Screening and the Specter of Harm to Clients

There has been much talk, some hyperbole, and little documentation about the potential consequences to clients in the discussions of the wisdom of amending MR 1.10 to provide for screening. I come from Illinois, a state that, since 1990, has allowed screening on a more expansive basis than would be permitted under the amendment to MR 1.10 proposed by the Standing Committee on Ethics and Professional Responsibility in Report 109. From the perspective of a fifteen year term as director of that state's lawyer discipline agency, I can offer this observation on the Illinois experience: in the years between 1992 and 2007, there was not one complaint to the disciplinary agency that a conflicts screen had been breached by disclosure of client information.

I am not speaking only of matters where formal disciplinary charges were pursued against an attorney. Instead, I am describing the inquiries, averaging about 6200 each year, generated by the filing of a grievance by a client, the submission of a report by an attorney or judge, or the docketing of a matter because of some information learned by the staff through some other source. Each year, we coded the inquiries to be able to track the type of misconduct alleged. On average, 243 of the 6200 complaints involved some charge that the attorney had engaged in a conflict of interest and another 38, on average, involved concerns that a lawyer had failed to preserve a client confidence. Our collective memory is that not one of the inquiries involved a concern that a lawyer had breached a screen.

People complain to discipline for different reasons. The vast majority of clients who complain are individuals who were involved in personal legal disputes, including divorce, criminal cases, personal injury and real estate, and they largely complain about lawyers who practice alone or in small firms. In Illinois, that phenomenon is tempered by the fact that the Illinois Supreme Court has sanctioned lawyers for failing to report misconduct by other lawyers, *In re Himmel*, 533 N.E.2d 790 (1989), so that each year, about 550 of the 6200 inquiries are initiated by attorney reports. Those matters are as likely to involve attorneys who practice in large firms for corporate clients, and more than a few are submitted by partners of the offending attorneys. While breach of a conflicts screen would not necessarily be a mandatory report under Illinois Rule 8.3, it was my experience that Illinois lawyers did not limit their reports to those required by the rule, and, indeed, some appeared to appreciate the *Himmel* duty as a shield against criticism for making reports they felt were warranted. I find it unlikely that there were substantial breaches of conflicts screens occurring but not being reported.

I pretend no ability to assure ABA members that there has never been a breach of a conflicts screen constructed by an Illinois law firm, nor do I think that to be a valid test of whether screening is a good idea. I can say that in my experience, practices that are bad for clients eventually lead to clusters of discipline complaints or malpractice claims or both, and that, out of 93,000 times someone cared enough to complain about an Illinois lawyer over a 15 year period, not one time did the complaint involve breach of a conflicts screen. When I consider that fact with the absence of any concern among my colleagues

who defend malpractice claims, I feel confident that screening does not, in fact, pose any real threat to client interests.

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