

Screening: Not Just a Big Firm Issue

Currently, Rule 1.10 of the ABA Model Rule of Professional Conduct prohibits all lawyers associated in a firm from knowingly representing a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9.

The ABA Standing Committee on Ethics and Professional Responsibility has proposed a modification to Rule 1.10 as an additional exception to the disqualification of Rule 1.10 for the lawyers in the firm not otherwise disqualified by Rule 1.9. It's called "screening."

At present, Rule 1.9 prohibits a lawyer who has represented a client in a matter, and who has acquired information protected by Model Rules 1.6 and 1.9(c) that is material to the matter, from thereafter representing another person in the same or a substantially related matter in which that second person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing. That disqualification follows the lawyer to a new firm, and is imputed to all lawyers in the new firm.

The proposed amendment would allow the relocating lawyer to be screened by her new firm from any contact with documents or discussion of the matter in question, and thereby allows the new firm to continue with the representation. A court may still disqualify the firm if it is not satisfied with the screen proposed or finds that no screen could be devised to properly protect the former client. Rule 1.10 sets the standard from the perspective of professional responsibility and discipline.

"Isn't this a problem only for the large firm lawyer and the large corporate client?," you may ask. Not in our now mobile profession. Lawyers now move from firm to firm, from solo to firms, from large firm to small firm, and vice versa; sometimes several times in a career. Should your former client or the client of your former firm have the power to prevent you from accepting a new position or, for that matter, disqualify your new partners or employers from representing a client they may have had a relationship with for many years, regardless of whether that client's confidential information is protected in fact?

I practice in Illinois where screens have been allowed and successfully employed since 1990. Twenty-two other states have adopted some form of screening to allow lawyers mobility between associations.

I was in a 3-lawyer plaintiffs' civil litigation firm until a few months ago. Our junior member, an associate, was offered a position with a 5-lawyer defense litigation firm across town at a significant increase in salary. (I wish I could have matched it; she was a good lawyer.) That firm was defending two cases which we had filed and our associate had had a significant participation in both. I didn't want to stand in the way of a good opportunity for a young lawyer whom I respected and liked. I called the new firm and asked what they proposed doing if they were not going to withdraw from the cases. We agreed on a very workable plan with a staff person reviewing all mail, as it was

opened and out of the presence of my former associate and securing documents regarding the cases in a locked cabinet in the responsible partner's office. We agreed the cases would not be discussed in her presence. The clients were protected.

Is screening foolproof? No, but I agreed to it because I know the quality of my former associate and I trust her new employers from past experience. Will it always work? No, that's why the men and women in the black robes get the big money. I could have filed a motion to disqualify if there were problems.

In my view, small town practices will benefit from the rule change even more than the city lawyers. We're actually a suburb of St. Louis here in Belleville, but there are counties in Illinois where there are only 3 or 4 lawyers. I'm sure there are many such communities in the 50 states. What happens when you want or need to re-locate? The possibilities of unworkable imputation are magnified when local options are more limited. Without screening, a country lawyer may have to become a city lawyer to continue a practice, draining smaller towns of valuable talent.

Screening has worked successfully in 23 states. It's time to amend the model rules to protect the interests of both clients and lawyers.

George R. Ripplinger
Ripplinger & Zimmer LLC
Belleville, IL