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Something Old, Something New: Oregon's Updated Lateral-Hire Screening Rule

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Oregon's lateral-hire screening rule—now found at RPC 1.10(c)—has been around since 1983. At that time, it was a pioneering application of screening to lateral movement between firms in private practice. Then, as now, the purpose of the rule was to facilitate lawyer movement between firms in private practice without compromising client confidentiality. Since the Oregon rule was adopted in 1983, many states followed and the ABA eventually amended its influential Model Rules of Professional Conduct in 2009 to allow screening in this context. Because our rule had remained essentially unchanged since it was adopted over 30 years ago, the Oregon Supreme Court approved an updated version of our screening rule that became effective earlier this year that moves us closer to the national formulation reflected in the ABA Model Rule. In this column, we'll look at both the theory and the mechanics of lateral-hire screening in light of our updated rule.

Theory

When a lawyer leaves an "old" firm to join a "new" firm, clients of the "old" firm that do not follow the lawyer to the "new" firm become the lawyer's former clients. Under RPC 1.10(a)—the "firm unit rule"—an arriving lawyer's former client conflicts are imputed to the "new" firm as a whole unless the lawyer is

screened in accord with RPC 1.10(c) (or the clients involved waive the conflict). To illustrate, if your firm is hiring a new lawyer who worked opposite you on a pending case, you need to screen the lawyer to avoid having your firm disqualified when the new lawyer (and the new lawyer's conflict) join your firm.

"Screening" is defined in RPC 1.0(n) as "the isolation of a lawyer from any participation in a matter through 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." The definition underscores the theory behind screening. By disqualifying the individual lawyer who arrives with a former client conflict but not the new firm as a whole if it uses screening, the rule protects the former client while still permitting lawyers to move between firms in private practice.

Mechanics

When our rule was originally adopted as part of the old "DRs," it included very detailed procedures and reflected a time period when information was largely communicated in paper form rather than electronically. The amendments approved by the Supreme Court delete the former detail while preserving the essential mechanics of screening: making sure the "new" lawyer does not work on the matter otherwise creating the conflict and that the "new" lawyer does not share the former client's confidential information with the "new" firm.

The new version of RPC 1.10(c) describes these twin aims succinctly:

> "When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 (the former client conflict rule), unless the personally disqualified lawyer is promptly screened from any form of participation or representation in the matter and written notice of the screening procedures employed is promptly given to any affected former client."

Under the old formulation, the "new" lawyer was required to execute an affidavit attesting that the lawyer would not "switch sides" upon joining the new firm and would not share the former client's confidential information. The old formulation also required the "new" firm to inform all members of the screen and certify the procedures implemented by affidavit. Both affidavits were then served on the former client through the "old" firm. When our screening rule was initially adopted, internal notification was typically handled by paper memo and affidavits were transmitted by letter.

Although the formality of the old formulation reflected the practice norms when our screening rule was originally adopted in the early 1980s, the fundamental approach remains sound from the perspective of law firm risk management. For example, ORCP 1E now widely permits the use of declarations in place of affidavits, but the practice of confirming the "new" lawyer's understanding and the screening procedures the firm has implemented remain prudent to document the screen to the former client, the "old" firm and, if necessary, a court hearing a disqualification motion. Similarly, email has supplanted paper memos as the medium of choice for communicating internally

at law firms, but the practice of sending firmwide notification continues to be wise to both implement and document a screen.

Two concluding notes on "mechanics" are warranted. First, the updated rules also contain an amendment to the confidentiality rule—RPC 1.6(b)(6)—that confirms the general ability of a prospective new-hire to share client identities and the nature of matters the prospective new-hire has handled with the "new" firm so that the "new" firm can run conflict checks that are the key predicate to identifying situations that may require screening. Second, although the screening rule is framed in terms of lawyers, it is prudent to use this mechanism with new staff hires as well.

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