

ABA JOINS 23 STATES IN ADOPTING RULE EXPANDING THE USE OF “CONFLICT WALLS”, OR SCREENING, FOR LATERAL HIRES. WILL NEW HAMPSHIRE FOLLOW?

APRIL 16, 2009

Introduction: The Debate Over the New ABA Rule

At its mid-year meeting in February, 2009, the ABA House of Delegates voted 226-191 to change Model Rule 1.10 (the “imputation” rule) so as to allow broad use of screens - - also known as conflict walls or ethics walls - - to resolve conflicts in lateral hire situations. As the vote reflects, the delegates were sharply divided and the deliberations were spirited. The controversial rule has also generated sharp and often hostile debate within the broader universe of professional responsibility lawyers. A sample of the competing arguments follows:

- Information will be shared, either accidentally or intentionally, and there will be no way for the abandoned client to know. It is the perception of the client left behind that we need to focus on.
- The ABA has allowed screening as a means of facilitating the transfer of government lawyers to private practice since 1983 . . . and since that time, disciplinary proceedings regarding breaches of those screens have been non-existent.
- When the client learns of the lateral move, she will fear the disclosure of confidential information to the opposition, and will not be reassured by screening procedures.
- There is not a lawyer of any experience in representing other lawyers who has not had a client who would breach a screen.
- Of course there are going to be lawyers who violate screens . . . just like there are lawyers who steal client funds and violate Rule 1.6 and ignore conflict rules . . . and when we discover the violations, they will be sued or sanctioned just like for other violations. The problem in a “no-screen” approach is the underlying assumption that all lawyers will exploit the situation.

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- The violations that are the most difficult to detect are going to occur most often.
- This is another example of the ABA standing aside when ethics rules are obstacles to law firm expansion.
- In overseeing implementation of screens in my firm, I have never worried that another lawyer in my firm would violate a screen.

In presenting the recommendations of the ABA's Standing Committee on Ethics and Professional Responsibility ("ABA Ethics Committee") to the Board of Delegates, Robert Mundheim, the Committee's Chair, explained that the amendment "permits screening of lawyers as they move from one employment in the private sector so that any conflicts of interest they might carry with them need not be imputed to all the other lawyers in their new (place of) employment." The ABA's action followed the lead of twenty-three states that had already enacted a variety of screening provisions to address the lateral hire situation.¹ In the words of Carolyn Lamm, the ABA's president-elect, the new Model Rule restored the ABA's "historic leadership by putting forward a balanced screening proposal for our states to adopt".

New Hampshire's recently revised Rules contain the definition of screening contained in the Model Rules:

Rule 1:10(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

In the context of lateral movement of lawyers, screening is the process of walling off attorneys who join a firm with confidential information relating to a former client's case. The procedure is intended to "prohibit both his participation in a matter and his communication or use of information he may have about a matter." Report of ABA Ethics Committee. When successfully implemented, the process ensures that colleagues in the new firm representing an adverse client in the same or a similar matter do not gain access to the information transported by the migrating lawyer.

¹In the New England region, Massachusetts and Rhode Island have adopted screening rules that allow lawyers to transfer between firms without imputing that lawyer's disqualification to other lawyers in the new firm. Rhode Island and eleven other states have rules that are substantially similar to the rule that has now been established by the ABA: Delaware, Illinois, Kentucky, Maryland, Michigan, Montana, North Carolina, Oregon, Pennsylvania, Utah and Washington. Massachusetts and eight other states permit screening unless the migrating lawyer had a "substantial role" in the former matter: Arizona, Colorado, Minnesota, Nevada, North Dakota, Ohio, Tennessee and Wisconsin. Two others, Indiana and New Jersey, permit screening unless the migrating lawyer played a "primary role" in the former matter.

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Under the ABA's new rule (and those of other states that have already acted), screening can be used to resolve conflicts and confidentiality issues without the consent of the former client. The implications of the new rule are significant. They are perhaps best understood if one considers the hypothetical of adverse litigation between clients of firm A and firm B and a decision by firm B, during the course of the litigation, to hire a lawyer at firm A who has knowledge of the litigation. Before the ABA's amendment to Rule 1.10, the consent of firm A's client would have been necessary before screening could be used to avoid disqualification of firm B. After the amendment, the new firm can continue to represent client B over the objection of the migrating lawyer's former client by following the screening procedures outlined in the new rule.

The New Screening Rule

The new screening provisions of the ABA Model Rule are underscored below²:

Rule 1.10 Imputation of Conflicts of Interest: General Rule

- (a) 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 or 1.9, unless
- (1) the prohibition is based upon a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or
- (2) the prohibition is based upon Rule 1.9(a) and
- (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
- (ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

²It has been reported that the ABA is already considering revisions to the new language, which can be read to permit screening even for non-migrating lawyers, i.e. outside of the context of lateral hires that were the clear focus of the ABA's amendment. States will need to monitor this process.

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

As summarized by the ABA Ethics Committee's Recommendation and Report to the House of Delegates ("Report"), the amendments start from the proposition that client confidentiality must be protected. "The question is not whether but how (the protection of client confidentiality) should be accomplished." (Report at p. 10.)

To carry out, and emphasize, the continued importance of client confidentiality, the amended rule sets forth new protective measures for screening in the context of lateral hires that exceed those required by the limited screening provisions that already existed in the Model Rules. (See Model Rules 1.11, 1.12 and 1.18.) The new procedures:

1. Require that a prompt notice to the former client confirm that no material confidential information was shared with the new firm prior to implementation of the screen;
2. Require a statement to the former client that judicial review of the screening process is available; and
3. Require certification by both the lawyer and the firm, upon request by the former client and at the end of the process, that the screening procedures were followed, that no material confidential information was shared with the new firm, and that the transferring lawyer had not participated in the same or substantially related matter against the former client.

Id.

These procedures were the result of protracted debate within the ABA regarding the advisability of adopting broader screening rules, and reflect the substantial opposition encountered by those who advocated the broader rules. Law firms in states adopting the ABA's new rule will be required to establish oversight mechanisms that insure immediate implementation of appropriate screening procedures, immediate notification to former clients, and ongoing monitoring so that certifications during and at the end of the screening process can be provided.

New Hampshire and the ABA's New Rule

New Hampshire is one of approximately twenty-five states in the country that retains greater restrictions on screening in its Rules. Presently, our Rules allow screening only when government lawyers and judges or other adjudicative officers transfer to private practice (see NHRPC Rules 1.11 and 1.12); and when material, confidential information has been provided to a law firm by a prospective client (see NHRPC Rule 1.18). In each of

these rules, screening is allowed without the consent of others if “timely screening” is implemented and prompt, written notification is given.

New Hampshire’s Ethics Committee will review the ABA’s rule and make recommendations to the Supreme Court, over time, regarding the adoption of the Rule or some modification of the Rule. It will be interesting to see if the proposal encounters the opposition that characterized the ABA’s debate. The ABA’s Report seeks to address many of the concerns raised during those debates. It notes, for example, that the experience of states with ethical screens reveals no widespread pattern of violations; that the prospect of the opponent’s primary lawyer being hired in the midst of litigation is negligible - - due to other ethical restrictions on recruitment during adversary proceedings; that screening is necessary to protect the interest of the hiring law firm’s client in retaining his or her law firm of choice; and that the expanded Rule is particularly important now - - when many of the lateral moves are involuntary and caused by law firm downsizing.

It is clear that this rule change - - unlike many others that have occurred only when the ABA adopted revisions to its Model Rules - - has been seen by one state after another as a necessary accommodation to a more mobile legal profession. New Hampshire will make its own decision on this important development in the months, or years, to come.

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