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From here to there: Elements of an effective screen when onboarding a lateral hire

By Tracy L. Kepler

The stars have all aligned. You have an attorney position to fill, and have found the perfect candidate with the right credentials, experience and book of business, who clears the initial conflicts checks (review of clients and matters on which the attorney is/was actively working). The attorney, looking for more interesting and meaningful work, better opportunities for advancement, and more money, has accepted your offer and is ready to start work. Your firm knows the value of having screening mechanisms in place, but even with all the “T”s crossed and “I”s dotted, the potential for a conflict of interest may arise. How can your firm implement an effective conflicts of interest screen and have some comfort in its effectiveness if and when the time comes to defend against a disqualification motion?¹

Imputed Disqualification & Conflict of Interest Screens

The purpose of conflict screening is three-fold: (1) to assure the affected parties that confidential information known by the disqualified lawyer remains protected and is not shared; (2) to prohibit the disqualified lawyer from participating in the matter at issue; and, (3) to ensure that other employees of the firm who are working on the matter do not communicate with the disqualified lawyer with respect to the matter.

Rule 1.0(k) of the ABA Model Rules of Professional Conduct defines screening as “the isolation of a lawyer [or other person with the conflict] 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.”²

Rule 1.10(a) of the ABA Model Rules of Professional Conduct permits a law firm to remove imputation of a lawyer’s disqualification if it is based upon Rule 1.9(a) or (b) (“Former Client Rule”), and arises out of the lawyer’s association with a prior firm, as long as the disqualified lawyer is timely screened, and apportioned no part of the fee in the matter.³ Subsection (2) of Rule 1.10(a) goes even further and requires that, in addition to the disqualified lawyer being “timely screened from any participation in the matter,” the law firm

must ensure that (1) the conflicted lawyer is “apportioned no part of the fee therefrom;” (2) each affected client receives “written notice” that enables the former client to “ascertain compliance with the provisions of this Rule;” and, (3) “certification of compliance with these Rules and with the screening procedure 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.”⁴ Rule 1.10(a)(2) also explains that the written notice should 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.”⁵

At least 18 jurisdictions have adopted a screening rule substantially similar to Rule 1.10(a)(2) which permits the screening of a lateral lawyer irrespective of the lawyer’s level of involvement with the former firm’s client or matter.⁶ Another 14 states have adopted rules where the availability of screening depends upon the lateral lawyer’s knowledge of or involvement in the relevant matter or former client.⁷ However, even if your jurisdiction has a non-consensual screening provision similar to Rule 1.10, the court may still disqualify your firm once the lateral hire has joined.⁸

Further, since not all jurisdictions have adopted a private firm screening rule, circumstances may arise where, as a result of the conflict, the hiring firm may be required to withhold an offer of employment. For example, if the hiring firm performs an initial conflict check of the prospective lateral hire’s clients and determines that there is a conflict with a former client, i.e., if the lateral hire actively represented the client while at the former firm, and the pending or proposed representation at the new firm is in the same matter (an attorney may not switch sides in the middle of a representation) or is in a substantially related matter, the firm cannot drop the client in order to hire a desired lateral attorney. Understanding the rules of your jurisdiction regarding lateral screening and imputed disqualification is imperative.

While these rules provide general guidance on how to comply with your ethical obligations, they leave many gaps with regard to the specifics and practicalities of implementing

an effective screen in the law firm setting. Developing and maintaining effective screens when a lateral hire joins to the firm are critical as a failure to do so may result in a disqualification or fee disgorgement motion for the firm, as well as a potential malpractice claim and reputational harm to the firm.

Elements of an Effective Screen

An effective screen consists of several elements. Each of these elements may not be appropriate for every situation and law firm. Firms should consider those elements applicable to the specific case, and select those that are appropriate and necessary in light of the nature of the conflict, the firms' operations, their risk threshold and the personalities of the affected clients.

(1) Timing

In order to be effective, screening measures must be implemented as soon as practical after a newly-hired lateral lawyer or the law firm knows or reasonably should know that there is a need for screening-before or at the time the conflict arises. Initially, when the lateral hire provides his or her list of former clients to the hiring firm, the firm must look for instances where it is representing a client adverse to a former client of the lateral hire. The firm must then determine whether the prior work merits a screen, specifically questioning whether the lateral hire has information material to the new matter, or whether the matters are substantially related. In addition to knowing what to look for, with onboarding of lateral hires and conflicts of interest, timing is critical. Courts have emphasized the need for a screen to be established in a timely manner in order to ensure that attorneys adverse to the lateral's former client are not infected with protected client information. Some have even suggested the screen should be in place at, or before, the time the lateral begins working at the hiring firm. A best practice is to complete conflicts checks on all parties, including former clients, far enough in advance of a lateral's start date to provide sufficient time for any needed follow up and time to implement a screen. In many situations, if the new firm has done a good job of conflict checking during the recruitment process, it will know of the need for the screen well before the lateral attorney's first day on the job. At a minimum, a law firm must erect a screen promptly after learning of a disqualifying conflict.

(2) Internal and External Notice

The disqualified lawyer who will be screened must be informed that he or she is screened from the particular matter(s) and the reasons for the screen. The notice should be in writing, which can be as simple as an email, or more formal, such as a written memorandum circulated through the firm. Maintaining documentation of the screening notification and the receipt/written acknowledgment of the same is important evidence in the event that an issue later arises.

You also should provide notice to all of the staff that are working on the screened matter that the screen has been erected and how that screen will operate. Advise firm attorneys and staff of the new lateral attorney's start date, the screen, and that they should not discuss the matter involved with the new attorney. Again, being able to prove delivery and receipt of this notice on a timely basis may prove to be critical. For example, in *Martin v. Atlanticare*, 2011 U.S. Dist. LEXIS 122987 (D.N.J. Oct. 25, 2011), a lawyer moved from one firm, where he was representing the defendant and worked extensive hours on the case, to a new firm representing the plaintiff in the same matter. The new firm timely implemented

a screen for the new lawyer from the case, but never memorialized it in writing. This factor, among other issues, tipped the scales in favor of the first firm's motion to disqualify the new firm.

Lastly, you must provide notice to the affected clients. ABA Model Rule 1.10(a)(2) requires that a law firm give notice to affected clients when an ethical screen is erected for a conflict arising from prior work at a different law firm. Rule 1.10(a)(2) also requires subsequent certification of the screening procedures both at regular intervals and upon written client request. (See Model Rule 1.10(a)(2)(ii)). When drafting the notice and subsequent certifications to the affected clients, the law firm must be thorough, specific and prepared for the outcome. On the one hand, a client who receives this type of proactive notice may raise additional questions, challenge the screen and possibly even seek disqualification of the firm. On the other hand, if the notice is not sufficiently precise, the following may occur: (1) an affected client may feel betrayed or become suspicious as to the reasons why the law firm did not permit the affected client to assess the dangers from the potential conflict or the adequacy of the screen elements at the outset; and, (2) a court or attorney disciplinary agency who receives a client grievance based upon the notice or certification may be more likely to find the screen to be inadequate.

(3) Physical & Operational Separation

Law firms should employ both physical and operational separation of the disqualified lateral attorney from the screened matter. This technique may include the following:

- Having the matter handled by staff located in different geographical offices, different floors/sections in the same office, or in a separate practice group.
- Minimizing the amount of communication and collaboration between staff on both sides of the screen, and ensuring that shared support staff, such as administrative assistants, paralegals, interns/externs, of-counsel, contract attorneys, investigators, etc., do not operate on both sides of the screen.
- Limiting access to physical or electronically stored information concerning the screened matter from the disqualified lateral attorney.⁹ Only lawyers and staff working on the matters giving rise to the conflict should have access to the files on the screened matters. These limitations may include the use of document management software controls to block disqualified persons from having access to specified electronic files, as well as physical locks – for example, on offices or file cabinets – to prevent disqualified persons from having access to or sharing any information with those handling the screened matter.

(4) Education

Even before the law firm considers erecting a screen for a specific conflict, it should provide guidance on ethical screens. Firms should ensure that lawyers and staff understand the conflict of interest rules and when/why a screen may be used. This training may be completed through internal/external CLE programming and distribution of risk management articles and relevant jurisdictional legal ethics opinions and materials.

(5) Accountability

Clearly, creation of the screen also requires additional measures. To be effective, a screen must be monitored and documented as well. A best practice is to designate one person to handle the following:

- Maintain and preserve records of the screen such as the dates on which the law firm erects and dismantles the screen

and all documents evidencing the screen, including but not limited to, all notices and reminders related to the screen, affidavits, certifications as to the adherence to the screen, checklists, emails, memoranda, etc. This information should be preserved as long as the matter continues in case the firm is later required to demonstrate the adequacy of its screen.

- Track all of the screens the firm is using at any given time, monitor compliance (staff are actually abiding by the parameters of the screen) and, if necessary, attest to the compliance with, and effectiveness of, a particular screen.

- Send reminders about the screen. Reminders should be sent to the disqualified staff and the team working on the screened matter on a regular basis (every 60 or 90 days) reminding them of the screen and its elements. In addition, every six months or annually, a memorandum should be circulated to all lawyers and staff warning of communications with the disqualified attorney about the matter.

- Review billing and payments to prevent the disqualified attorney from receiving any portion of the fees earned on or directly linked to the screened matter.

- Enforce disciplinary standards and consequences if there is a determination that an element of a screen has been violated.

Conclusion

Lateral hiring is a necessary part of the changing legal landscape, and it can yield mutually beneficial results for both the associate and the law firm. However, lateral hiring is not without risk, and even the most effective screen cannot insulate a law firm from the threat of discipline or disqualification. However, with the adoption of timely screening practices, protocols and procedures, a firm can minimize its risk. ■

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¹ For more information on lateral moves between law firms and conflicts checklists, see CNA Publication, "The Logistics of a Lateral Move Between Law Firms."

² ABA Model Rule 1.0(k)(2020).

³ ABA Model Rule 1.10(a)(2020).

⁴ ABA Model Rule 1.10(a)(2)(i)-(iii)(2020).

⁵ *Id.*

⁶ See, Ellen J. Bennett & Helen W. Gunnarsson, *Annotated Model Rules of Professional Conduct*, CTR FOR PROF. RESP. (9th ed. 2019).

⁷ *Id.*

⁸ See, *Kala v. Aluminum Smelting & Refining Co. Inc.*, 688 N.E.2d 258 (Ohio 1998) (screens not allowed in side-switching cases despite availability of such a remedy in other former-client conflict situations); *Twenty-First Century Rail Corp. v. N.J. Transit Corp.*, 44 A.3d 592 (N.J. 2012) (no screen allowed without former client's consent in subsequent adverse representation in same matter); and *Beltran v. Avon Products Inc.*, 2012 U.S. Dist. LEXIS 83060 (C.D. Cal.) (screen does not block firm's imputed disqualification when screened lawyer has key confidential information from substantially related cases).

⁹ See, *Line Trust Corp. Ltd. v. Lichtenstein*, No. 601951/2009 (N.Y. Sup. Ct. Nov. 17, 2011) (motion to disqualify firm granted as a result of flaws in law firm's screen allowing access to firm's document management system).