

Law Firm Hiring and Screening

192-191

Is this the score of a Timberwolves, Lynx, or Gopher basketball game? Must have been a crazy overtime game with an exciting finish, right? Nope. In fact, 192-191 was the vote total on a motion to table further consideration of a resolution in the ABA House of Delegates at its recent annual convention in New York City. Maybe it's not as thrilling as a last-second shot by local star Blake Hoffarber, but it's still of interest to the professional regulation world.

What possibly could have generated such an evenly divided House? The answer is a proposed amendment to ABA Model Rule of Professional Conduct 1.10 that would have permitted screening of lateral attorney hires by private law firms without obtaining consent from the attorney's former clients. Even though Minnesota is one of several states that has allowed screening by private firms on a limited basis for nearly a decade, this debate and its reflection of a changing legal world bear watching.

The current ABA Model Rule 1.10 does not permit screening when an attorney leaves one private firm and joins another.¹ Presently, the new hire will bring with her a conflict of interest prohibiting adverse representation against any former client she personally represented in a same or substan-

tially related matter or in which her firm represented the client and about whom she has obtained any confidential information. Upon her hiring, this conflict is automatically imputed to all members of her new firm. Particularly in the world of commercial litigation as engaged in by large, multi-office law firms,

this imputation can very often result in an otherwise desirable lateral hire not being offered a position, since the possibility of having to withdraw from pending or future representations may be too financially daunting to offset any as yet unknown benefit to the firm. The ABA, and those states that have adopted the Model Rule without amendment, do not allow the newly hired lawyer to be screened from participation in such matters, absent the consent of the former client.

Minnesota's Approach

Recognizing the harsh result this approach can create, states such as Minnesota have adopted amendments to Rule 1.10 to permit screening in some situations.² Since 1999, Rule 1.10(b), Minnesota Rules of Professional Conduct (MRPC), has stated that if the new hire would be prohibited from representing a client due to a conflict of interest under Rule 1.9(b)³, other lawyers in the hiring firm may nevertheless represent the client, without client consent, if there is no reasonably apparent risk that confidential information will be used because: 1) whatever information the lawyer may have is unlikely to be significant in the subsequent representation, 2) the lawyer is subject to effective screening measures, and 3) timely and adequate notice of the screening is provided to all affected parties.

Note that this approach does not permit screening if the attorney has a 1.9(a) conflict of interest. What's the difference? A 1.9(a) conflict with a former client basically means that the attorney actively represented the client while at the former firm, and that the pending or proposed representation at her new firm is in the same matter (an attorney may not switch sides in the middle of a representation) or is in a substantially related matter. In such instances, screening is not considered sufficient to cure the conflict for the rest of the firm.

In the 1.9(b) situation for which screening is permitted in Minnesota, the recently hired lawyer either had no involvement in the client's matters while at her old firm or such minimal involvement that she did not obtain significant client confidential informa-

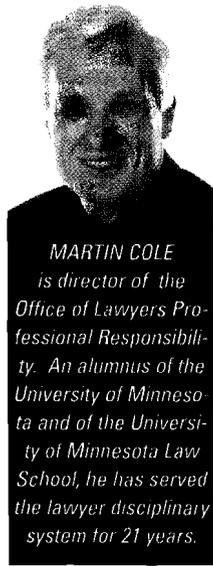
tion related to the matter. While the lawyer still may not reveal whatever limited information she may have obtained,⁴ the new firm may in such situations institute screening measures, even without obtaining consent of the former client. This is a reasonable balance between protection of the fundamental tenets of client confidentiality and loyalty on the one hand and the ability of attorneys to change firms and firms to hire the best legal talent on the other.

The Minnesota Supreme Court upheld this approach to imputation of conflicts in private firm hirings in *Lennartson v. Anoka-Hennepin Independent School Dist. No. 11*.⁵ The Court of Appeals had refused to disqualify a law firm that hired an associate from a firm that represented the opposing side in pending litigation and who had actively participated in the matter and obtained significant client information.⁶ The Supreme Court reversed. The Court stated that the rule is conjunctive, so that all three aspects of Rule 1.10(b) had to be met to avoid disqualification: no significant client information, screening and notice. If the new attorney has significant client confidential information, as was the case in *Lennartson*, then screening is not available and disqualification is required, unless the former client consents.

So Why the Fuss?

As a result of the Minnesota rule amendment and Supreme Court's decision in *Lennartson*, imputed disqualification in Minnesota has been a relatively quiet topic. Not so in those jurisdictions that retain the ABA Model Rule, which does not permit screening in any lateral hire situation.

No screening whatsoever often creates hard feelings when clients strictly enforce their ability to effectively block a lateral hire, or in the alternative compel withdrawal by the hiring firm. No doubt there have been some instances of a former client playing "hard ball" in refusing an otherwise reasonable request for consent. Thus, the proposal to the ABA House of Delegates was submitted to allow screening in private firm hires. The



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proposal did not stop at the Minnesota approach of screening in some situations, or that of any other state that has approved screening.

Rather, the proposal made no distinction between a proposed lateral hire who has insignificant or no client confidential information from an attorney who quite possibly was the former lead counsel in a major litigation matter. Any new hire may be screened without the consent of the former client, as screening is seen as eliminating the need for any imputation. Support of the recent proposal includes the argument that a client should not have veto power over a law firm's hiring decisions.

This view turns client loyalty on its head. Instead of the focus being, as it historically always has been, on the client's right to confidentiality unless there is almost no risk of harm, the view now seems to be "how dare a former client get in the way of the business of practicing law?" And rather than a proposal akin to Minnesota's that would permit screening in some situations, the proposed amendment sought to eliminate consent or notice altogether.

Opponents of the proposal were just as vociferous. Feeling themselves to be the guardians of client loyalty, their rhetoric was fierce. Opponents also showed little interest in a compromise position

similar to the Minnesota approach. As the final vote total indicates, the entire debate was spirited to say the least. Finally, a motion to table the matter for further study was made, and passed by that barest one vote margin—who says every vote doesn't matter?

Do We Care and What Now?

Should this debate concern us here in Minnesota? I think so. First, the ABA Model Rules of Professional Conduct do matter; they reflect the view of many thoughtful and knowledgeable lawyers who serve in the ABA House. You are not selected to serve in this body without qualifications. Second, the ABA Model Rules form the basis for professional responsibility study in the states. With the practice of law becoming increasingly national in approach, most states desire to adopt or amend rules to match the prevailing approach in other jurisdictions. If a rule permitting screening without consent in all lateral hire situations became prevalent, there is little doubt that some attempt to amend the Minnesota rule to comply would be forthcoming. For now, however, the national debate may quiet down for a while, at least until the next national ABA meetings in Boston (February 2009) or Chicago (August 2009). ▲

Notes

- ¹ ABA Model Rule 1.11 does permit screening of lawyers joining a private law firm from public office or government work. Minnesota's version of Rule 1.11 is in accord.
- ² If the newly hired attorney neither personally represented the client at her former firm nor gained any significant client information, there is no conflict to impute at all, since the attorney would not be prohibited from representation under Rule 1.9, MRPC.
- ³ Rule 1.9 deals with duties to former clients. When an attorney departs a firm, those of her clients at that firm that do not decide to continue with her for representation at her new firm become former clients.
- ⁴ Rule 1.9(c) prohibits an attorney from using information to the disadvantage of the former client or revealing information of the client unless some other Rule of Professional Conduct authorizes it.
- ⁵ 662 N.W.2d 125 (Minn. 2003).
- ⁶ *Lennartson v. Anoka-Hennepin Independent School Dist.*, 11, 638 N.W.2d 494 (Minn. Ct. App. 2002). The Court of Appeals reversed in part based upon its analysis of Rule 1.10(b), MRPC. The COA held that the rule should be read such that if the new attorney did not have significant client confidential information, then screening was not required at all. If the attorney had such information, however, then screening and notice were required.



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