

December 2011 WSBA *Bar News Ethics & the Law* Column

## **The Lateral-Hire Screening Rule: How It Works**

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When Washington adopted lateral-hire screening for lawyers moving from firm to firm in private practice in 1993, it joined a small group of states that offered this very useful risk management tool. As time passed, screening spread slowly but steadily around the country even though the influential ABA Model Rules of Professional Conduct did not include a screening rule for lateral movement in private practice. In 2009, however, the ABA, which had long allowed screening for government lawyers, finally adopted a screening rule for lawyers in private practice, too. In light of the change in the ABA Model Rule, the WSBA proposed and the Supreme Court adopted amendments to our own screening rule, RPC 1.10(e), that became effective September 1. Collectively, the amendments move our rule close to the ABA version while maintaining the Washington-specific elements that have worked well here for nearly 20 years. Then, as now, the twin goals of screening are to accommodate lawyer and staff mobility while safeguarding client confidentiality.

In light of the changes just adopted, this column will look at three facets of screening for lateral movement between firms in private practice. First, we'll outline the mechanics of implementing a screen for a newly hired lawyer. Second, we'll note the potential range of consequences if a timely and effective

screen is not used. Finally, we'll briefly survey what other states regionally have done in this practical area of law firm management.

Before proceeding, three preliminary comments are in order. First, although our focus will be on newly hired lawyers, both the Washington comments and case law also allow screening of newly hired staff to avoid otherwise disqualifying conflicts. Second, screening for movement between government and private practice and between judicial (or other neutral) positions and private practice are governed by separate rules at, respectively, RPCs 1.11 and 1.12. Finally, screening is only available to insulate firms from conflicts created by lateral movement and not as a general alternative to conflict waivers (see *Amgen, Inc. v. Elanex Pharmaceuticals, Inc.*, 160 F.R.D. 134, 139-141 (W.D. Wash. 1994)).

### ***Mechanics***

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(e) (or the client involved waives the conflict). To illustrate, if your firm is hiring an associate who worked opposite you on a pending case, you need to screen the associate to avoid having your firm disqualified when the new lawyer (and the new lawyer’s conflict) join your firm.

To determine whether a screen is needed, it is critical to run a conflict check to see if a new-hire may have any potentially disqualifying conflicts. The ABA in Formal Ethics Opinion 09-455 and the WSBA in Advisory Opinion 1756 generally conclude that a lawyer may reveal a client's identity to a "new" firm for conflict review unless the client's identity is, in and of itself, confidential. (In this comparatively rare circumstance, the lawyer would need the client's consent.) Comment 10 to RPC 1.0(k) (which defines screening) emphasizes that "screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening." To avoid an argument that a screen is untimely, the conflict check and any accompanying screen should ideally be done before the new-hire arrives. If not, RPC 1.10(e)(3) requires the "new" firm to "demonstrate by convincing evidence that no material information relating to the former representation was transmitted by the personally disqualified lawyer before implementation of the screening mechanism and notice to the former client." In *Daines v. Alcatel, S.A.*, 194 F.R.D. 678 (E.D. Wash. 2000), for example, an opponent in a long-running series of complex cases argued that a screen was ineffective because it was implemented the day after a new paralegal arrived. Although the screen was ultimately found to be effective nonetheless, the court only reached that decision after extensive briefing and a hearing on a motion to disqualify and the firm involved incurred the expense of outside counsel to defend itself.

If a screen is necessary, there are two key components.

First, under RPC 1.10(e)(1), the lawyer being screened must not participate in the matter involved at the “new” firm. The rationale underlying screening is that the new-hire with the conflict must maintain the former client’s confidential information while not being involved in any respect in the matter otherwise triggering the conflict at the “new” firm. RPC 1.10(e) emphasizes this by requiring the lateral-hire to execute an affidavit to this effect. RPC 1.10(e) also requires that lawyers and staff at the “new” firm who are working on the matter involved be informed of the screen. As a practical matter, a firmwide (or at least officewide) email is the easiest way to both provide and document this notice.

Second, under RPC 1.10(e)(2), the former client must be given notice of the screen. The notice must include a copy of the screened lawyer’s affidavit and must describe the screening procedures used. If requested by the former client, the notice (in the form of an affidavit) “shall be updated periodically to show actual compliance with the screening procedures.” RPC 1.10(e) allows either the “new” firm or the former client to seek judicial review or supervision of the screen. If the “old” firm still represents the former client, Comment 12 to RPC 1.10 allows the notice to be served on the “old” firm and with a request “in writing that the former law firm provide a copy of the affidavit to the former client.”

Otherwise, the notice must be served directly on the former client. Comment 12

to RPC 1.10 notes that direct service does not violate the “no contact” rule because it falls within RPC 4.2’s “authorized by law” exception.

RPC 1.10(e)(1) also requires that the screened lawyer be “apportioned no part of the fee” from the matter involved. WSBA Advisory Opinion 190 counsels that with a firm equity holder, the apportionment applies to the net profits (*i.e.*, less direct expenses and overhead) rather than the total fees from the matter concerned. With a non-equity holder, Opinion 190 concludes that the apportionment only applies to any bonus or distribution linked specifically to the matter involved.

### ***Consequences***

Disqualification is the most common consequence of the failure to screen (or otherwise obtain a waiver). Recent examples include *Ali v. American Seafoods Co., LLC*, No. C06-0021P, 2006 WL 1319449 (W.D. Wash. May 15, 2006) (unpublished), and *Qwest Corp. v. Anovian, Inc.*, No. C08-1715RSM, 2010 WL 1440765 (W.D. Wash. Apr. 8, 2010) (unpublished). Simply being removed as counsel, however, may not be the only problem for a firm whose client has just lost what may be a substantial investment in time and money through conduct solely of the law firm’s doing. The Washington Supreme Court in *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992), held that a violation of the conflicts rules also constitutes a breach of the underlying fiduciary duty of loyalty. *Eriks* notes that accompanying remedies include both damages and fee

forfeiture. Although failure to follow the RPCs alone is not generally grounds for a malpractice claim, it does not take too much imagination to construct a negligence theory around a firm's failure to avail itself of a practice management tool that has been available for nearly 20 years. Finally, civil remedies and bar discipline are not mutually exclusive.

### ***Other States***

Although almost all jurisdictions now use professional rules patterned on the ABA Model Rules, screening remains an area with considerable variation among states. This can become a key consideration for firms with offices or at least practices beyond Washington. Regionally, Oregon (RPC 1.10(c)) has had screening for lateral movement between firms in private practice since the 1980s. Idaho, in turn, adopted screening in 2010 (RPC 1.10(a)(2)). Alaska, however, does not yet have screening for lateral movement between firms in private practice by either rule (RPC 1.10) or judicial decision (*Richard B. v. State Dept. of Health and Social Services*, 71 P.3d 811, 822-23 (Alaska 2003)).

### **ABOUT THE AUTHOR**

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