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Screening: An Idea Whose Time Has Come?

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When the Idaho Rules of Professional Conduct were last amended in 2004, they did not include a screening rule to avoid imputed conflicts when lawyers move laterally from firm to firm in private practice. The approach with our "firm unit rule"—RPC 1.10—was influenced significantly by the American Bar Association's rejection of screening for lateral movement in private practice in 2002 when the ABA revised its influential Model Rules of Professional Conduct upon which Idaho and most states pattern their RPCs. In 2009, however, the ABA revisited screening and adopted a lateral-hire screening rule for private practice similar to the ones that have been available to governmental lawyers and judges since the ABA Model Rules were first adopted in 1983.

In light of the sea change at the ABA, the Board of Commissioners recommended that our screening rule be revised based on the recent ABA amendments. The membership approved the change in the just completed annual resolution process and, as I write this, the proposal is under review by the Supreme Court. If adopted by the Supreme Court, Idaho would join an increasing number of states that now permit lateral hire screening in private practice. This article concurs in the recommendation of the Commissioners and the membership that it is time to revisit screening for private practice in Idaho. A short history of screening is first presented for context. The mechanics of

screening are then outlined. Finally, the screening debate is surveyed and concludes with the suggestion that Idaho adopt screening patterned on the corresponding ABA rule.

Screening: A Short History

"Screening" is defined by Idaho Rule of Professional Conduct 1.0(k) 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 under these Rules or other law." We already have a definition of screening in our RPCs because screening is already available to avoid imputed conflicts in three circumstances: (1) under RPC 1.11, when a lawyer moves between government and private practice; (2) under RPC 1.12, when a lawyer moves from a judicial or other adjudicative position to private practice; and (3) under RPC 1.18, when a firm declines representation of a prospective client.

When the Idaho RPCs were last significantly revised in 2002 and 2003 and then adopted by the Supreme Court in 2004, screening for lateral movement between firms in private practice was considered but ultimately rejected.[1] At the time, the ABA's "Ethics 2000" Commission had recommended screening for lateral movement in private practice but the ABA's House of Delegates did not adopt that aspect of the Ethics 2000 Commission's proposals.[2] Idaho's own "E2K" Committee, which subsequently reviewed our rules in 2002 and 2003 in

light of the changes to the ABA Model Rules approved as part of the ABA Ethics 2000 process, concurred.[3] The version of RPC 1.10 that the E2K Committee recommended and that was adopted by the Supreme Court in 2004 did not include screening for lateral movement in private practice.

Under RPC 1.10, which is often called the "firm unit rule," one lawyer's professional conflict is imputed to the lawyer's firm as a whole. When a lawyer leaves one firm to join another, the lawyer's clients from the "old" firm who do not follow the lawyer to the "new" firm become the lawyer's former clients for conflict purposes under the former client conflict rule, RPC 1.9. If the lawyer is working opposite the new firm and the client involved remains behind when the lawyer moves to the new firm, the lawyer's former client conflict will be imputed to the new firm by RPC 1.10. In that instance, the new firm will be disqualified from that ongoing matter unless the lawyer's former client consents.[4] As practical matter, consent is rare under those circumstances and, if consent is declined, it effectively bars the lawyer from moving to the new firm (at least until the matter giving rise to the conflict is concluded).[5]

The ABA revisited screening in February 2009 and amended ABA Model Rule 1.10 to include a provision that now permits it for lateral movement in private practice.[6] In doing so, the ABA Standing Committee for Ethics and Professional Responsibility, which recommended the change to the ABA's House of Delegates, noted in its report accompanying the proposed amendment that an

increasing number of states had adopted screening for lateral movement in private practice without any significant disciplinary problems resulting.[7] Regionally, the ABA Ethics Committee Report lists Arizona, Colorado, Montana, Nevada, Oregon, Utah and Washington as jurisdictions that have adopted screening for lateral movement in private practice.[8] Following the 2009 ABA amendments, the Board of Commissioners recommended that Idaho adopt similar amendments.

How Would It Work?

Under ABA Model Rule 1.10(a)(2) as amended in 2009 and the current proposal here, there are three primary elements to an effective screen.[9]

First, the lawyer being screened must not participate in the matter involved at the new firm.[10] The comment to the definition of screening in the ABA Model Rules, which is identical to the corresponding Idaho comment, describes the essence of an effective screen:

> "The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and

> instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel." ABA Model Rule 1.0, cmt. 9.[11]

Second, the former client must be given timely notice of the screen so that the former client can challenge it if the former client believes that it is inadequate. ABA Model Rule 1.10(a)(2)(ii), which the Idaho proposal mirrors, provides in this regard:

> "[W]ritten notice . . . [must be] . . . promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures[.]"

Third, at the conclusion of the matter (or at periodic intervals if requested by the client), the new firm must certify compliance with the screening rule and the accompanying procedures. ABA Model Rule 1.10(a)(2)(iii), again which the Idaho proposal mirrors, outlines this concluding requirement:

> "[C]ertifications of compliance with these Rules and with the screening procedures . . . [must be] . . . provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures."

Should Idaho Adopt Screening?

The ABA Ethics Committee Report and an accompanying Minority Report summarize the debate over screening. The proponents have argued that

screening facilitates lawyer mobility in an era when lawyers no longer typically remain at a single firm for an entire career. The opponents, in turn, have focused on the appearance of "side switching" and perceived risks to client confidentiality based on that same mobility.

With both, the central concern threading through the debate has been the need to ensure client confidentiality. I respectfully suggest the proponents have the better argument for two reasons.

First, lawyers and their firms are both subject to very exacting standards of client confidentiality and the penalties for violating that duty are severe. For individual lawyers, RPC 1.6, which governs confidentiality generally and RPC 1.9, which addresses responsibilities to former clients, impose a strict duty to maintain a former client's confidentiality under pain of regulatory discipline. For their firms, these same rules and the underlying fiduciary duty they reflect suggest equally severe sanctions in the form of disqualification (*see, e.g., Parkland Corp. v. Maxximum Co.*, 920 F. Supp. 1088 (D. Idaho 1996) (disqualification based on former client conflict)) and claims for breach of fiduciary duty (*see, e.g., Damron v. Herzog*, 67 F.3d 211 (9th Cir. 1995) (casting continuing duties to former clients under Idaho law in fiduciary terms)). Perhaps because lawyers readily appreciate both the duty of confidentiality and the corresponding sanctions for failing to do so, the ABA Ethics Committee Report noted (at 3) that jurisdictions with screening report few problems:

> "The Committee inquired of states with screening and received responses from disciplinary counsel, state bar association officials, and practicing lawyers in those jurisdictions that properly established screens are effective to protect confidentiality. Moreover, the Committee considered the applicable case law, and found that courts have exhibited no difficulty in reviewing and, where screening was found to have been effective, approving screening mechanisms."

Second, screening has been a part of the Idaho RPCs since they were first adopted in 1986. During that time, government lawyers moving to private practice (and between private practice and the government) have had the benefit of screening under RPC 1.11 as have judicial personnel under RPC 1.12.[12] During that time, there were only two reported decisions dealing with either rule: *State v. Cherry*, 139 Idaho 579, 83 P.3d 123 (2004), which addressed RPC 1.11; and *Foster v. Traul*, 145 Idaho 24, 175 P.3d 186 (2007), which addressed RPC 1.12. Both were disqualification decisions in which lawyers moved, respectively, from the local public defender to the prosecutor's office and from a judicial clerkship to a firm representing one of the litigants in a case pending before the former clerk's judge. In both instances, the lawyers involved took no part in the matters at issue in their new positions and did not divulge confidential information from their former employers to the new ones to benefit the new employer's clients. The trial courts in each refused disqualification and the appellate courts affirmed. Nearly a quarter century's experience with screening without incident under RPC 1.11 and 1.12 suggests that screening under RPC 1.10 should not lead to problems either.

Concluding Comments

Screening is a practical solution to an increasingly common fact of practice life. It accommodates lawyer mobility while ensuring that client confidentiality is protected. In light of the change to the ABA Model Rule, Idaho should, as the Board of Commissioners and the membership have recommended, permit screening for lawyers moving laterally in private practice.

ABOUT THE AUTHOR

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[1] *See* December 9, 2002 Minutes of the Idaho State Bar Ethics 2000 Committee ("E2K Committee") at 1.
[2] *See* American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct*, 1982-2005 (2006) at 250-58.
[3] *See* E2K Committee, December 9, 2002 Minutes at 1.
[4] Under the judicially created "hot potato rule," a law firm cannot "fire" a current client to "cure" a conflict. *See generally Unified Sewerage Agency v. Jelco*, 646 F.2d 1339, 1345 n.4 (9th Cir. 1981).
[5] In my experience, when consent is granted, it is usually conditioned on voluntary screening of the lawyer involved. *See, e.g., Spur Products Corp. v. Stoel Rives LLP*, 142 Idaho 41, 122 P.3d 300 (2005) (involving a voluntary screen).
[6] The text of the ABA Model Rule and the accompanying report of the ABA Standing Committee on Ethics and Professional Responsibility ("ABA Ethics Committee Report") are available on the ABA Center for Professional Responsibility's web site at www.abanet.org/cpr. The ABA Ethics Committee Report also includes a minority report. There were technical amendments to the ABA Model Rule in August 2009. The current Idaho proposal includes those amendments and would mirror the present version of the ABA Model Rule.
[7] ABA Ethics Committee Report at 3.
[8] *Id*. at 1 n. 1.
[9] Screening is directed primarily at lawyers. Under RPC 5.3, however, lawyers have a duty to ensure the ethical conduct of nonlawyer staff. Therefore, screening should also be an available tool for staff lateral hires. *See* ABA Model Rule 1.10, cmt. 4 (so stating); *see, e.g., Daines v. Alcatel*, 194 F.R.D. 678 (E.D. Wash. 2000) (lateral hire staff member properly screened under Washington's corresponding rule).
[10] Under ABA Model Rule 1.10(a)(2)(i), the lawyer must also not be directly apportioned any part of the fee involved. Comment 8 to the Model Rule clarifies that this does not prohibit the screened lawyer from receiving a salary or partnership share established by prior agreement based on overall firm revenues.
[11] Comment 10 to ABA Model Rule 1.10 further notes on the timing of the screen: "In order to be effective, 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."
[12]RPC 1.18 deals with prospective clients and, as noted earlier, contains a screening mechanism if a prospective client does not become a client of the firm. RPC 1.18 was new to the RPCs with the amendments which became effective in 2004.