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Useful Tool:
Lateral Hire Screening

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The lawyer who hired me when I entered private practice had joined the firm as an associate out of law school and eventually retired from that same firm over 30 years later. Although there are still a few lawyers with that career path, it is becoming increasingly rare. Most lawyers today will change positions several times over their careers—often moving from firm to firm in private practice.

Washington RPC 1.10(e) facilitates lateral movement in private practice through screening to address otherwise disqualifying conflicts.[1] It allows lawyers to further their careers by moving to new firms and benefits the firms they join with their additional talent. At the same time, it protects clients by ensuring that the lawyers moving laterally do not share information about their former clients with their new firms. In short, screening is a key practice management tool for law firms.

When a lawyer leaves an "old" firm to join a "new" firm and does not bring clients along, the clients for whom the lawyer worked or otherwise acquired confidential information at the "old" firm become the lawyer's "former clients" under the former client conflict rule, RPC 1.9. Because RPC 1.10(a) generally imputes one law firm lawyer's conflicts to the lawyer's entire firm, a new-hire's former client conflicts will be imputed to the "new" firm. Although in many

circumstances this will not create problems for the "new" firm because the "new" firm is not handling matters adverse to the new-hire's former clients, it poses a potentially disqualifying conflict if the "new" firm is working on the other side of an ongoing matter. In that scenario, the new-hire's former client conflict would be imputed to the "new" firm unless the conflict is waived by the former client or the new-hire is screened under RPC 1.10(e).[2] Because waivers can often be difficult to obtain in the middle of heated litigation or a difficult transaction, screening—which can be implemented by the "new" firm unilaterally—is usually a more practical solution. If a new-hire is effectively screened from the matter involved, then the new-hire's former client conflict will not be imputed to the "new" firm as a whole.

In this column, we'll look at two principal aspects of screening under RPC 1.10(e).[3] First, we'll discuss the critical importance of running conflict checks as a part of the hiring process. Second, we'll survey the "mechanics" of screening.

Before we do, however, three preliminary comments are in order.

First, failure to screen—or to screen effectively—when necessary can have a significant impact on the "new" firm. In addition to any disciplinary ramifications for the individual lawyers involved, conflicts in the lateral movement setting are most often policed through the court-imposed remedy of

disqualification of the "new" firm from the case concerned.[4] Disqualification, in turn, can have further consequences—usually none of them good—for the firm's relationship with the client that just lost counsel on which it may have spent substantial fees through disqualification that was of the firm's own making.

Second, although we'll focus on lateral movement by lawyers, Washington's rule also encompasses screening of nonlawyers such as paralegals through Comment 11 to RPC 1.10. This comment recognizes both that lawyers have a duty to supervise nonlawyers under RPC 5.3 and that nonlawyers are often privy to precisely the same kind of confidential information screening is designed to protect.[5]

Third, in theory nothing prohibits screening when a group of lawyers join a firm—such as when a small firm merges into a larger firm—and do not bring the clients with them that might otherwise create conflicts.[6] The practical utility of screening in the merger context, however, is often limited because the economic driver for most mergers is the expectation that the firm being acquired will bring its clients to the merged firm.

Conflict Checks

Regardless of the position being filled, running a conflict check on a potential lateral before an offer is extended or making the offer conditional on conflicts being resolved is prudent for two primary reasons.

First, there may be some situations where a conflict is a "show stopper" because the matter creating the conflict is extremely sensitive and screening may not be a foolproof remedy. For example, the lawyer on the other side of bitterly fought, high-dollar divorce case may not be a good candidate for screening if the firm interested in hiring the lawyer is a small firm with an open office plan where there is no practical way to implement effective screening. In that instance, a more prudent approach may be to defer discussions until the case involved is resolved.[7]

Second, if there are conflicts and screening is a viable remedy, knowing about them in advance will allow for screening to be implemented before or at the time the lawyer involved arrives for work at the "new" firm. Delaying a screen can put the hiring firm at risk of being on the receiving end of a disqualification motion by an aggressive opponent. In *Daines v. Alcatel, S.A.*, 194 F.R.D. 678 (E.D. Wash. 2000), for example, the plaintiff challenged a screen implemented less than 24 hours after a paralegal who had worked for the plaintiff's law firm on

the matter involved went to work for the defendant's law firm. The paralegal brought her conflict questionnaire with her when reporting for her first day of work. The hiring firm ran the conflict check the following day and promptly instituted a screen. Although the court ultimately denied the plaintiff's disqualification motion, the court's ruling followed extensive discovery—including a number of depositions—over what the paralegal had done at the defendant's law firm during the brief period before the screen was in place.

RPC 1.6(b)(7) generally permits a prospective new-hire to share the names and at least general information about matters the lawyer has handled at an "old" firm so that the "new" firm can run a conflict check. Comment 13 to RPC 1.6 discusses the scope of the information involved: "Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated." WSBA Advisory Opinion 201801 (2018) tempers this further (and reflects the text of rule) by noting that disclosure of even this limited information should not occur if "the identity of a particular client or the nature of a particular client or matter is itself confidential[.]"[8]

Mechanics

RPC 1.0A(k) defines screening broadly as "the isolation of a lawyer . . . from any participation in a matter through the 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[.]" If a screen is necessary, there are three central 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 permitting the lateral-hire to execute an affidavit to this effect. Other measures—such as restricting the lawyer's access to the file involved—may also be appropriate to assist the hiring firm in demonstrating that the lawyer will not participate in the matter involved.[9] 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.

Third, RPC 1.10(e)(1) requires that the screened lawyer be "apportioned no part of the fee" from the matter involved. WSBA Advisory Opinion 190 (rev. 2009) 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, Advisory Opinion 190 concludes that the apportionment only applies to any bonus or distribution linked specifically to the matter involved.

ABOUT THE AUTHOR

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[1] Washington RPC 1.10(e) is substantively similar to ABA Model Rule 1.10(a)(2) but traveled a circuitous route to that similarity. Neither the ABA Model Rules nor the Washington RPCs as originally adopted in the 1980s contained a screening mechanism for lawyers moving from firm to firm in private practice. *See* ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013* 249-56 (2013) (ABA Legislative History); Robert H. Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 Wash. L. Rev. 823, 852 (1986). In 1993, Washington adopted screening in this context through an amendment to RPC 1.10. *See* RPC 1.10, cmt. 9 (discussing history). The ABA amended Model Rule 1.10 in 2009 to include screening. *See* ABA Legislative History at 268-74. Washington then further amended RPC 1.10 in 2011 to move our rule closer to its ABA Model Rule counterpart. *See* RPC 1.10, cmt. 9.

[2] The waiver by the new-hire's former client would be under RPC 1.9(b). Depending on the circumstances, a corresponding waiver by the current client of the "new" firm, might also be necessary under RPCs 1.7(a)(2) and 1.7(b), which address, respectively, conflicts between the interest of the law firm and those of a client and associated waivers.

[3] RPCs 1.11 and 1.12 govern, respectively, movement between governmental positions and private practice and movement between judicial (or similar "neutral") positions and private practice. Both include screening mechanisms for lawyers joining law firms from governmental or judicial positions (including clerkships) that are similar to RPC 1.10. LLLT RPC 1.10(e) and RPC 1.10(f) address screening LLLTs.

[4] *See, e.g., Ali v. American Seafoods Co., LLC*, 2006 WL 1319449 (W.D. Wash. May 15, 2006) (unpublished) (disqualifying firm for failing to screen laterally-hired lawyers); *Qwest Corp. v. Anovian, Inc.*, 2010 WL 1440765 (W.D. Wash. Apr. 8, 2010) (same).

[5] Comment 11 to RPC 1.10 cites two Washington federal district court decisions addressing the duty of supervision: *Daines v. Alcatel*, 194 F.R.D. 678 (E.D. Wash. 2000); and *Richards v. Jain*, 168 F. Supp.2d 1195 (W.D. Wash. 2001).

[6] *See, e.g., Cavender v. U.S. Xpress Enterprises, Inc.*, 191 F. Supp.2d 962 (E.D. Tenn. 2002) (using screening in merger context where lawyer on the other side of pending matter was not bringing client with him to the merged firm). By contrast, under the so-called "hot potato rule" a firm cannot "fire" a client to "cure" a conflict in the merger context. *See, e.g., Picker Intern., Inc. v. Varian Associates, Inc.*, 670 F. Supp. 1363 (N.D. Ohio 1987) (disqualifying merged firm that had acquired smaller firm that unilaterally withdrew from representing a client that otherwise posed a conflict impeding the merger).

[7] ABA Formal Opinion 96-400 (1996) addresses conflicts arising from job negotiations.

[8] Although it predates the adoption of ABA Model Rule 1.6(b)(7) on which Washington RPC 1.6(b)(7) is based, ABA Formal Opinion 09-455 (2009) includes a useful discussion of the scope of conflict-related information that a prospective new-hire is allowed to share with a potential "new" firm. ABA Formal Opinions 99-414 (1999) and 489 (2019) discuss other aspects of lateral movement.

[9] *See, e.g., Assenberg v. County of Whitman*, 2015 WL 5178032 at *5 (E.D. Wash. Sept. 4, 2015) (unpublished) (noting that a screen included denying a lateral-hire access to the file involved).