Dealing With Your Partner's Conflicts of Interest

If you have ever been surprised by the imputation rules found in ER 1.10 of the Arizona Rules of Professional Conduct,[1] don't feel like you are alone. They require us to engage in the legal fiction that the disabling conflicts of interest of a single lawyer are in fact possessed by every other lawyer in that lawyer's firm. This vicarious "infection" can result in lost business and unexpected disqualification rulings.

The problem usually arises when a lawyer in a firm wants to represent a party in litigation against a former client of one of the other lawyers in the same firm. There are, however, other occasions in which application of the imputation rules apply.

A recent ethics opinion from Ohio demonstrates the breadth of the rules in other contexts.[2] In the opinion, the question posed was whether the partner of a lawyer serving on a board of directors of Company A, which was not a client of his law firm, could represent a party in litigation against Company A. The opinion begins by observing that a significant risk would exist that the duties of loyalty and independence of the lawyer serving on the board of directors would be materially limited if he were to attempt to represent the party suing Company A. This is because of his fiduciary duties to Company A as a director, and his own personal interest in continuing to serve as a director. The opinion then refers to the provisions of ER 1.10, which impute the lawyer–director's disqualifying conflict of interest to every other member of the lawyer's firm, including the partner with the new case. The opinion points out that since this proposed engagement would result in Company A and the new client being directly adverse to each other in the same proceeding, the provisions of ER 1.7(b), as incorporated in ER 1.10, would not allow even the affected parties to waive the conflict.[3] Other authorities are in accord.[4]

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ER 1.10 has some limitations, however, and you should be familiar with them when you are determining whether the imputation rules apply to your situation. First, the rules only apply to conflicts contemplated by ERs 1.7 (Conflict of Interest: Current Clients) and 1.9 (Duties to Former Clients). This is a broad range of conflicts, to be sure, but does not include such disabilities as when a lawyer in a firm must be a witness in a lawsuit, which is covered by ER 3.7, and which allows another lawyer in the same firm to continue the presentation. In other words, the prohibition against the lawyer–witness participating in the trial is not imputed to other members of his firm.

Second, if the prohibition against representation is based on the infected lawyer's "personal interest" alone, and would not effect a material limitation in representation by the other lawyers in his firm, then ER 1.10 will not prohibit another lawyer in the firm from representing the client. An example would be where the lawyer has strong religious beliefs about abortion rights and the case involves a woman's right to terminate a pregnancy. As long as the lawyer will not work on the case and his personal beliefs will not materially limit the representation by other lawyers in his firm, the firm will not be disqualified.

Third, the imputation rules apply only to lawyers. Thus, the confidences or beliefs held by paralegal staff and legal secretaries will generally not disqualify a law firm under ER 1.10. Comment [4] to the rule suggests, however, that the paralegal or secretary be "screened" from personal participation in the matter.[5]

Fourth, the imputation rules apply only while the infected lawyer is associated "in a firm." This means that when that lawyer leaves the firm, the other lawyers in the firm are no longer prohibited by ER 1.10 from representing that client, unless any of the remaining lawyers have acquired information concerning that client that is protected by the confidentiality restrictions of ER 1.6 or ER 1.9(c).[6] Conversely, if the conflict arises because a new lawyer is joining the firm, remember that ER 1.10(d) allows the new lawyer to be screened under certain conditions, the result of which will be that the firm will be allowed to continue the representation.[7]

A final word about screening: The imputation rules frequently allow for the screening of infected lawyers, and the general sense in this world of migrating lawyers is that screening will be increasingly and more liberally allowed. Screening is allowed to prevent disqualification in situations where lawyers move between judgeships, government and private employment,[8] and where confidences shared with a prospective client might otherwise disqualify a lawyer's entire firm.[9] An effective screen also may encourage a waiver of the imputed conflict, which would not otherwise be acceptable to the affected client.[10] AZ AT

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endnotes

1. Rule 42, ARIZ.R.S.CT.
2. Ohio Supreme Court Board of Commissioners on Grievance and Discipline Op. 2008-2 (June 6, 2008).
3. ER 1.7(b) allows the affected parties to give informed consent to certain conflicts of interest if (a) the firm reasonably believes that it will be able to provide competent and diligent representation to each affected client; (b) the representation is not prohibited by law; and (c) the representation does not involve the assertion of a claim by one client against another client represented by the same firm in the same litigation.
4. *See Berry v. Saline Mem. Hosp.*, 907 S.W.2d 736 (Ark. 1995); Virginia Ethics Op. 1821 (2006); Illinois Ethics Op. 02-01 (2002); Missouri Informal Ethics Op. 970171.
5. ER 1.0(k) defines "screened" generally as the isolation from participation in a matter through the imposition of procedures within

a firm to protect information the isolated person is obligated to protect under the ethics rules or other law.

6. ER 1.10(b); Arizona Ethics Op. 90-06 (June 1995).
7. *See Screening Out Your Conflicts*, ARIZ. ATT'Y (April 2006), at 12. The ABA recently revised Model Rule 1.10 to allow, under certain conditions, the screening of a migrating lawyer who had a "substantial role" in litigation to which her new firm represents an opposing side. Arizona has not yet adopted the ABA revisions.
8. *See* ER 1.11(a)(1) and ER 1.12(c)(1).
9. *See id.* 1.18(d)(1).
10. *See id.* 1.10(c).