On Screening

Screening is now one of the more important considerations involved when lawyers in private practice move between firms.

In a previous column, we examined the ethical problems confronting a lawyer who leaves Firm A to join Firm B that just happens to be representing a client who is engaged in litigation against the migrating lawyer's former client who is still using Firm A.[1] Now, the State Bar's Committee on the Rules of Professional Conduct is proposing, at the time of this writing, to have ER 1.10 (Imputation of Conflicts of Interest: General Rule)[2] amended so that a lawyer representing a client in litigation could move to another firm, leaving the client behind with his old firm, without disqualifying his new partners from continued representation of a client involved in that same litigation, as long as the migrating lawyer is effectively "screened" from his new partners.[3]

This would bring Arizona's rule in general conformity with the ABA's new Rule 1.10 found in its Model Rules of Professional Conduct, after which our ethics rules are patterned, and will once again focus attention on the screening process and the role it plays in resolving conflicts of interest.

Screening, the isolation of a person[4] within a law firm in order to protect information which that person is obligated to keep confidential under our ethics rules, is the legal profession's method of avoiding the imputation of a single lawyer's ethical disqualifications to the rest of the firm of which that lawyer is a part.[5] Used for many years to allow public officers and judges to enter private practice without disqualifying their new employers in matters in which they had participated "personally and substantially,"[6] screening is now one of the more important considerations involved when lawyers in private practice move between firms.[7]

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

Unfortunately, our ethics rules only describe in general terms what is required to implement an effective screen.[8] A recent case from Nevada[9] points out some common screening pitfalls and suggests some things to consider in order to avoid them.

That case involved a lawyer who had served as a "settlement judge" in a case where the lawyer's firm became counsel for the defendant in the case after his service as the settlement judge had ended. The parties agreed that the lawyer was personally disqualified from representing the defendant, but disagreed on whether the screening procedures used by the lawyer's firm prevented his disqualification from being imputed to all other members of his firm. After discussing the factors to be applied when screening nonlawyer employees and citing authorities from other jurisdictions dealing with screening situations covered by both ER 1.12 and ER 1.10, the court stated that it did not have enough facts before it to make a determination in the case, and sent the matter back to the trial court for review, using five "nonexhaustive" factors it recommended:

1. *The adequacy of the instructions given to firm members and employees to prohibit the exchange of information between the disqualified attorney and the other members of the firm.* This should be in writing and should be part of the notice given to affected former clients as required by ER 1.10(d)(3) of Arizona's present ethics rules.
2. *The degree to which it is demonstrated that the "infected" lawyer is effectively restricted from access to files and other information about the case.* This will be easier to accomplish when the lawyers working on the case and their files are on a different floor from where the screened lawyer works, or where their respective offices are in different cities. It will be more difficult to demonstrate when, as recognized in the next factor, the lawyers involved practice in a small, more intimate setting.
3. *The size of the firm and its structural divisions.* This is a practical test and acknowledges the obvious fact that the smaller the firm, the greater the risk of prohibited disclosure between the screened lawyer and the others in the firm.
4. *The likelihood of contact between the screened lawyer and other members of the firm.* This is related to the factor involving firm size and may be more appropriately considered when the infected lawyer is in a different office location, even on a different floor, than the other lawyers working on the case.
5. *The timing of the screening.* This can be the most important factor of all, especially when adequate time is available to implement a screen before the infected lawyer migrates to the new firm. You can't wait until you're caught to set up a screen and expect to get away with it.[10]

One last observation: The ABA's Model Rules of Professional Conduct describe what should be contained in the

David D. Dodge provides consultation to lawyers on legal ethics, professional responsibility and standard of care issues. He is a former Chair of the Disciplinary Commission of the Arizona Supreme Court and practices as David D. Dodge PLC in Phoenix.

written notice required to be sent to affected former clients, including: (1) a description of the screening procedures employed; (2) a statement of the firm's and the screened lawyer's compliance with the Rule; (3) a statement that review may be available before a tribunal; and (4) an agreement by the firm to respond promptly to any written inquiries or objections by the former client.[11]

These specific requirements were not included in the Arizona version of ERs 1.11 and 1.12; mentioned in the "new" ER 1.10, which became effective in 2003; or included in the new rule being proposed. Arizona instead seems to favor a broadly worded provision that simply requires "written notice" of the situation to be given to any affected former client. A careful lawyer may want to view the more descriptive Model Rule requirements as a "safe harbor" when notifying the former client of the screening measures required in whatever version of ER 1.10 we finally end up with.

endnotes

1. *When Lawyers Change Firms*, ARIZ. ATT'Y (October 2011). at 8.
2. Rule 42, ARIZ.R.S.CT.
3. See www.azbar.org/newsevents/newsreleases/2013/05/draft-proposed changestoer110. Our present rule would impute the migrating lawyer's conflict of interest if he had had a "substantial" role in the litigation.
4. Screening rules apply to lawyers as well as nonlawyer assistants. *See* Comment [4] to ER 1.10.
5. For an excellent treatment on the subject, *see* GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING §§ 14.8-14.10 (3d ed. 2000).
6. ER 1.11 (Special Conflicts of Interest for Former and Current Government Officers and Employees) and ER 1.12 (Former Judge, Arbitrator, Mediator or Other Third-Party Neutral).
7. ER 1.10(d)(2).
8. Comments [8]-[10] to ER 1.0 (Terminology).
9. *Ryan's Express Transportation Services, Inc. v. Amador Stage Lines, Inc.,* 128 Nev. Adv. Op. 27 (Nev. 2012).
10. *See Kala v. Aluminum Smelting & Refining Co.,* 688 N.E.2d 258, 267 (Ohio 1998) and cases cited.
11. Search online for "Model Rules of Professional Conduct Rule 1.10" and follow the links to Model Rule 1.10(a)(2)(ii) and (iii).