Screening conflicted lawyers under Rule 1.10

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When a lawyer leaves one private firm and joins another, whether at the partner or associate level, there are conflict of interest issues that must be considered and addressed. Rule 1.10 of the Minnesota Rules of Professional Conduct (MRPC) addresses the issue of imputed conflicts of interest. The general rule is that lawyers in a law firm share each other's conflicts of interest. If one lawyer is prevented from representing a current or former client, or a potential client, due to a conflict of interest, then all lawyers in the firm are equally prohibited.

When lawyers join a firm, they bring with them their conflicts of interest, which generally are then imputed to the remainder of the firm as well. Thus, when a law firm wishes to hire someone, it must check for potential conflicts of interest. If enough of them exist, the hiring firm must decide just how much it wants to hire that person, especially if it will require withdrawal from an existing case or declining a potentially lucrative new representation.

Not all conflicts of interest that would apply to a lawyer at her previous firm are transferred to her new firm, however. Rule 1.10(b), MRPC, states that when a lawyer joins a firm, the lawyer's new firm may not represent a client in the same or a substantially related matter in which the lawyer joining the firm (or that lawyer's prior firm) represents or represented a client adverse to the new firm's client, and — an important "and" — about whom the joining lawyer has acquired confidential information. Thus, if the joining lawyer was the principal lawyer for the adverse party in pending litigation, clearly the rule will be met and the new firm must either withdraw or decline offered representation. Even if the new lawyer was not involved directly in the representation at her prior firm but had acquired even insignificant confidential information about the client or the matter, then the same prohibition applied, at least until recently.

On the other hand, if the new lawyer's firm did represent an adverse party, but the lawyer can establish that she did not obtain any confidential client information then the prohibition would not apply to the new firm.

Effective Aug. 1, 1999, Rule 1.10(b), MRPC, was amended to allow for the first time in some limited situations screening of lawyers joining a private firm from another private firm.Ftn 1 The rule now states that even if the lawyer has acquired some confidential information about the client, which previously would have automatically imputed a conflict to the new firm, the new firm may not be disqualified if:

- the information is unlikely to be significant,
- the lawyer is subject to adequate screening measures to prevent disclosure and involvement of the new lawyer, and
- notice of the screening is given to all affected clients.

The screen

What is a screen and what measures constitute an effective screen? One source reveals: "To be valid, a screen must include measures to ensure that members of the firm will not harvest confidential information about the client learned by the incoming lawyer, and also wall off the incoming lawyer from benefiting financially from the firm's participation in the matter (other than receipt of ordinary partnership income or law firm salary)."Ftn 2 Another source adds: "An adequate showing of screening ordinarily requires affidavits by the personally prohibited lawyer and by a lawyer responsible for the screening measures. A tribunal can require that other appropriate steps be taken."Ftn 3

When disqualification claims come before a court based upon an imputed conflict created by a lawyer changing firms, the burden will fall on the firm seeking to avoid disqualification and seeking to establish a valid screening measure. The key ingredient in such situations is access. The Comment to Minnesota's Rule 1.10 states in part that "[p]reserving confidentiality is a question of access to information. … A lawyer may have general access to files of clients of a law firm and regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that the lawyer is privy to information about the clients actually served but not those of other clients."

Expansion

Courts have further expanded on these general concepts. For example, judges, when faced with claims for disqualification of a firm based upon an imputed conflict, followed by a claim of an effective screen, most often have not accepted evidence that information was not actually shared. Instead they have analyzed the level of access the purportedly screened lawyer had to the files at the new firm. Although the greater concern should be disclosure by the attorney to her new firm of the confidences of her former client (not her access to the new firm's clients' files), courts apparently look to these measures as being more objective evidence of an effective screen. Thus, it has become critical whether instructions were given to all firm members that a particular lawyer was to be screened, and the degree to which the file was maintained in a separate locked area to which the incoming lawyer did not have access, or in a file cabinet to which the lawyer did not have a key or a combination.Ftn 4

One area new to the electronic age is that files no longer are kept only in file cabinets or in storerooms. Today files are more likely stored electronically on a computer. A firm's intra-office server may be accessible to all attorneys, such that all files and all documents in that file can be accessed from an attorney's desktop. An incoming lawyer, who is otherwise to be screened from a particular matter, must be considered in this situation as having complete access to the file. Steps can be taken to deny access to some members of a computer network to certain documents or files. In order to avoid possible disqualification, such steps must be taken and taken promptly upon learning of the potential conflict. Relying on the incoming lawyer's word and good faith not to "peek" may not stand up to scrutiny in a contested challenge to the adequacy of a firm's screening measures.

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1 Screening had previously been allowed for lawyers joining a private firm from government practice. Rule 1.11(a), MRPC.

2 Hazard and Hodes, *The Law of Lawyering,* 3rd Edition (2001), Sec. 14.8.

3 American Law Institute, *Restatement (Third) of the Law Governing Lawyers,* Volume 2 (2000), Sec. 124 Comment d(ii). For an example of what one court considered a model screening mechanism and proof, see *Miller v. Chicago & Northwest Transp. Co*., 938 F.Supp. 503 (N.D. Ill. 1996).

4 See, e.g., *Cromley v. Board of Educ. of Lockport,* 17 F.3d 1059, 1064 (7th Cir. 1994); *Heringer v. Haskell*, 536 N.W.2d 362, 365-66 (N.D. 1995) and the numerous cases cited therein.