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Lateral Hiring: The Screening Rule

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Back in the “old days,” lawyers often stayed at one firm throughout their careers. In today’s economic environment, by contrast, lateral movement of lawyers between firms has become the norm rather than the exception. Along with “migrating lawyers,” however, has come the potential problem of “migrating conflicts.” That’s where Oregon’s innovative lateral-hire screening rule, RPC 1.10(c), can be of great benefit to law firms. In this column, we’ll first look at the problem and then examine the solution. Although our focus will be on lateral movement in private practice, RPCs 1.11 and 1.12 offer similar screening solutions for governmental and judicial positions.

The Problem

When a lawyer leaves a firm, the “old” firm’s clients become the lawyer’s former clients. Under RPC 1.9, most former clients do not present former client *conflicts* in this context because the lawyer making the change may not have done any work personally for the former client at the old firm or was not otherwise privy to the former client’s confidential information. In that circumstance, the lawyer can oppose the former client at the “new” firm without screening or a conflict waiver.

If the lawyer worked on a matter for a former client at the old firm (or otherwise obtained the former client's material confidential information) and the new firm is on the other side of that same matter, however, then the lawyer will bring the lawyer's former client conflict to the new firm under RPC 1.10(a)'s "firm unit rule." Such conflicts are generally waivable, but screening usually provides a more practical solution. Under RPC 1.10(c), the new lawyer's conflict will not be imputed to the firm as a whole if the lawyer is both timely screened and the screen is maintained throughout the duration of the matter involved. Absent a waiver or a screen, however, the new firm would be at risk of disqualification and other conflict-related penalties.

The Solution

There are typically five steps to implementing a screen in the new-hire context. Ideally, a screen should be implemented before a new-hire begins substantive work at the new firm.

First, the new firm should obtain a list of clients and matters the lawyer was actively working on at the old firm (to the extent that such matters may be disclosed under the confidentiality rule, RPC 1.6). The new firm should then run that information through its conflict system to determine whether there are, in fact, any conflicts.

Second, if there is a conflict, the new-hire must execute an affidavit mirroring RPC 1.10(c)(1) and attesting that the new lawyer will not participate in

the conflicting matter and will not discuss that matter with the new firm.

Additional measures such as file restrictions may be appropriate in some instances, but the thrust of the rule (and the definition of “screening” under RPC 1.0(n)) is to prevent the transfer of confidential information that the lawyer learned at the old firm to the new firm.

Third, the new firm must advise its personnel of the new-hire, the screen and that they should not discuss the matter involved with the new-hire. RPC 1.10(c) is phrased in terms of firm “members,” with “members” not defined. To be on the safe side, it is prudent to at least notify all personnel (lawyers and staff) at any Oregon offices and at least lawyers at any firm offices outside Oregon. (Not all states have screening. Washington, for example, does but Idaho doesn’t for lateral movement in private practice. At least for a lawyer moving laterally within Oregon, however, the RPCs’ choice-of-law rule—RPC 8.5(b)—should make Oregon law applicable even if the firm has multistate offices.) The internal notice can be by email and should be preserved in the event that there are any questions regarding the screen later.

Fourth, a lawyer at the new firm must execute an affidavit mirroring RPC 1.10(c)(2) and attesting that the new lawyer has been screened and that the screen has been communicated internally at the firm. Both the new-hire’s affidavit and the supervising lawyer’s affidavit are then served on the old firm.

Fifth, the screen must be maintained through the duration of the matter involved. RPC 1.10(c) allows the old firm to request additional affidavits from both the new-hire and the new firm at the conclusion of the representation attesting that the screen was maintained.

Summing Up

Screening isn't an everyday occurrence even as lateral movement of lawyers in private practice has become more common. But, when you need it, Oregon's screening rule provides a very practical and effective tool to handle conflicts arising when lawyers move laterally.

ABOUT THE AUTHOR

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