hits," Penn may use her

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<sup>153</sup> The four ethics committee opinions from three jurisdictions discussed above, *see* text accompanying notes *supra*, do expressly authorize the sharing of information beyond client identity, but of course those opinions are advisory only, and rely on definitions of confidentiality different from that of Model Rule 1.6. *See* Boston Bar Op. 2004-1, *supra* note , at ("A lawyer seeking to move to a new firm or job may reveal to the prospective firm or employer, without the consent of the affected clients or ex-clients, 'conflict-checking information' including ... the general subject matter of the work done for those clients, but (a) only if such revelation would not be embarrassing or detrimental to the client whose information the lawyer reveals, and (b) only if the information revealed is limited to that reasonably necessary and appropriate for the conflict-checking purposes"); DC Op. 312, *supra* note , at ("as a general rule it is merely necessary to compare the client name and the general subject matter of the representation"); NY Op. 720, *supra* note , at ("Firm B [the target firm] must seek information concerning the clients of Firm A [the source firm] and, especially, the identity of those for whom the Moving Lawyer performed work and the nature of that work ...."); NY City Op. Op. 2003-2, *supra* note , at ("it would be prudent for the [target] firm to consider what, if any, steps it might take with regard to other matters about which the lateral acquired protected information while working at the former firm").

<sup>154</sup> *See* Pizzimenti, *supra* note , at 323 (96% of survey respondents report asking laterals about the work done at prior firm); David W. Evans, *Accounting and Finance for Lawyers: Ethical Issues and Financial Data*, 1004 PLI/CORP. 229, 239-40 (1997); Boston Bar Op. 2004-1, *supra* note , at .

<sup>155</sup> This kind of direct side-switching is remarkably common in reported cases (perhaps because this is where the most serious harm could occur). *See, e.g.,* Cromley v. Bd. of Educ., 17 F.3d 1059 (7th Cir.), *cert. denied* 513 U.S. 816 (1994); Kala v. Aluminum Smelting & Refining Co., Inc., 688 N.E.2d 258 (Ohio 1998).

<sup>156</sup> Penn here analogizes to Rule 1.9's giving lawyers permission to use former client information if it is "generally known." *See* MODEL RULES, *supra* note , at 1.9(c)(1). The phrase "generally known" has been interpreted to mean that it is "already known" to the recipient of the information. *See, e.g.,* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* § 1.6-1(b) (2005-06).

best judgment about whether her existing or former client in fact would object were she to ask the client, which of course she cannot at this time.<sup>157</sup> If she reliably predicts that her clients would give her permission if asked, then she has not committed any material ethical violation (if any at all) by revealing otherwise confidential client information to the Target Firm.<sup>158</sup> And third, if Penn cannot know reliably whether a former or present client would object to the précis if asked, she might opt to reveal the précis anyway if she is certain that the client will suffer no discernable harm to its interests. If the Restatement is indeed without support for its unsupported assertion that this path is acceptable, Penn will have breached an ethical duty to those former clients, but in a way which likely will not lead to any disciplinary action against her by her governing bar authorities.<sup>159</sup>

### C. Authority to Reveal Information about the Source Firm's Clients

The next two categories of information which Penn will consider sharing with the Target Firm relate to those clients of the Source Firm who were not Penn's clients, but about whom Penn learned potentially material information. The earlier taxonomy distinguished the names of clients fitting this description and the information she learned about them. Both categories are assessed together here. The question to resolve is whether these items ought to be treated any differently from the first two items just discussed.

#### 1. Revealing Client Identities

On the question of sharing with the Target Firm the identity of the Source Firm's clients whom Penn never represented, Penn has the same permission as she has for her own clients. The earlier inquiry concluded that Penn has some authority from some source to reveal her client lists except where doing so causes harm to her clients' interests,<sup>160</sup> and that same analysis applies to the identities of the Source Firm's other clients. There is no reason to treat the two categories differently, even though the lawyers from the Target Firm who represented those clients will not know about that disclosure when Penn makes it. And, because Penn will disclose only isolated names of

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<sup>157</sup> Because Penn does not wish to inform the Source Firm of her plans to relocate, she likely may not discuss her relocation with her clients. See HILLMAN, *supra* note , at § 2.2.4, § 4.8.3 (describing common law fiduciary principle that a lawyer leaving a firm may not solicit her clients to remain with her until she has disclosed the fact of her leaving (and the solicitation) to her firm colleagues); RESTATEMENT, *supra* note , at § 9(3)(restating that doctrine); Judith Kilpatrick, *Changing Firms or Offices: Doing It Right*, 2002 ARK. L. NOTES 39, (same).

<sup>158</sup> In making this statement, I am assuming that, contrary to the client identity list discussed above, Penn's clients do indeed have a veto over her revealing the précis lists. See text accompanying notes *supra*.

<sup>159</sup> This prediction seems sound. See Boston Bar Op. 2004-1, *supra* note ; DC Op. 312, *supra* note ; NY Op. 720, *supra* note (all acknowledging that conflict-checking will include some information about the representation beyond the client's name).

<sup>160</sup> See text accompanying notes *supra*.

her colleagues' clients, there appears to be no worry about any trade secrets transgression.<sup>161</sup>

The *process* of the disclosure of the firm's clients' names, on the other hand, may well develop in a very different fashion. That practical implication deserves a moment's reflection. The process of discerning which clients of the Source Firm might cause Penn to taint the Target Firm will likely be the reverse of the process for identifying Penn's own clients. The process is reversed in the following way: When Penn offers her client list to the Target Firm, the names on that list will, of course, be generated by Penn to allow the Target Firm to compare the list to its opposing/adverse party database.<sup>162</sup>

It seems unlikely, though, that Penn can generate an accompanying list of those clients of the Source Firm who were not her clients but whose information material to a Target Firm representation she has learned. Attempting to generate such a list would be a nearly impossible task for Penn. The alternative of Penn's sharing the names of all of the Source Firm's clients from the past six years is similarly impractical, if it is not unlawful.<sup>163</sup> One imagines that instead of asking Penn to list the identities of all clients about whom she may know some information even though she did not work on their cases, the Target Firm will offer to Penn its adverse party list, and ask her whether any name on that list matches an individual or entity about whom she knows significant

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<sup>161</sup> See HILLMAN, *supra* note , at § 3.5.2; Robert W. Hillman, *The Property Wars of Law Firms: Of Client Lists, Trade Secrets, and the Fiduciary Duties of Law Partners*, 30 Fla. St. U. L. Rev. 762 (2002). Hillman reports that few courts have treated client lists as equivalent to a business's trade secrets protected by the Uniform Trade Secrets Act, 14 U.L.A. 438 (1990). Those few which have applied trade secrets doctrine to lawyers leaving law firms with client lists have emphasized both the overinclusion of names beyond that necessary for the lawyer's lateral move, and the use of the lists for solicitation purposes. See *Reeves v. Hanlon*, 95 P.3d 513 (Cal. 2004); *Fred Siegel & Co. v. Arter & Hadden*, 707 N.E.2d 853 (Ohio 1999). Neither of those factors operates in the conflict checking process described in the text.

<sup>162</sup> The literature and common sense support this assumption of comparing lists to databases. See, e.g., SHAPIRO, *supra* note , at 299-302; Susan Saab Fortney & Jett Hanna, *Fortifying A Law Firm's Ethical Infrastructure: Avoiding Legal Malpractice Claims Based on Conflicts of Interest*, 33 ST. MARY'S L.J. 669, 681-96 (2002); Robert W. Martin, Jr., *Practicing Law in the 21st Century: Fundamentals for Avoiding Malpractice Liability*, 33 LAND & WATER L. REV. 191, 194 (1998); Pizzimenti, *supra* note , at 323 n73; Mark Bassingthwaighe, *Memory Fails as Conflict Manager*, VA. LAWYER'S WEEKLY (August 2002) available at <http://www.virginialaw.com/alpsva3.cfm>; Robert D. Reis, *Conflicts of Interest: Designing a System that Can Help You Avoid Them*, RISK MANAGEMENT REPORT (Oct. 14, 1993).

<sup>163</sup> The solution by which Penn simply discloses all of the Source Firm's past clients to the Target Firm would work to permit the Target Firm to check for any overlapping names with its adversary list, but it is unimaginable that any lawyer would resort to that drastic measure, even if it were ethically permissible, which it seems not to be. Not only are the logistics of doing so terrifically complex, but doing so would give to the Target Firm, for entry into some segment of its database, access to all of the Source Firm's business sources. Because Penn will be looking for work without revealing her relocation plans to her employer, she would not have the Source Firm's permission to effect such a massive revelation of its business. Revealing a firm's client list to a competitor law firm without the first firm's permission risks a breach of Penn's fiduciary duties to the firm, and comes closer, because of its overbreadth, to risking a claim of trade secrets violation. See HILLMAN, *supra* note , at §3.5.2, 3:22-27. See also discussion of trade secrets at note *supra*.

information. If a name appears on the list satisfying that criterion, Penn will then share with the Target Firm the fact that a certain name represents a former or existing client of her firm.<sup>164</sup>

## 2. Revealing Information Learned

If Penn may properly identify those Source Firm clients about whom she possesses information, the question about the propriety of her disclosing any part of the information that she learned is far more complex. A précis, which Penn used with her own cases, will not work in this setting. As described earlier,<sup>165</sup> Penn will taint the Target Firm only if she had "acquired information protected by Rules 1.6 and 1.9(c) that is material to [a] matter"<sup>166</sup> pending at the Target Firm. Everything, then, will turn on whether Penn "acquired ... information ... that is material ..." to some ongoing the Target Firm work, while she was not representing that client at the Source Firm.<sup>167</sup> Because she did not represent the client, Penn may not be able easily to produce a précis, but even if she did, that précis will not answer the questions that the Target Firm will have.

Consider how the conflict checking would proceed at the Target Firm for this kind of worry. The most likely process looks something like this: It begins by the Target Firm sharing with Penn its list of existing clients. Penn reviews the Target Firm list to see if any name appears on it which she recognizes as a client at the Source Firm and about whom she had acquired some information. Imagine that Penn recognizes Rockport Associates,<sup>168</sup> a client of the Source Firm while she was there but whom she did not represent, but some of whose facts the other lawyers at the Source Firm discussed openly and frequently. Penn thus "had acquired information" regarding Rockport Associates, but she cannot know whether the information she acquired is "material," because she

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<sup>164</sup> The process just described in the text makes sense conceptually, as the most reliable way of Penn's identifying names of firm clients who were not her own clients. But, as readers of earlier drafts of this Article who work in large law firms report, the process as described may be entirely impractical, given the size of the firm's adverse party database. Susan Shapiro's research supports this conclusion as well. See SHAPIRO, *supra* note , at 330-31. If sharing an adverse party list is not feasible, the target firm will have to take some risks that Penn will be able to identify those of her firm's clients who might present this concern.

<sup>165</sup> See text accompanying notes *supra*.

<sup>166</sup> MODEL RULES, *supra* note , at R. 1.9(b)(2). The reference to Rule 1.9(c) serves to exclude from this universe information which is "generally known." Otherwise the Rule 1.9(c) information is the same as the Rule 1.6 information.

<sup>167</sup> Depending on many factors, including the jurisdiction's common law, Penn's tenure and status at the Source Firm, and the size of that firm, Penn will be presumed in some strong or weak fashion to have acquired information while at the Source Firm about the Source Firm's other clients. For a discussion of the operations of these presumptions, see, e.g., GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING (3d ed. 2002); RESTATEMENT, *supra* note , at § 132; *Silver Chrysler Plymouth v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975)(weak presumption rebutted); *Cardinale v. Golinello*, 43 N.Y. 2d 288, 372 N.E.2d 26 (1977)(irrebuttable presumption because of the small size of firm).

<sup>168</sup> See text accompanying notes *supra*.

does not know what the nature of the Target Firm's work has been for that client. Consistent with the earlier analysis, she may properly disclose to the Target Firm that Rockport Associates is a possible "hit," much like the Target Firm would do when Penn has disclosed her client list. The intriguing question is what the ethics doctrine permits to happen next.

In jurisdictions which permit preemptive screening or "ethical walls,"<sup>169</sup> the Target Firm could end the process there, and establish an ethical wall separating Penn from any active work involving that opposing party.<sup>170</sup> No further information would need to be shared, and the Target Firm's screens would serve as an excess of caution, in case Penn knows any information material to the Target Firm's ongoing work. Because the Target Firm would announce the fact of the screen after Penn has made her lateral move away from the Source Firm, Penn's desire to keep her job search quiet is not placed in jeopardy.

Not all jurisdictions, though, permit preemptive screening,<sup>171</sup> and Penn's Model Rules do not permit that option except in employment involving the government.<sup>172</sup> Without the option of establishing an ethical screen, the Target Firm needs to know what kinds of information Penn possesses before the firm can decide whether to hire her. Neither the Rules nor the Restatement permits Penn to tell the Target Firm what she knows. Under Rule 1.6, the information Penn knows is confidential and can only be disclosed with permission or through one of its exceptions.<sup>173</sup> No exception to Rule 1.6 applies here. Penn has no implied authority to share the facts that she possesses,<sup>174</sup> and she need not share them in order to comply with some other law.<sup>175</sup> Even under the

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<sup>169</sup> For a discussion of the screening availability, either through variations of the Model Rules (which will not permit any screening of Penn) or through the jurisdiction's common law, *see* text accompanying notes *supra*.

<sup>170</sup> This is a very common solution, despite the Model Rules' refusal to adopt it. *See* Susan P. Shapiro, *Reform or Professional Responsibility as Usual? If It Ain't Broke . . . An Empirical Perspective on Ethics 2000, Screening, and the Conflict-of-Interest Rules*, 2003 U. ILL. L. REV. 1299, 1309-10 [hereinafter Shapiro, *An Ethical Perspective*]; Pizzimenti, *supra* note , at 314-15; Hungerford, *supra* note , at 826.

<sup>171</sup> *See, e.g.,* Towne Dev. of Chandler, Inc. v. Super. Ct., 173 Ariz. 364 (1994)(Arizona Supreme Court rejects screening, holding that "[t]he language of [Arizona's version of] Rule 1.10 is absolute"); Neb. State Bar Ass'n, Op. 94-4 (screening not available even in the case of former government attorney); DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 607-08 (4th ed. 2004)("Fewer than a fifth of all states have permitted screening as a cure for imputed disqualification.").

<sup>172</sup> Compare MODEL RULES, *supra* note , at 1.10 with *id.* at 1.11.

<sup>173</sup> It is clear that Rule 1.6 covers this information even if Penn never represented the client herself. As a member of the law firm the Source Firm, Penn owes a confidentiality duty to all of the Source Firm's clients. *See* HAZARD & HODES, *supra* note , at ; WOLFRAM, *supra* note , at 891.

<sup>174</sup> MODEL RULES, *supra* note , at 1.6(a).

<sup>175</sup> *Id.* at 1.6(b)(6).

Restatement's broader analysis, Penn is similarly bound to keep her information secret.<sup>176</sup> While some scenarios might exist where the Restatement's functional harm test would leave Penn with permission to share what she knows,<sup>177</sup> it seems prudent to assume that in most instances Penn will not know enough about Rockport Associates or about the dispute involving the Target Firm's client (identified earlier as Susan Moran<sup>178</sup>) to make the functional assessments that the Restatement test requires.

The Target Firm is left with three possibly ethical options (assuming that the jurisdiction does not authorize the unilateral establishment of ethical walls), only two of which are practically available. The first option, which the Target Firm would like to adopt but cannot, is to ask Rockport Associates for its consent to the Target Firm's hiring Penn and screening her, just in case. Rockport Associates' consent would resolve any confidentiality problem and waive any conflict of interest problem engendered by the otherwise impermissible screening.<sup>179</sup> But the Target Firm cannot pursue this elegant solution, because in this lateral hire story Penn has opted not disclose to the Source Firm that she is leaving until she has a commitment at a new firm. Given her lateral move strategy, she cannot discuss those plans with any Source Firm clients even if not directly hers, lest her employer learn of her plans.

The Target Firm's second option is to take a calculated risk, which is probably the most common solution in non-preemptive-screening jurisdictions. The Target Firm could (if the above analysis permitted the sharing of such a précis, or otherwise with Susan Moran's permission) share with Penn its précis about the Susan Moran/Rockport Associates litigation, allowing Penn a better sense about the value to the Target Firm of the information she possesses about Rockport Associates. Penn then could tell the Target Firm whether she sees any major likelihood that her information would be "material" to the Moran/Rockport Associates dispute. If it might be material, then Penn does not get the job; if not, then the Target Firm could offer her the job. The risks of this option arise from two sources: (1) Penn's assessment of the value of her information to the Moran/Rockport Associates dispute could be wrong (and, indeed, she has a cognitive dissonance incentive to conclude that her information is not material<sup>180</sup>); and (2) even if

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<sup>176</sup> See RESTATEMENT, *supra* note , at § 60(1)(a).

<sup>177</sup> For instance, to use an extreme example, Penn might have learned only that Rockport Associates formerly was headquartered in Brussels, a fact whose disclosure she could conclude would have no harmful effect on Rockport Associates.

<sup>178</sup> See text accompanying notes *supra*.

<sup>179</sup> See, e.g., MCMORROW & COUILLETTE, *supra* note , at 808-75, § 808.06[3]; SHAPIRO, *supra* note , at 392-97.

<sup>180</sup> Cognitive psychologists and others have been developing recently rich insights about the influences of heuristics and biases on the personal beliefs and decisionmaking processes of persons acting in good faith. Penn's judgment about the value of her information to the Target Firm matter will be influenced, whether she knows it or not, by such phenomena as cognitive dissonance and the self-serving bias. For a sample of this developing literature, see, e.g., BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50



Penn's assessment is right, Rockport Associates may nevertheless challenge the Target Firm's hiring of Penn and seek the Target Firm's disqualification in the Moran dispute.<sup>181</sup> Through the operations of presumptions and the difficulties of proof of a negative, Penn could be *deemed* to possess information she in fact does not possess, and the firm disqualified despite its good faith precautions.<sup>182</sup> But the Target Firm may be willing to accept these risks.<sup>183</sup>

The Target Firm's third option, of course, is simply to refuse to hire Penn, and to look for a lateral who does not bring with her that possibility of taint. That path is the safest, but such an option has a serious effect on associates' career advancement and mobility opportunities. This realization—that the most risk-averse option causes the greatest harm to lawyer mobility and client choice of counsel—underscores the need for better rules and doctrine in this area.

#### D. Authority to Reveal Billing Information

The previous sections have covered the four categories of information which the Target Firm ought to insist that Penn share before the Target Firm decides whether to hire her, in order to screen effectively for potential conflicts of interest. These four categories arose from the Target Firm's need to satisfy its fiduciary obligations to its ongoing clients, as well as its commitment to maintaining its ongoing business.

The fifth category of information, which this section investigates, is of an entirely different quality, but is nearly as important to the Target Firm in its hiring decisions. As noted above,<sup>184</sup> law firms hire laterals not just because of their talent as lawyers. Firms also have a deep interest in the laterals' generation of billable hours and attorney's fees, and origination of business.<sup>185</sup> With this end in mind, firms frequently ask laterals about their billing history. It seems reasonable, then, that the Target Firm would ask Penn

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STAN. L. REV. 1471, 1471 (1998); Russell Korobkin & Chris Guthrie, *Heuristics And Biases at the Bargaining Table*, 87 MARQ. L. REV. 795 (2004).

<sup>181</sup> See, e.g., *Dana Corp. v. Blue Cross & Blue Shield Mut.*, 900 F.2d 882 (6th Cir. 1990); *Schwed v. General Electric Co.*, 990 F. Supp. 113 (N.D.N.Y. 1998).

<sup>182</sup> See, e.g., *Cardinale v. Golinello*, 372 N.E.2d 26 (N.Y. 1977)(irrebuttable presumption because of the small size of firm); Craig A. Peterson, *Rebuttable Presumptions and Intra-Firm Screening: The New Seventh Circuit Approach to Vicarious Disqualification of Litigation Counsel*, 59 N.D. L. REV. 399, 405 (1984).

<sup>183</sup> See SHAPIRO, *supra* note , at 328 (describing examples of firms taking such risks).

<sup>184</sup> See text accompanying notes *supra*.

<sup>185</sup> Recall this advice offered by one consultant to firm hiring committees: "[Pay close attention to p]ossible responses of clients to their lawyers' move to your firm. Will they follow the candidate when he or she changes firms? If so, which clients does the candidate expect to follow him or her? What are their annual billings?" *Questions To Help Spot Unprofitable Lateral Candidates*, *supra* note , at . See also HILLMAN, *supra* note , at 1:4-1:5, § 1.1; REGAN, *supra* note , at 37-38.

questions about how much income her clients have earned her and the firm over the past several years.

The question to explore here is whether Penn's sharing of that billing information is ethically permitted. The answer to that question depends, it seems, on the way in which the billing information is packaged by Penn to the Target Firm. For clarity and simplicity, imagine two scenarios. In the first, Penn discloses explicitly to the Target Firm the fact that in the previous three years her firm has generated \$500,000 in billables from Marblehead Sailboats, Inc. (MSI), and that MSI is likely to follow Penn to the Target Firm.<sup>186</sup> In the second, Penn discloses that three of her clients, whom she names, have resulted in a total of \$800,000 in billables for the previous three years. Is either of these disclosures permissible, assuming that none of the clients has consented to it? It appears that the former is not permissible, but the latter passes muster. The proceeding discussion explores why.

### 1. Specific Disclosure of Billables

The analysis begins with the first scenario, where Penn has told the Target Firm precisely how much money her client has paid to her firm in the past few years. No published authority has addressed this question even obliquely. As with previous categories, it makes sense to begin with the language of the Rules of Professional Conduct, and then look for other sources of authority if the Rules do not answer the question definitively. Because the financial information shared by Penn is presumptively covered by Rule 1.6, as "information relating to the representation of a client,"<sup>187</sup> Penn may only reveal her billings to the Target Firm, at least under the Rules, if she can locate an exception to Rule 1.6. No such exception exists. No stretched analysis of the Rule's exceptions can cover the billing information. It is not necessary to assist the Target Firm to maintain its fiduciary obligations to its current clients.<sup>188</sup> It is not impliedly authorized in order for Penn to practice effectively her professional roles.<sup>189</sup> Penn shares the information only to sell herself to the Target Firm, and that is not an allowable basis to breach her confidentiality duties to MSI.<sup>190</sup>

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<sup>186</sup> It is no doubt the case that the "portfolio" negotiation is far more likely to occur with migrating partners than with migrating associates like Penn, but it is not inconceivable that a senior associate would have such a relationship with her clients to warrant the clients' willingness to follow her to a new law firm. In any event, the conceptual issue addressed here is the same for partners as for associates. *But see* HILLMAN, *supra* note , at 4:84-4:112-5, § 4.8 (discussing the special fiduciary obligations of partners to their partnerships).

<sup>187</sup> MODEL RULES, *supra* note , at 1.6(a). *See* text accompanying notes *supra*.

<sup>188</sup> *Compare* text accompanying notes *supra*.

<sup>189</sup> *Compare* text accompanying notes *supra*.

<sup>190</sup> Of course, Penn may readily reveal the financial data if she has MSI's permission to do so. I assume here that she cannot have such permission, because she will not have spoken with MSI about her leaving before she knows she is leaving. Indeed, as seen above, she risks breaching her fiduciary duties to the Source Firm if she discusses with one of the Source Firm's substantial clients her plans to move, and the

Under the Restatement, Penn has difficulty in concluding that the billing information may be revealed lawfully, but for a more peculiar reason. Recall that the Restatement, albeit with questionable support, interprets the scope of the lawyer's ethical confidentiality obligation in substantially narrower fashion than does the actual language of Rule 1.6.<sup>191</sup> Under the Restatement's analysis, Penn may not share information about her client's affairs if "doing so will adversely affect the interest of the client or if the client has instructed the lawyer not to use or disclose such information."<sup>192</sup> Otherwise, a lawyer may use or disclose client information freely. Thus, it at first appears that if she may make a reliable judgment that revealing MSI's \$500,000 in lawyer's fees to the Target Firm will not adversely affect MSI's interests, Penn has authority through the Restatement to share the information.

The Restatement, however, identifies one specific exception to this general principle, and that exception seemingly applies to lawyers who reveal billings in order to advance their careers. Section 60(2) of the Restatement reads as follows:

Except as stated in § 62 [addressing disclosure with client consent], a lawyer who uses confidential information of a client for the lawyer's pecuniary gain other than in the practice of law must account to the client for any profits made.<sup>193</sup>

Is Penn's sharing of her billings with the Target Firm to induce the firm to hire her "use[ of] confidential information of a client for the lawyer's pecuniary gain other than in the practice of law"? One of the Comments to Section 60(2) implies that it is so. Comment *j* makes explicit what the black letter statement leaves implicit—that "Subsection (2) prohibits a lawyer from using or disclosing confidential client information for the lawyer's personal enrichment, regardless of the lack or risk of prejudice to the affected client. The duty is removed by client consent (see § 62)."<sup>194</sup> It is a distinct challenge for Penn to assert that her sharing of the billings is for a *lawyering* purpose; it serves only to advance her career or to enrich the Target Firm. Thus, Penn cannot use the billing information for that purpose under the Restatement's analysis.

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client's opportunity to follow her, before she has disclosed her plans to her firm. See authorities cited at note *supra*.

<sup>191</sup> RESTATEMENT, *supra* note , at §60(b)(1). See text accompanying notes *supra*.

<sup>192</sup> RESTATEMENT, *supra* note , at § 60(1)(a).

<sup>193</sup> *Id.* at § 60(2).

<sup>194</sup> *Id.* at § 60(2) cmt *j*.

The Restatement, though, is not without its ambiguity on this point. It distinguishes "self-enrichment in personal transactions"<sup>195</sup> from "the lawyer's pecuniary gain ... in the practice of law,"<sup>196</sup> so Penn might see her sharing client numbers with the Target Firm as fitting into the latter category, and not for "personal" enrichment. But another of the Restatement's Comments to Section 60(2) describing the permissible use of client information within the practice of law undermines that argument. Comment *g* addresses only the obvious need for a lawyer to use client information while representing *that client*, connecting the "practice of law" phrase to the representation of a particular client.<sup>197</sup> The Comment says nothing about use of confidential client information to advance the lawyer's career, or to improve the business opportunities of a prospective new firm, each of which seems more aptly a "pecuniary interest" of the lawyer.

It thus appears that Penn has little reliable support, either in the Rules of in the law of lawyering, for her complying with the request from the Target Firm for information about her billables. Not only would her disclosure appear to violate the Rules of Professional Conduct and the law of lawyering as represented by the Restatement, but it also may run afoul of the laws of agency as well.<sup>198</sup>

## 2. General Disclosure of Billables

If it is correct that Penn cannot lawfully reveal, absent client consent, her specific client billable amounts, she may instead lawfully divulge her gross billables for several clients, whose identity the Target Firm knows. There is no direct support for this assertion in the literature, but it makes sense. Penn encountered an ethical prohibition in the previous subsection because she intended to disclose a discrete item of client information—the actual amount of money spent on legal services by MSI at the Source Firm—to a third party without client permission. By contrast, in the second scenario, where Penn reveals that she billed \$800,000 to three clients, she discloses no specific

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<sup>195</sup> *Id.* . Comment *j* includes the following sentence: "There is no important social interest in permitting lawyers to make unconsented to use or revelation of confidential client information for self-enrichment in personal transactions."

<sup>196</sup> *Id.* , at § 60(2).

<sup>197</sup> *See id.*, at cmt. *g*. Comment *g* covers "[d]ivulgence to facilitate law practice." It explains that a lawyer may reveal confidential client information "to other lawyers in the same firm and to employees and agents such as accountants, file clerks, office managers, secretaries, and similar office assistants in the lawyer's firm, and with confidential, independent consultants, such as computer technicians, accountants, bookkeepers, law-practice consultants, and others who assist the in furthering the law-practice of the lawyer or the lawyer's firm." *Id.*

<sup>198</sup> *See* RESTATEMENT OF AGENCY, *supra* note , at § 388, Comment *c* ("An agent who acquires confidential information in the course of his employment or in violation of his duties has a duty not to use it to the disadvantage of the principal, see § 395. He also has a duty to account for any profit made by the use of such information, although this does not harm the principal."). *See also id.* at § 395, Comment *e* ("Even though the agent properly acquires and uses confidential information concerning his principal's activities in the course of employment, he has a duty to account to the principal for any profits thereby made.).

facts about any particular client, and Rule 1.6 therefore would not apply at all. If a client's identity may be revealed, a premise accepted for the sake of this analysis, then Penn's clumping together of her clients' billings does not add any further information which she has an obligation to maintain confidential.

### 3. Policy Considerations in Revealing Billables

This Section concludes by considering briefly whether the resulting ethical ban<sup>199</sup> on revealing client billables when migrating to a new firm is a sensible policy. If clients are likely to be harmed in some way by this prevailing practice, or if some other professional interests are at stake, then the prohibition emerging from the Rules and the Restatement ought to be maintained (and, indeed, enforced). But if the practice causes no such damage, then some explicit change in the rules or in the doctrine would be wise.

It is hard to imagine why the Restatement's general policy of permitting disclosure of otherwise confidential information when a lawyer comfortably predicts that no material harm will befall the client as a result should not apply to the question of revealing client billings. The Restatement's exception to that policy when revelation serves the pecuniary gain of the lawyer might make sense in other self-dealing contexts,<sup>200</sup> but it seems misplaced here. Revealing the level of business from a client (especially a client whose business is likely to be sustained and who may wish to follow the migratory lawyer) is not the kind of self-dealing to which the Restatement's caveats are directed. As long as the lawyer can be trusted to discern reliably whether her client is apt to be harmed by the billings disclosure (a trust which the Restatement accepts in all other contexts), there is little worry here of unseemly exploitation by the migrating lawyer.<sup>201</sup> Because it is very likely that the American Law Institute's drafters did not consider this context when developing that exception, some authority ought to clarify that the self-dealing exception found in Section 60(2) does not apply to the migrating lawyer. The same contention, of course, applies to the Model Rules' language as well.

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<sup>199</sup> In the interest of clarity, the "ethical ban" referred to is the conceptual ban developed through the text's analysis. No court or ethics committee has addressed the question. It is true, though, that the practice of revealing billables is commonplace.

<sup>200</sup> The Restatement expresses its best argument for this exception as follows: "A lawyer who acquires confidential client information as the result of representation should not be tempted by expectation of profit to risk a possibly incorrect assessment of future harm." RESTATEMENT, *supra* note , at §60, cmt. *j*. Its Reporter's Note uses as a prime example of the need for this exception the case of insider trading by a lawyer, where the client may not be harmed but the lawyer ought not be exploiting information in such an unseemly way. *See id.* at Reporter's Note Comment *j*, citing SEC v. Singer, 786 F. Supp. 1158, 1171 (S.D.N.Y. 1992); *In re Glauberman*, 586 N.Y.S.2d 601 (N.Y.App.Div. 1992).

<sup>201</sup> Indeed, the client may be harmed by the application of the exception. Consider Penn and her client MSI. If Penn cannot reveal her MSI billings to the Target Firm, her chances of getting hired by the Target Firm might be diminished. If Penn believes that the Target Firm would be a better firm for her than the Source Firm, and if she believes that MSI is likely to follow her to the Target Firm, then the Restatement's ban limits MSI's opportunity to be represented by Penn at a superior firm. And, because Penn cannot discuss with MSI her desire to disclose its confidential information, she cannot rely on its consent.

## E. Conflict Checking in Extraordinary Circumstances

The discussion thus far has addressed, and attempted to offer concrete suggestions about, the most common examples of lawyer migration, where a lawyer<sup>202</sup> who has formerly worked in a setting where she represented clients and where her colleagues also represented clients proceeds to seek employment elsewhere. The discussion thus far has covered several permutations of information sharing and risk assessment when that lawyer tries to move to her new firm. But the discussion up to now, despite its several mazes, in fact has observed a simplified lawyering world, in this one important respect: It has assumed that Penn's disclosure of her clients' identities and their précis would not creating discrete harm to those clients. The analysis has proceeded upon that assumption, and has depended upon it.

But of course not all clients' representations will fit that description. This Section proceeds to address the ethics and the practice of conflict checking when the very fact of the revelation causes some identifiable, or at least possible, harm to a lawyer's client.

To make sense of this, perhaps best labeled the "extraordinary," version of conflict checking, the story about Penn, the Source Firm, and the Target Firm needs to be revised. For the sake of the remaining discussion, assume that the migratory lawyer story reads as follows:

In this iteration, the Source Firm is no longer a general litigation and corporate business firm, as it was in its original description. Instead, assume that the Source Firm is a "boutique" firm specializing in the most serious kind of lawyer liability, discipline, and malpractice matters, and that it always works for the defense—that is, for the lawyer accused of wrongdoing. Lisa Penn's story remains the same, except that all of her clients have been lawyers in trouble. Like in her earlier story, some of Penn's work has been fully public, in open court proceedings with pleadings available to any willing viewer, and with many cases reported in the legal newspapers and in the appellate and trial court reports. But some other of her work has been painfully discreet, with her representing lawyers whose reputations were at risk and whose cases were not yet public in any fashion. After six years of doing this work, Penn opts to move to a more generalist firm, to do a wider variety of litigation. Like before, she answers an ad placed by the Target Firm, and proceeds just as the earlier story contemplated.

This Section will now consider how Penn's obligations are different in this story, and how she, and the Target Firm, ought to proceed.

As this story develops, the Target Firm has asked Penn for her list of former clients and a précis on each client identified. In the earlier iteration of the story, the

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<sup>202</sup> Or a law student—the analysis thus far applies equally to law students who have worked in law firms or clinical programs while in law school.

ethical assessment concluded that Penn may reveal that information so long as the disclosure is neither embarrassing nor detrimental to the clients involved. In this version of the story that embarrassment and detriment are readily apparent. Penn no longer has the implicit (under existing doctrine) authority to share the identity and précis lists with the Target Firm. She loses her authority because *all* of her clientele fits within a certain description (lawyers in trouble), which some of her clients would prefer to maintain confidential. Note that if the Target Firm handled lawyers-in-trouble work along with many other kinds of work, Penn's problem would be minimized substantially. The revelation of the client identity list would not present a problem, because that disclosure would not by itself communicate the nature of the work that Penn was doing for her clients. But in this story Penn specializes exclusively in work for lawyers in trouble, so the difficulty indeed remains. Her revealing her client's identity means revealing an embarrassing fact about that client.

Is Penn, therefore, forever bound to remain at the Target Firm or to work in solo practice for the rest of her career? That result would be a terrible consequence, and one has to assume that such a result would be unacceptable. Penn and the Target Firm must find some ethically appropriate method to test whether the Target Firm's hiring of Penn will cost the Target Firm some important client business, or otherwise harm some important client interests.

Two solutions are available to Penn and the Target Firm, and neither is foolproof. The first involves the Target Firm sharing its list of clients and adversaries with Penn. The second involves the use of "middle counsel" to protect the interests of Penn's clients. The first of these seems justifiable under current law. The second may not be so, but ought to be so.<sup>203</sup>

#### 1. Sharing the Source Firm's Lists

The worry that the Target Firm faces is that Penn might have worked for a client in her practice who turns out to be an adversary of the Target Firm, thus (absent either screening of Penn within the Target Firm or waiver by the adversary) disqualifying the Target Firm from its ongoing work. If the Target Firm shares with Penn its current adversary list, then Penn can review the list to determine whether any of her current or former clients show up. If not, then the Target Firm may hire Penn. The firm will of course be relying upon Penn's good judgment to make sure her review is accurate, but that seems not an unreasonable allocation of responsibility, if the Target Firm considers Penn worthy to join the firm as an associate. While Penn presumably has a substantial interest in joining the Target Firm, she has an equally strong interest in not costing the

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<sup>203</sup> In the new version of the migration story there exists a third alternative, but it is too specific to the story created here to warrant discussion in the text. Because Penn has only represented *lawyers* at her boutique firm, she could ask the Target Firm for a list of any lawyers who are its adversaries now or may soon be so. That list, presumably, will be much shorter than the Target Firm's full list of adversaries. This solution will not work if Penn's practice has specialized in a different kind of embarrassing area, like, say, defending sexual predators.

Target Firm important business because of her sloppy conflict checking.<sup>204</sup> So the Target Firm may use this process to test for Penn's disqualifying connections, and, if none appear, it may confidently hire her.

If a potentially disqualifying connection appears, though, life becomes much more complicated in this version of the story than it was in the earlier version. The mere fact that a name on the identity list causes a "hit" (that is, Penn once represented an adversary of the Target Firm) will not be a problem for the Target Firm. Only if Penn's work for that client is or was substantially related to the Target Firm matter will there be a problem. That was the purpose of Penn's use of her précis list. Here, though, the précis list won't exist, at least for some clients of Penn's. The question then becomes how much of her client work Penn may reveal in this version of the story.

It may help to articulate a distinction at this point that seems important to Penn's analysis. Penn's lawyers-in-trouble clients might be divided into three groups: (1) Lawyers whose cases have been publicly filed and who understand that, and therefore would not complain if Penn shared some of that public information with the Target Firm (e.g., "I represented Lyssa Anderson in the past, when she was sued for malpractice, in a case involving her representation of a partnership known as the Fine Family Trust."); (2) Lawyers whose cases have been publicly filed but who would object strongly to Penn's revelation of the fact of her representation or its nature, even though some smart sleuth could look the case up and read about it; and (3) Lawyers whose cases have never been publicly filed or broadcast and who would be hurt personally and harmed professionally by word that they have been in trouble. Penn's response to a "hit" on the Target Firm's list will be different depending on which category best describes the hit.

It seems fair to conclude that Penn has permission to reveal to the Target Firm a précis about any hit involving category (1), but not so for hits fitting into categories (2) and (3). Recall the Restatement's confidentiality test:

[a lawyer may not] use or disclose confidential client information [where] doing so will adversely affect the interest of the client or if the client has instructed the lawyer not to use or disclose such information.<sup>205</sup>

Presumably the first client suffers neither harm nor violation of instruction if Penn shares a précis about her case. The second category client, though, suffers that violation of instruction, even if the instruction is entirely implicit. And the third category client's interests are adversely affected by Penn's disclosure of his being in trouble. Thus, under all of the standards for disclosure reviewed here (existing rules, existing doctrine, and

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<sup>204</sup> *But see* note *supra* (describing the heuristics and biases which may operate to distort Penn's judgments about the effects of her prior work).

<sup>205</sup> RESTATEMENT, *supra* note , at § 60(1)(a). For a proposed revision of Rule 1.6 which incorporates the Restatement's distinctions but only for conflict checking purposes, *see* text accompanying notes *infra*.



proposed rules), Penn may not share a précis or otherwise discuss the facts of at least some of her clients with the Target Firm.

Penn might, therefore, be out of luck if such a non-sharing hit occurs, because she cannot resolve satisfactorily the "substantially related" question before the Target Firm hires her. But she has one last chance (aside from the "middle counsel" idea discussed immediately below) to test to see if her work for one of the Target Firm's adversaries is substantially related to the Target Firm's work. That solution involves, though, the Target Firm's sharing with Penn its précis information for *all* of its ongoing client work. If Penn has access to the subject matter of the Target Firm's representation of its clients, she may zero in on the "hit," and make her best judgment about whether the two matters meet the substantial relationship test. If so, she must decline the job offer, even if her jurisdiction permits preemptive screening.<sup>206</sup> If not, she may inform the Target Firm that she is "clean" and may become an associate at the firm. Whether the Target Firm's sharing with Penn its précis descriptions for all of its ongoing work is practical,<sup>207</sup> or ethically permissible,<sup>208</sup> might depend on the specific administrative operations of the Target Firm, but for reasons developed in the previous two footnotes this solution raises grave doubts about its feasibility. The problems encountered, though, might better be resolved through the use of the "middle counsel" device.

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<sup>206</sup> The screening option does not work because to implement it Penn must disclose to the Target Firm who her client is, and the procedures discussed here all assume that the Target Firm will never know which of its adversaries, if any, were also Penn's clients. Because Penn must maintain that confidentiality, she cannot establish the immediate screening mechanisms required for preemptive screening.

<sup>207</sup> Most firms will likely maintain a database which contains the fields, including a short description of the nature of the Target Firm's work for its clients, necessary for Penn to do her search. *See, e.g.*, SHAPIRO, *supra* note , at (describing the varying practices of firms' conflict-checking procedures, and confirming that most larger firms rely on some computerized systems); Novachick & Miller, *supra* note , at . *But see* the next footnote for a discussion of the difficulty for Penn to determine the facts needed for her substantial relationship assessment if she is relying only on the database's summary.

<sup>208</sup> In general, based on the discussion and analyses here, the Target Firm may share its client identity and précis lists with Penn if necessary to perform its duty-bound conflict checks. But the ethics of the Target Firm's response is more complicated, for this reason. Within the revised version of the story, the Target Firm cannot make the substantial relationship determination, but must allocate that to Penn. As already noted, such an allocation of responsibility makes sense. *See* text accompanying note *supra*. But there is a qualitative difference between Penn's making that assessment and the Target Firm's making that assessment. Much more depends, it seems, on the facts of the Target Firm's ongoing work for a client than on the facts of Penn's ongoing or prior work for the adversary. It is the ongoing work which is most at risk, and the substantial relationship assessment needs to know a fair amount about the ongoing work. For the Target Firm to shift the decisionmaking to Penn, it must give not only a fairly substantial précis on any ongoing case Penn will review, but it must provide that substantial précis for *every* ongoing case, because Penn cannot tell the Target Firm which client's work she needs to look at. It seems that it is easier for the Target Firm to perform the substantial relationship assessment with limited information from Penn than it does for Penn to do so with limited information from the Target Firm. If that suspicion is indeed accurate, then the Target Firm may conclude that it is too great a revelation of client facts, and too administratively cumbersome, for Penn to perform the assessment. Since by definition the Target Firm cannot perform it, the Target Firm may choose not to hire Penn if any hits occur, even ones which upon further analysis would show them to be benign.

Before discussion of that device, though, there remains one more important and troubling implication arising from the analysis thus far about Penn's response to the "extraordinary" situations. That implication concerns Penn's role after she gets hired by the Target Firm, assuming that she successfully clears the processes just described.

Here is the problem, and it is a serious one: Assume that Penn saw no "hits" when she looked at the Target Firm's adversary list, meaning that the Target Firm was opposing none of Penn's past or present clients and she could join the Target Firm without any risk of disqualifying the firm from its ongoing work. Imagine, then, that a year into Penn's happy and productive life as an the Target Firm associate, the Target Firm partners circulate an e-mail message asking whether any firm member perceives any possible conflict if the firm accepted a new prospective case. The prospective client is Ken Jorgensen, and he has a major dispute with an individual named Betty Marsh. Penn used to represent Betty Marsh, a lawyer who faced serious misconduct charges in the past. When Penn sees the circulated conflicts alert, she is stuck. If she says nothing, she risks allowing the Target Firm to engage in a disqualifying representation. If she says to the firm, "Stop. We have a potential conflict here," she has revealed confidential client information. Penn finds herself in an ethical box, and nothing she could have done (short of never leaving her previous firm) would have avoided this from happening.<sup>209</sup>

In this post-hire setting, Penn must have permission to reveal her prior representation of Betty Marsh to her colleagues, even though that disclosure seemingly violates the Restatement and Rule 1.6. That permission comes most comfortably from Rule 1.6's exception for disclosures necessary "to comply with other law."<sup>210</sup> While the earlier analysis rejected that exception in conflict-checking contexts because of the rule's mandate that the lawyer discuss the disclosure with the client beforehand,<sup>211</sup> in this setting the argument for the exception's applicability is more compelling. Because the substantive law of every jurisdiction penalizes Penn (or her firm, which is saying the same thing) for representing conflicting interests, Penn must tell her colleagues about Betty Marsh to avoid breaching that duty and violating that "law." Where in the hiring context the Target Firm could simply opt not to hire Penn, here there is no such alternative. Penn, therefore, will tell her colleagues that they must assess whether accepting the Jorgensen matter would create a conflict with Marsh, even though that conversation reveals confidential facts about Marsh to the Target Firm lawyers.<sup>212</sup>

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<sup>209</sup> Compare N.Y. Op. 555 (because of a failure to counsel its clients, firm had a duty to inform a wife that her husband was having an affair, and a duty to maintain the husband's confidences about that fact); *A. v. B.*, 726 A.2d 924 (N.J. 1999) (firm's faulty conflict checking system led to firm's representing a husband and wife for will drafting purposes but then learning that the husband had a paramour, whom he wished to keep secret from his wife).

<sup>210</sup> MODEL RULES, *supra* note , at 1.6(b)(6).

<sup>211</sup> See text accompanying notes *supra*.

<sup>212</sup> Indeed, were Penn not to warn the firm and the Target Firm accepted the Jorgensen matter, Marsh could have a legitimate complaint against Penn and the Target Firm for violating her confidentiality rights. See

## 2. The "Middle Counsel" Solution

While no discussion appears in the legal ethics literature about this idea, some law firms apparently employ an arrangement in which they specially assign a lawyer, perhaps a retired partner, to serve as "middle counsel" who will receive any information from a prospective hire in order to effect the conflict check.<sup>213</sup> The concept is an elegant one. If Penn reveals her client list and her précis list to the Target Firm's hiring lawyers, she must trust that those lawyers will use that information only for the firm's conflict checking purposes. If the Target Firm instead created a middle counsel position, and required that counsel to maintain in confidence everything she learned from Penn, the degree of disclosure of Penn's client's information to others would be minimized. Penn might even be able to respond to the extraordinary situation described above by limiting her harmful identification of Betty Marsh to just one person at the Target Firm, a person who otherwise does not participate in the Target Firm's ongoing lawyering business.

For the present analytic and evaluative purposes, the middle counsel concept is at once very attractive and entirely unauthorized. If Penn would be barred from sharing with the Target Firm the identity of Betty Marsh, or any similar confidential fact about a client of hers, she finds no doctrinal or rules support for her disclosing that information to a partner specially assigned to protect the confidentiality of her information. The middle counsel's enforceable and reliable promise to keep Penn's information confidential cannot change the fact that Penn has revealed protected information to a third party without client consent and without any exception under Rule 1.6.

A better version of Rule 1.6 would account for this, and permit something along those lines. The following Part reviews a few changes to the existing rules which seem warranted and sensible given the difficulties and complications this Article has identified thus far.

### III. PROPOSED MODEL RULES CHANGES

If Penn's jurisdiction were to confront her predicament in a thoughtful and helpful way, it would amend, or at least interpret, its Model Rules to permit her to share some information as she prepares to change firms. This Part develops suggestions for how her jurisdiction might do so, acknowledging both the needs of the mobile lawyers and the privacy interests of clients.

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Cromley v. Bd. of Educ., 17 F.3d 1059 (7th Cir.), *cert. denied* 513 U.S. 816 (1994)(plaintiff complains after her lawyer joins the defendant's law firm); GILLERS, *supra* note , at 296-97.

<sup>213</sup> This idea gets noted in Susan Shapiro's comprehensive study of Illinois law firms' conflict of interests experiences. See SHAPIRO, *supra* note , at 286-87. I first learned of this in discussions with law firm partners who are members of the Boston Bar Association Ethics Committee. The idea also surfaced in a post on the ethics listserv. See Post of W. William Hodes, Ethics listserv, *supra* note , February , 2004.

The Model Rules must acknowledge the need for lawyers to share some client information in order to screen for conflicts of interests. A clear set of rules governing this process is essential to protect lawyers and clients alike. The proposed rules changes suggested here do not include other potentially helpful amendments which the ABA has rejected in the past, such as permitting screening of a lawyer who transfers into a firm with some disqualifying taint.<sup>214</sup> The proposals attempt to capture those rule changes which the ABA seemingly would fully approve, and except for permitting aboveboard conflict-checking do not otherwise alter existing Model Rules doctrine about confidentiality or conflicts of interest.

### *Model Rule 1.6*

Model Rule 1.6 must express clearly the reality that lawyers have permission to share information necessary to facilitate lateral transfers and similar lawyer movement between employment settings (including, for instance, a law student who had worked at a law school clinic and who then accepts her first job<sup>215</sup>). That goal may be accomplished by the following additional exception to the confidentiality rule:

1.6(b)(7) to permit a lawyer or law firm considering the employment of or affiliation with a lawyer departing another law firm (a “migrating lawyer”) to perform an adequate conflict of interest check, and to permit the migrating lawyer to assist in such a check, so long as

(a) the information disclosed is limited to the minimum necessary to perform an effective conflict of interest check; and

(b) the information disclosed is neither embarrassing to the client nor detrimental to the client's interests, and excludes matters which the client has requested the lawyer not reveal without advance consent.<sup>216</sup>

The proposed Rule 1.6 should at the same time add, most likely in its Comments, a suggestion to the migrating lawyer about how to respond when sharing a client's identity or précis would be embarrassing or detrimental to the client, and a suggestion to target law firms to implement procedures intended to minimize the use of and exposure to the lateral's client information. The Comment's paragraphs might look like this:

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<sup>214</sup> Compare Model Rules, *supra* note , at R. 1.10 (no mention of screening of disqualified lawyers) with *id.* at 1.11 (permitting screening in the government context). *See also* Hungerford, *supra* note , at 825-26; Pizzimenti, *supra* note , at 313-14; Shapiro, *An Empirical Perspective*, *supra* note , at 1300-01.

<sup>215</sup> *See* Boston Bar Op. 2004-1, *supra* note (inquiry triggered by a law student).

<sup>216</sup> This proposal seeks to authorize typical conflict of interest checking, reincorporates for that purpose only the Code's concept of "secrets," and seeks to cover both the sharing of client lists and descriptions by the moving lawyer and the sharing of client lists (and perhaps more) by the target firm, to cover the "information acquired" conflict possibility discussed above. *See* text accompanying notes *supra*.

[19] Paragraph (b)(7) permits lawyers to disclose certain limited client information sufficient to permit a prospective hiring law firm to avoid conflicts of interest that might prejudice the client or disqualify the prospective law firm. In most instances the lawyer may reveal her client's identity and enough information about the nature of her legal work to satisfy the ethical obligations of the hiring law firm. In some instances, however, the disclosure of the client's identity or the nature of the representation would create embarrassment or harm to that client. In those instances, the lawyer seeking employment ordinarily may not disclose the information without her client's consent. She may, however, explore alternative approaches, including a review of her prospective law firm's adversary list, to minimize the new law firm's risk of disqualification from its ongoing work. She also may reveal limited information to a member of the prospective law firm specially assigned to review any such information and to maintain that information confidential from the remainder of the firm.

[20] The exception to the confidentiality rule created by paragraph (b)(7) does not imply the opportunity on the part of the recipient law firm to use that otherwise protected client information for any purpose other than checking for possible conflicts of interest. Law firms should establish protocols and administrative procedures intended to restrict access within the firm to the client information provided by prospective hires to a very narrow category of persons whose access is essential to accomplish an adequate conflict check, and law firms may not share the information received with any person outside of the law firm, or for any purpose other than its conflict checking requirements. In similar fashion, a lawyer who has received otherwise protected client information from a prospective hiring law firm to assist that lawyer in predicting conflicts of interest may not disclose that information to any other person, or to use that information for any other purpose.

#### *Model Rule 1.7*

Rule 1.7 (and Rule 1.9, which follows below) should express the requirement that law firms and lawyers maintain adequate procedures to protect against conflicts of interest. Here is a proposal for adding a subsection to Rule 1.7:

(c) Lawyers and law firms shall keep records of client work and adverse interests, and perform screening of prospective new employees, associates, and partners, including non-lawyer staff, and shall perform conflict checks sufficient to insure against concurrent conflicts of interest and to protect the interests of its existing clients.

#### *Model Rule 1.9*

Rule 1.9 deserves a similar mandate:

(d) A law firm shall keep records of prior engagements made at or near the time of such engagements, and shall have a policy implementing a system by which proposed engagements, and the former representations by prospective new lawyers or non-lawyer staff, are checked against current and previous engagements, so as to render effective assistance to lawyers within the firm in complying with this Rule.<sup>217</sup>

Were the ABA to adopt language similar to that just offered, lawyers whose jurisdictions follow the Model Rules would have explicit authorization to engage in the kind of conflict checks most lawyers engage in as a matter of course. The language chosen does include a significant, but unsurprising, policy judgment. The earlier discussion showed that a firm could conduct a minimalist, but still adequate, conflict check by acquiring only the client list from a prospective new lawyer, without a description of the subject matter of the work performed by the lawyer or her colleagues for each client.<sup>218</sup> Such a minimalist system would limit mobility substantially, but would not foreclose it. Such a strict limitation on lawyer mobility is not warranted by any legitimate concerns for client interests, and no authority has ever advocated it. The language suggested here permits a more realistic and desired level of lawyer movement, and client choice of counsel, by expanding the permitted sharing to include information beyond simple client identity. It protects client interests adequately by its revival of the Model Code's attention to the likely injury caused by the sharing of client information, and to the desire of clients to keep other information secret.<sup>219</sup>

With that distinction in place, though, some disclosure for conflict checking purposes will still be expressly prohibited by Rule 1.6. Some lawyers wishing (or required) to change jobs will not be allowed to disclose to prospective employers the minimum information necessary to protect the new firm's clients. What happens to those lawyer is a major challenge for the professional regulatory authorities, assuming, as seems right, that an involuntary life sentence to a law firm, or a personal poison pill that could render a lawyer leaving a law firm unemployable by other law firms, is not an acceptable result.<sup>220</sup>

## CONCLUSION

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<sup>217</sup> This language is nearly identical to that added to its Code by New York state in 1996. *See* NY CODE OF PROF'L RESPONSIBILITY, DR 5-105(e)(1996).

<sup>218</sup> *See* text accompanying notes *supra*.

<sup>219</sup> The four published ethics opinions discussing conflict checks employ some version of this distinction, either because of the express language of a jurisdiction's confidentiality definition (*see* DC Op. 312, *supra* note ; NY State Op. 720, *supra* note ; NY City Op. 2003-2, *supra* note ) or through interpretive measures (*see* Boston Bar Op. 2004-1, *supra* note ).

<sup>220</sup> The problem is actually more complicated than the text implies, because a law firm may let an associate go. If that associate is then barred from revealing conflict-checking information, and if new firms are required to demand that information, the associate inevitably remains unemployed or in solo practice.

The quote from the law firm hiring partner that introduced this Article<sup>221</sup> showed vividly the worry and the misunderstanding that practicing lawyers experience when they change firms, or when their firms laterally hire a new lawyer. This Article has explained that lawyers must reveal information about their prior work in order to avoid ethical misconduct resulting from their mobility, but that those lawyers seemingly have no reliable authority to make such disclosures. The ideas developed here attempt to address that dilemma head on.

This Article has concluded that lawyers have very meager authority under the ABA's Model Rules to reveal client information in order to effect conflict checks, far too meager to do so adequately. While other sources of authority, most notably the Restatement (Third) of the Law Governing Lawyers, offer more workable guidance, those authorities may not apply in all jurisdictions, or perhaps in any jurisdiction (and, furthermore, would not overrule a state's Rules for disciplinary purposes). The teachings from the Restatement, as the Article explains, are also far too blunt and crude to work effectively in many specific contexts of conflict checking with migrating lawyers.

These difficulties need to be addressed by bar leaders and courts. This Article has suggested some specific changes to the Model Rules in order to make those Rules more responsive and effective for conflict checking. Those suggestions are, of course, just the beginning of a much longer dialogue needed on this topic. The hope here is that these thoughts will trigger more critical discussion and deliberation about these issues.

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<sup>221</sup> See note 2 *supra*.