

## Avoiding Imputed Disqualification Through Screening

by

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When clients hire attorneys they reasonably expect their attorneys to be loyal and to keep their confidences and secrets. Conflict of interest rules — 1.7, 1.8 and 1.9 of the Minnesota Rules of Professional Conduct (MRPC) and proposed new rule 1.18 regarding prospective clients — have been enacted to protect this important and legitimate client expectation.

When changing firms or professional associations a lawyer has a continuing duty to preserve client confidentiality. The obligation of loyalty and confidentiality is imputed to or applies to all of the attorneys in the firm. This imputation is based on the premise that each lawyer is vicariously bound by the obligation of loyalty owed by all of the lawyers with whom he or she is associated.

Rule 1.10(a) provides: “Except as provided in this rule, while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.”

Unqualified imputation of conflicts would radically limit the opportunity for attorneys to move from one practice setting to another and the opportunity for clients to change counsel. Rules 1.10 (general rule), 1.11 (government), 1.12 (judge, arbitrator or law clerk) of the MRPC, and proposed new rule 1.18 (prospective clients) attempt to balance these competing considerations by using screening in some circumstances.

### Screen saver

Screening is permitted under MRPC 1.10 only when there is no reasonably apparent risk that confidential information will be used because the information known to the moving attorney is unlikely to be significant in the subsequent matter.[Ftn 1](#) Under rules 1.11 and 1.12, screening is permitted if the lawyer did not personally and substantially participate in a matter giving rise to the conflict. Under these rules there is also a requirement that the screened attorney not receive any portion of the fee from the matter for which he or she was screened.[Ftn 2](#)

Under proposed Rule 1.18, the firm may undertake or continue representation in a matter where the moving attorney is disqualified because of previous communications with a potential client if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

- the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- written notice is promptly given to the prospective client.

Screening means isolating the lawyer who has a conflict from any participation in the matter by timely imposing procedures within the firm that are reasonably adequate to protect information that the isolated lawyer is obligated to protect.[Ftn 3](#)

Adequate screening procedures at a minimum require:

- the personally disqualified attorney to acknowledge, preferably in writing, the obligation not to communicate with anyone in the firm about the matter;
- written direction to all attorneys and support staff of the firm informing them of the screening and forbidding communication in any manner with the screened attorney about the matter;
- denial of access to firm files or other materials relating to the matter; and
- periodic reminders to firm personnel about the screening requirements.

For screening to be effective, notice of the screening procedures must be given to all affected clients as soon as the lawyer or firm knows or reasonably should know that there is a need for screening.

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[1] There is now pending before the Minnesota Supreme Court slightly different petitions by the Minnesota State Bar Association and the Lawyers Professional Responsibility Board to amend Rule 1.10 to expand the circumstances in which imputation of conflicts can be avoided by screening.

<sup>2</sup> This provision only prevents the attorney from receiving compensation directly related to the matter in which the lawyer was disqualified.

<sup>3</sup> [Proposed new] Rule 1.0(l) Minnesota Rules of Professional Conduct.