

RECENT AMENDMENT TO CONDUCT RULE 1.10

FEBRUARY 23, 2012

In 2009, the ABA followed the lead of twenty-three states and amended Model Rule 1.10 to allow for involuntary “screening” of newly hired attorneys. “Screens” - - sometimes referred to as conflicts walls, ethics walls, or Chinese Walls - - are methods of precluding firm-wide imputation of a lateral attorney’s conflicts of interest. See Advisory on the Law of Lawyering in New Hampshire No. 21. At the time of the ABA’s amendment, New Hampshire’s ethical rules limited screening to situations where: (1) government lawyers and judges or other adjudicative officers transition to private practice (see Conduct Rules 1.11 and 1.12); and (2) material, confidential information has been provided to a law firm by a prospective client (see Conduct Rule 1.18).¹

Effective March 1, 2012, New Hampshire will allow the use of involuntary “screens” under N.H. R. Prof. Conduct 1.10. See NHSC Order dated January 25, 2012, available at <http://www.courts.state.nh.us/supreme/orders/1-25-12-Order.pdf>. Historically, the efficacy of screens turned on considerations such as “the size and structural divisions of the law firm involved, the likelihood of contact between the ‘infected’ attorney and the specific attorneys responsible for the present representation, the existence of rules which prevent the ‘infected’ attorney from access to relevant files or other information pertaining to the present litigation or which prevent him from sharing in fees derived from such litigation.” Schiessle v. Stephens, 717 F.2d 417, 421 (7th Cir. 1983). New Hampshire will similarly condition the use of involuntary screens. The safeguards built into New Hampshire’s new version of Rule 1.10, however, exceed those within Model Rule 1.10. In particular, screening under the newly amended N.H. R. Prof. Conduct 1.10 requires that:

- (1) the lawyer provide the former client (or his or her counsel) with an affidavit assuring compliance with the lawyer’s ethical rules of confidentiality; and
- (2) a partner, officer or shareholder in the new firm provide the former client (or his or her counsel) with a similar affidavit assuring the former client that the firm’s members and employees are aware of the disqualification of the new lawyer. The affidavit must also describe the screening

¹In addition, firms sometimes offered forms of voluntary screening as a means of inducing an existing client to waive a conflict of interest associated with a potential new client. Voluntary screening, however, is not referenced in New Hampshire’s Rules of Professional Conduct governing conflicts of interest.

Attorney Conduct, Liability & Professionalism Practice Group

Peter Beeson, Co-Chair
603.410.1712
pbeeson@devinemillimet.com

**Mitch Simon, Of Counsel
and Co-Chair**
603.228.1541
msimon@devinemillimet.com

Andy Dunn
603.695.8503
adunn@devinemillimet.com

Bob Dewhirst
603.695.8646
rdewhirst@devinemillimet.com

Jonathan Eck
603.695.8742
jeck@devinemillimet.com

Joshua M. Wyatt
603.695.8517
jwyatt@devinemillimet.com

Kristen Blanchette
603.695.8572
kblanchette@devinemillimet.com

DEVINEMILLIMET.COM

process and the firm must agree to respond promptly to written inquiries or objections asserted by the former client.

- (3) If requested by the former client, similar affidavits should also be prepared after the disqualifying matter terminates.

Importantly, the new screening procedure is unavailable where the lawyer to be screened “had substantial² involvement in, or received substantial material information about, a matter that is ongoing at the time of the firm transfer and that would be the focus of the screening procedures.” N.H. R. Prof. Conduct 1.10(c)(3). As the new comment explains, this provision “differs from the ABA Model Rule, and draws on more restrictive procedures that have been adopted in Massachusetts and Oregon.” Id. Ethics Committee Comment. The comments further explain that the procedures are intended to strike a balance between the lawyer’s interests in professional mobility, the rights of existing clients to retain the law firm of their choice, and the interests of former clients in maintaining client confidentiality. Id.

Law firms seeking to hire experienced attorneys and attorneys seeking to make a lateral employment move will benefit from the job mobility promoted by the new screening procedure. With this new procedure, however, come new risks. Lateral attorneys and hiring firms should carefully comply with the prescribed conditions of an ethical screen to avoid disqualification, discipline or potential fee forfeitures. Equally important, if the lateral attorney participated in or received information about an ongoing matter between the new and old firms, the parties should carefully consider whether the screening procedure is available.

The Advisories on the Law of Lawyering in New Hampshire issued by the Attorney Conduct, Liability and Professionalism Group are intended to provide general overviews of professional responsibility law in a variety of areas encountered by lawyers. Because the law in this field is constantly changing, and because the Advisories are generic, they should not be relied upon as guidance or advice on how to handle specific situations. If you have any questions about this e-mail, or if you know of anyone else who may be interested in receiving these alerts, please send us an e-mail at AC&LPG@devinemillimet.com.

² “Substantial” is defined as “denot[ing] a material matter of clear and weighty importance.” N.H. R. Prof. Conduct 1.0(l).

Office Locations:

111 Amherst Street
Manchester, NH 03101
T 603.669.1000
F 603.669.8547

43 North Main Street
Concord, NH 03301
T 603.226.1000
F 603.226.1001