PHILADELPHIA, FRIDAY, NOVEMBER 7, 2008

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES

An incisivemedia publication

PROFESSIONAL CONDUCT

# Proposed Amendment to Model Rules Could Open 'Screen' Door

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*Special to the Legal*

In the not so distant past, a lawyer could plan to spend her entire career at one firm, beginning as an associate, moving into partnership and retiring without changing letterhead. Nowadays, it is not unusual to change firms at least once or twice during one's career. This new mobility has made the issue of imputed conflicts of interest both more important and more controversial. This controversy became manifest last August when the American Bar Association's House of Delegates took an amendment to Model Rule 1.10, dealing with imputed conflicts, under consideration. The amendment would permit screening of attorneys, so that any conflicts they bring to a new firm are not imputed to their new colleagues. The amended model rule would be consistent with the rule in Pennsylvania, but not with the rule in New Jersey.

The proposed amendment applies to this uncomfortable situation: An attorney has represented a client in a particular matter at one firm and moves to a second firm. The attorneys at the second firm wish to represent the client's adversary in the same or in a similar matter. Under the proposed amendment, the second firm may represent the adversary, provided that an appropriate screening mechanism is established and the affected client is promptly provided notice.

Under the current version of the model rule, the prohibition against representing a person whose interests are materially adverse to a current or former client in the same or substantially the same matter is imputed to all other members of the second law firm, except where the disqualification is based upon an attorney's personal interest. The current model rule does not permit any screening mechanism for the situation in which an attorney moves from one private firm to another. The rules do, however, allow screening for limited groups of attorneys, including former government attorneys who move into private practice, as well as former judges, law clerks, arbitrators and other third-party neutrals moving into private firms. These groups are governed by Rules 1.11 and 1.12, respectively.

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In 2001, the ABA Standing Committee on Ethics and Professional Responsibility presented an amendment that permitted screening for attorneys who moved from one private firm to another. The House of Delegates, however, defeated the proposed amendment by a vote of 176 to 130. In August, in light of a growing trend among the states to allow for increased screening, the Standing Committee on Ethics and Professional Responsibility renewed its effort to amend the model rules. The committee presented Report 114, which detailed the contours of the proposed amendment, to the ABA's House of Delegates.

Specifically, the proposed amendment would add section (e) and related commentary to Model Rule 1.10. Under the proposed language, a law firm would be permitted to represent a client in a matter in which the lateral lawyer is prohibited from representing the client under Rule 1.9 so long as two conditions are satisfied: the moving lawyer must be screened from any participation in the matter and cannot be apportioned any fee from the matter, and written notice must be promptly provided to any affected former client. The proposed amendment would allow an attorney to be screened regardless of the level of the attorney's involvement in the matter at issue between the two firms.

The proposed amendment goes further than most states in allowing screening: only 12 states, including Pennsylvania, allow screening of lateral lawyers without regard

to the lawyer's level of knowledge or degree of involvement in the case.

The substance of the proposed amendment to the model rules is nearly identical to the current Pennsylvania rule. Pennsylvania Rule of Professional Conduct 1.10(b) allows a law firm to represent the adversary of a lateral attorney's former client in the same or a substantially related matter so long as the lateral attorney is screened from any participation in the matter and apportioned no fee, and if written notice is promptly provided to the client. Comment 4 to Pennsylvania Rule 1.9 notes that three competing considerations come into play when lawyers move between firms: ensuring that the principle of loyalty to the client is not compromised, allowing clients to have a choice of legal counsel and enabling attorneys to form new associations. The comment further explains that, "[i]f the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel." With these interests in mind, the approach taken by the Pennsylvania rule is broad, and allows screening of lateral attorneys without regard to their level of involvement in the matter in their previous firm.

Some states have taken an intermediate approach that considers the level of involvement of the moving attorney in determining whether screening is permitted. For instance, under Arizona Ethics Rule 1.10(d)(1), screening of the disqualified attorney in the new firm is only available when "the matter does not involve a proceeding before a tribunal in which the personally disqualified lawyer had a substantial role." Similarly, Rule 1.10(e)(1) of the Colorado Disciplinary Rules of Professional Conduct prohibits any lawyer in the new firm from representing the client unless "the matter is not one in which the personally disqualified lawyer substantially participated."

The applicable New Jersey Rule of Professional Conduct is in accord with this intermediate approach. Rule 1.10(c)(1) allows screening if "the matter does not involve a proceeding in which the personally disqualified lawyer had primary responsibility." The rules define the term "primary responsibility" as "actual participation in the management and direction of the matter at the policy-making level or responsibility at the operational level as manifested by the continuous day-to-day responsibility for litigation or transaction decisions," (NJ R.P.C. 1.0(h)). Under the New Jersey rule, if the lateral attorney had primary responsibility for a client matter in her old firm, the lateral attorney's colleagues in her new firm could not represent the client's adversary in the same or a substantially similar matter.

An amendment to the new rule that reflected an intermediate approach was presented at the August House of Delegates. This amendment would allow for screening only if the attorney were not "substantially" involved in the matter at issue between the two firms. The amendment was not voted on, however, because a narrow majority of the House voted 192 to 191 to postpone consideration of the entire issue.

The issue of broadening the availability of attorney screening raises important issues of client loyalty and confidentiality. "Under the proposed amendment, a lawyer who participated substantially in representing the client at the former firm could ethically join a new firm that is charged with the responsibility of attacking and undermining the very work the lawyer performed for the affected client."

In such a situation, it is easy to understand that a client would balk if her previous attorney, with whom the client may have shared important and confidential information, were now employed by the firm that represents her adversary in the very same action. Under the proposed amendment to the Model Rule 1.10, the new firm could screen that lawyer and continue to represent the adversary without obtaining the former client's consent. Situations such as this may have the capacity to undermine a client's trust and, in turn, the public's confidence in the legal profession. This risk is more significant when the moving lawyer has played a substantial role in the representation of the client at his or her previous firm. The screening question is closely connected to another issue we recently discussed: advance waivers of conflicts. We wondered if advance waivers could ever be sufficiently informed, because who can predict the future? At the end, we opined that trying to negotiate the right to litigate against your client was not the best way to build relationships. Screening is somewhat different, because it's not you across the aisle, it's your partner. Still, it's a delicate situation and one that must be handled carefully. Our advice: stick closely to the requirements of Pa.R.P.C. Rule 1.10 and keep in mind, that loyalty to a client is the bedrock of the attorney-client relationship; loyalty from a client is the bedrock of business.

*Litigation Associate Kristine Mehok assisted with the research and drafting of this article.* •