When Lawyers Change Firms

In previous articles, we looked at some of the ethical rules that apply when a lawyer leaves a firm.[1] But what happens when a lawyer leaves a firm and joins another firm that represents the other side in a pending matter?

If there are any aspects of legal ethics that could qualify as rocket science, this would probably be one of them. And it's not a subject for ethics wonks alone: Lawyers are migrating between firms more than ever, and some of the resulting situations have been embarrassing and expensive for lawyer and firm alike.

The overarching issues here are (1) whether a lawyer's move to another firm puts a former client of that lawyer at risk of having a confidence disclosed to another person or used to the client's detriment without the client's consent,[2] and (2) whether a client's right to have the lawyer of its choice should be impaired in the process.

Let's remember first that if the client goes with the migrating lawyer, the client will obviously not be a "former client." But when the client, or a client the migrating lawyer worked for while at his former firm, stays with the former firm, that client becomes a "former client" subject to ER 1.9, and the lawyer's new or "destination" firm becomes subject to the imputation rules of ER 1.10(d).[3]

ER1.10(d) provides that a migrating lawyer who may have an ER 1.9 confidence concerning a client left behind will not infect his new firm if the lawyer is "screened" and notice of the screen is given to the former client affected. "Screened" is a defined term under ER 1.0(k) and presumes the isolation of the infected lawyer from any participation in the matter he worked on previously through "timely imposition" of procedures within the destination firm that effectively protect the confidences the migrating lawyer may possess.[4] But this exception to the imputation rules will not be allowed if the migrating lawyer had "a substantial role" in "a proceeding before a tribunal" involving his now former client and the destination law firm. In other words, if the migrating lawyer represented the seller in a real estate transaction, he can be screened to allow the destination firm to continue representing the buyer. But if the engagement was a lawsuit, and the migrating lawyer had a substantial role in representing a client who is opposed to a client in the destination firm, no dice. The migrating lawyer's new partners may be subject to disqualification as having an ER1.10 imputed conflict of interest.

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What is "a substantial role"?[5] Here's where it gets complicated, because the cases are not exactly uniform. (It also doesn't help that states have adopted ER 1.10 of the ABA's Model Rules in different ways, some providing for more lenient screening rules than others.[6])

Recently a federal court refused to grant a motion to disqualify a firm that had hired a migrating lawyer who had obviously had a substantial role in litigation where the destination firm represented the opposing party. In that case,[7] a complicated and protracted patent matter, the migrating lawyer had worked a total of 186 hours on the plaintiff's case (for which he billed more than $110,000), which represented eight percent of his billable time during that period. When he left Minneapolis to join defendants' counsel's

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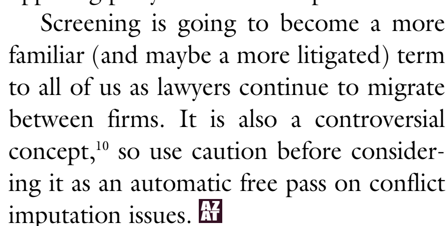
New York City office, which was just opening, the plaintiff attempted to disqualify the defendants' law firm, which had been working on the case for years. The court sitting in Wisconsin held that a federal court was not bound by Wisconsin's ethics rules, agreed that the migrating lawyer could not work on the case, but allowed the destination firm to continue representing the defendant under the screening procedures described.[7]

If you are ever confronted with an ER 1.10(d) issue in an Arizona matter, a good starting place would be the excellent analysis found in *Eberle Design, Inc. v. Reno A&E*,[9] where an associate who worked for nine hours drafting voir dire questions was allowed to join the lawyers representing the opposing party in an Arizona patent case.

Screening is going to become a more familiar (and maybe a more litigated) term to all of us as lawyers continue to migrate between firms. It is also a controversial concept,[10] so use caution before considering it as an automatic free pass on conflict imputation issues.



endnotes

1. *Clients Come First When Lawyers Leave Firms*, ARIZ. ATT'Y, April 2002, at 12; *Post-Departure Fee Splitting Agreements*, ARIZ. ATT'Y, April 2007, at 6; *Financial Penalties for Departing May Be OK*, ARIZ. ATT'Y, June 2008, at 10.
2. *See* ER 1.9, Rule 42, ARIZ.R.S.CT.
3. *See Dealing With Your Partner's Conflicts of Interest,* ARIZ. ATT'Y, Dec. 2010, at 12.
4. *See Screening Out Your Conflicts*, ARIZ. ATT'Y, April 2006, at 12.
5. "Substantial" is a defined term under ER 1.10(l) and denotes "a material matter of clear and weighty importance."
6. *See* an excellent analysis of the various states' rules and the considerations supporting them, in *Kirk v. First American Title Insurance Co.,* 183 Cal. App. 4th 776 (2010) (single telephone call soliciting lawyer's services as consultant to plaintiff's lawyers during which plaintiff's legal theories discussed did not later disqualify lawyer's new firm from representing defendants).
7. *Silicom Graphics, Inc. v. ATI Tech., Inc. et al.,* No. 06-CV-611-bbc, U.S. District Court (W.D. Wisc. Oct. 5, 2010).
8. The court used Seventh Circuit precedent to arrive at its decision. The Ninth Circuit has indicated that it will look to the states' ethics rules in these cases. *See In re County of Los Angeles,* 223 F.3d 990, 995 (9th Cir. 2000).
9. 354 F. Supp. 2d 1093 (D. Ariz. 2005).
10. Read Burkhart Lindahl, *Ohio's New Ethical Screening*, 31 U. TOL. L. REV. 145 (Fall 1999), and *see* William Freivogel's website http://freivogelonconflicts.com at Changing Firms-Screening.