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Eastern District Addresses Lateral-Hire Screening to Avoid Disqualification

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The federal district court in Spokane recently addressed lateral-hire screening to avoid disqualification in *Assenberg v. County of Whitman*, No. 2:14-CV-0145-TOR, 2015 WL 5178032 (E.D. Wash. Sept. 4, 2015) (unpublished). The plaintiff in this civil rights case was represented by a Spokane law firm. Early in the litigation, an associate at the plaintiff's law firm who had worked briefly on the case moved to another Spokane law firm that was representing the defendant county. Although it does not appear that the new firm ran a formal conflict check, it did ask the associate if he had worked on the plaintiff's case before it assigned him to work on a procedural motion in that case. The associate evidently forgot about his brief work for the plaintiff at the old firm and prepared the motion but had no other involvement in the case. Approximately three years later, the plaintiff moved to disqualify the defense firm based on the associate's conflict. Shortly after the plaintiff filed his motion to disqualify, the defense firm screened the associate from any further involvement in the case.

Despite the passage of time, the District Court denied the motion. The court noted that the associate had a former client conflict under RPC 1.9(a), which prohibits a lawyer from handling a matter for a new client adverse to a former client that is the same or substantially related to a matter the lawyer

handled for the former client. Unless screened under RPC 1.10(e) (or the conflict is waived), a lateral-hire's former client conflict is imputed to the new firm under RPC 1.10(a)—the so-called “firm unit rule.” In this instance, the court found that once the firm became aware of the conflict it took effective steps to screen the associate and that the associate had not shared any of the plaintiff's confidential information with the new firm.

The scenario in *Assenberg* is reminiscent of *Daines v. Alcatel, S.A.*, 194 F.R.D. 678 (E.D. Wash. 2000), where a hiring firm avoided disqualification even though a screen was not implemented until a paralegal with a conflict had been working briefly at the new firm. As in *Assenberg*, the firm in *Daines* was able to demonstrate in the face of a disqualification motion that the paralegal had not shared any of the opponent's confidential information with the new firm before she was screened.

Although neither firm was disqualified in *Assenberg* or *Daines*, it is important to underscore that both firms were put at risk and had to spend time and resources defending themselves. RPC 1.10(e) provides a straightforward and practical mechanism for firms to manage lateral-hire conflicts through screening. If a firm runs a conflict check on a potential lateral-hire's clients

before the lateral arrives, the hiring firm can proactively implement a screen at or before the new-hire's arrival and avoid the risk of disqualification.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB Ethical Oregon Lawyer, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.