



Screening Out Your Conflicts

There is a new definition found in the Terminology section of Arizona's ethical rules.¹ It involves a concept that has been part of "lawyer law" for a number of years, and it could get you out of a lot of trouble in the future. It concerns "screening," a situation denoting "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 [Arizona's Rules of Professional Conduct] or other law."²

In our professional world of constantly migrating lawyers, a screen (classically known to lawyers as a "Chinese wall") can often be the difference between being able to take on or continue a case, and having to resign or decline the representation. This is because of the "imputation" principles found in ER 1.10 (Imputation of Conflicts of Interest: General Rule). This rule, the basics of which have been with us since the mid-1980s, states that a single lawyer in a firm who has a conflict of interest that would prevent him from representing a client that firm has or wishes to have can infect every lawyer in the firm and effectively prevent the firm from representing the current or prospective client unless the "affected" clients consent.

In cases in which the conflict is caused by the association of a new lawyer who formerly represented a client who is opposing a party represented by the lawyer's new firm, ER 1.10(a) necessarily proceeds on the assumption that the lawyer would otherwise be tempted to violate his obligations

of confidentiality to a former client under ER 1.9(c)³ and that his new partners and associates would otherwise be tempted to violate their obligations under ER 8.4(c).⁴ However redundant ER 1.10(a) may be in this kind of situation, it is the provisions of new ER 1.10(d) that present new opportunities for Arizona lawyers to screen the infected lawyer so that the lawyer's new firm can avoid the consequences of ER 1.10(a).

ER 1.10(d) provides that when a new lawyer joins a firm, everybody else in the firm is infected per ER 1.10(a) unless (1) the matter is not one in front of a tribunal⁵ in which the new but personally disqualified lawyer had a substantial⁶ role and (2) the new but personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom and (3) written notice is given to the affected former client so they can ascertain that the required screening is being effectively accomplished.

This exception for migrating lawyers did not exist previously in Arizona, which quite clearly did not allow screens except

for former or current government employees.⁷ This was the rule even when the consequences were quite harsh.⁸

With new ER 1.10(d), Arizona has joined an increasing number of states that now allow "disqualified" migrating lawyers to be screened at their new firms. Arizona's new ethical rules go even further, however, and allow screening not only for former and current government employees, as

under the former rules,⁹ but also for former judges, law clerks, arbitrators, mediators and other third-party neutrals,¹⁰ nonlawyers such as paralegals and secretaries,¹¹ and lawyers in a firm who would be otherwise disqualified because of confidences learned from a prospective client.¹²

What are the practical mechanics of screening an individual from what he is not supposed to see or hear? This is going to

be easier where the disqualified lawyer is on a different floor from the screened files and the other lawyers working on the case, but more difficult when he is in the next office. Some written notice should be given to every employee in the firm that no files concerning the "infected" matter should be shown to the new lawyer and no discussions about the case held in his presence.

Remember that the affected party has in some cases a right to "ascertain compliance" with the screening rules,¹³ and it will be easier to show compliance if you can brandish something in writing. Otherwise, you might want to consult some of the authorities that have specifically discussed screening mechanisms.¹⁴

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Ethics Opinions and the Rules of Professional Conduct are available at www.myazbar.org/Ethics



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endnotes

1. ER 1.0; Rule 42, ARIZ.R.S.Ct.
2. *Id.* at ER 1.0(k).
3. This rule prohibits the use of information relating to the representation to the disadvantage of a former client; see *In re Ockrassa*, 799 P.2d 1350 (Ariz. 1990) (lawyer in county attorney's office who previously represented defendant as public defender suspended for 90 days).
4. This rule prohibits a lawyer from knowingly assisting another lawyer in violation of the Rules of Professional Conduct.
5. This is a defined term under ER 1.0(m) and includes proceedings before an arbitrator, an administrative law judge and any official who can render a legal judgment.
6. This is also a defined term under ER 1.0(l) and denotes a material matter of "clear and weighty importance."
7. See *Towne Dev. of Chandler, Inc. v. Superior Court*, 842 P.2d, 377 (Ariz. 1992) (absent waiver or consent of affected party, new lawyer infected entire firm even if he was screened and isolated from ongoing litigation).
8. See *Turbin v. Superior Court*, 797 P.2d 734 (Ariz. 1990) (entire Navajo County Attorney's Office disqualified when defendant's lawyer joined staff); cf. *State v. Gottsfeld*, 829 P.2d 1241 (Ariz. 1992).
9. ER 1.11(a) (Special Conflicts of Interest for Former and Current Government Officers and Employees).
10. ER 1.12(c) (Former Judge, Arbitrator, Mediator or Other ThirdParty Neutral).
11. See cmt. [4], ER 1.10.
12. ER 1.18(d).
13. ER 1.10(d)(3) gives the right to ascertain compliance in the migrating lawyer case; ER 1.18(d)(2) involving the prospective client, does not.
14. Cases described under ER 1.11 can be helpful. See *Rennie v. Hess Oil Virgin Islands Corp.*, 981 F. Supp. 374, 378 (D.V.I. 1997) (Seven mechanisms suggested, including affidavits of compliance by the migrating lawyer and others in the firm); *Romley v. Superior Court*, 908 P.2d 37, 44 (Ariz. 1995) (mechanism discussed, including directions to the migrating lawyer and threat of sanctions); California Ethics Op. 1993-128 (1993); RESTATEMENT OF THE LAW GOVERNING LAWYERS § 124 (Removing Imputation) at cmt. d (Screening).