

The ABA Screening Proposals (Part I)

BY ROY SIMON

As campaign season gets into full swing after Labor Day, do you wonder whether your vote – or any single vote – can make a difference? At the ABA House of Delegates last month, one vote did make a difference. The ABA Standing Committee on Ethics and Professional Responsibility, chaired by former New York State Bar Association President Steven Krane of Proskauer, proposed an amendment to ABA model Rule 1.10, the ABA’s rule on imputed disqualification, which is equivalent to New York’s DR 5-105(D). The proposed amendment would have allowed an ethics screen to avoid imputation of a lateral attorney’s former client conflict to other lawyers in the firm, thus enabling screening to overcome a former client’s objection to being opposed by one of its former lawyers in the same matter or a substantially related matter. In addition to the Standing Committee’s proposal, three other proposals were on the table.

At the last minute, however, a member of the House of Delegates proposed a fairly mild amendment to the Standing Committee’s screening proposal. The perennial opponent of screening — former Standing Committee Chair Larry Fox of Drinker, Biddle & Reath of Philadelphia — moved to post-poner consideration of the screening proposal “indefinitely.” (This reminded me of a wonderful New Yorker cartoon in which a brusque businessman says into the phone: “I can’t do lunch on Thursday. How about never? is never good for you?”) Fox’s motion to postpone perpetually (if I may cynically use that synonym for his word “indefinitely”) carried by a single ballot. One vote. Result? The ABA House of Delegates will not take up screening until its February 2009 mid-year meeting in Boston, if then.

In the meantime, in this month’s column (Part I), I will provide some background and context for the coming screening debate by relating a real-life story (with details changed to protect the innocent). In next month’s column (Part II), I will preview the anticipated February 2009 debate on the merits by examining the ABA Standing Committee’s proposed screening rule and the three alternative formulations that were never debated last month, due to the one-vote ballot on Fox’s “postpone indefinitely” motion.

Background: Existing ABA Model Rule 1.10 (and New York’s equivalent)

Currently, ABA model Rule 1.10 (the imputation rule) provides, in pertinent part, as follows:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 [the current client and former client conflict rules]

The ABA language is almost identical to the language of New York’s DR 5-105(D). (ABA Rule 1.10(a) creates an exception for personal conflicts of interest, but that exception is not pertinent to this column, which focuses on former client conflicts created by lateral hires.) Nothing in either DR 5-105(D) or ABA model Rules 1.10(a) allows an ethics screen to avoid imputation. ABA Rule 1.10(c) provides that a disqualification prescribed by Rule 1.10(a) “may be waived by the affected client under the conditions stated in Rule 1.7.” So if a conflict is consentable (which is usually the case, but not always), then the

former client may give informed consent to the conflict (equivalent to DR 5-105(C)'s consent after "full disclosure"). But if a former client withholds consent, or if confidentiality restrictions prevent the law firm from making the disclosures to the former client necessary to obtain the former client's informed consent, then building an ethics wall will not substitute for client consent or overcome the client's objection to the conflict.

This contrasts sharply with ABA model Rule 1.11 and New York's DR 9-101(B), which generally permit screening to avoid conflicts when a lawyer moves from government service to a private firm.

When we add ABA model Rule 1.9 and New York's DR 5-108(A) (the former client conflict rules) into the mix, the impact under both the existing ABA and New York imputed disqualification rules governing lawyers who switch from one private firm to another becomes troubling. If a law firm wants to hire a lateral lawyer from a law firm that represents a client I'll call Forma Corp. (for "former client"), but the hiring firm currently represents a client materially adverse to Forma Corp. in a substantially related matter, then Forma Corp. has an absolute veto over the law firm's hiring of the lateral lawyer.

And if the law firm decides to hire the lateral lawyer any-way on the theory that a prompt and effective screen will fully address the policy concerns that animate the imputed disqualification rule – then the law firm is not only committing a disciplinary violation in New York but is subject to disqualification in the substantially related matter – as well as the attendant public embarrassment, forfeiture of fees, major client relations problems, and other potentially negative consequences. The threat of disqualification based on a conflict of interest is familiar ground in New York's case law– see, e.g., *Kassis v. Teacher's Insurance and Annuity Association*, 93 N.Y.2d 611 (1999) (disqualifying a law firm that had hired and promptly screened a second year associate who had worked on the opposite side of a pending case), and in the pages of NYPRR, see, e.g., Roy Simon, *Advance Conflict Waivers In New York (Parts I and II)*, NYPRR (Sept. & Oct. 2006).

An Illustration of the Power of Existing Imputed Disqualification Rules

Reciting rules, however, does not fully capture the human element behind the rules. I recently learned the details of a disturbing situation in which a major Wall Street law firm extended an offer to a young associate at a large out-of-state law firm but was thwarted, after months of discussion, by the inability to work out a conflict waiver provision that would have made it safe to hire the associate. The situation was heart-wrenching. The young associate needed to relocate to New York, and the out-of-state firm's New York office was not handling a sufficient volume of IP work to offer the associate a position in New York. She therefore looked for work at New York City firms that desired to build up their IP practices (and what New York firm doesn't?). She had a master's Degree in neurobiology and strong references from her former firm, so she was a desirable candidate and soon attracted two offers – subject, of course, to a check for conflicts of interest. She accepted the offer from one firm and left the other open as a back-up offer in case a conflict turned up at her first-choice firm.

Unfortunately and unexpectedly, a conflict did turn up. At the out-of-state firm, about a year earlier, the fledgling associate had been dragooned into an "all hands on deck" document review to ferret out privileged documents during rush-rush due diligence regarding a possible client acquisition. The acquisition was in an industry where proprietary information is acutely sensitive and competition is brutal. I'll call it the defense electronics industry, and I'll call the product at issue an "invisibility cloak,"

which was recently in the news. (I have permission to tell this story, but to protect confidentiality I have changed various details. The changes make no difference to the legal points or to the nature or magnitude of the personal and institutional costs incurred by all.)

Our young neurobiologist did not know anything about defense electronics, was assigned to review thousands of documents at lightning speed, and in any event was looking only for the names of attorneys in the to/from/cc lines for privilege protection purposes, not to read the documents for substance. The client – I'll call it Techetron – should have been grateful to the associate and the out-of-state law firm for pitching in to respond to a corporate emergency (no doubt the lawyers worked into the small hours of the morning for many days, disrupting previously made or hoped-for social plans).

Instead, when the conflict arose, Techetron refused a request to waive the conflict. The hiring law firm nevertheless drafted a proposed waiver letter in which the law firm promised to impose a prompt and effective screen around the lateral associate. Techetron countered with a revised waiver letter that demanded not only a high screen, but also (a) a promise that the associate would not work on any matters in the defense electronics industry involving invisibility cloak materials for fifteen years (a demand that went far beyond the requirement of DR 5-108(A) that the associate not work on “substantially related” matters); (b) a promise that the associate would not work on any matters adverse to Techetron for at least fifteen years, whether substantially related to the Techetron matter or not (thus also giving Techetron far more protection than it was entitled to under the rules); and (c) a demand that the hiring firm notify Techetron within a week if the hiring firm contemplated undertaking any matters that involved either invisibility cloaks or potential adversity to Techetron's interests (demands that would very likely require the hiring firm to violate client confidentiality or induce it to seek client consent to disclosures to Techetron that might not be in the client's interests).

The hiring firm tried to moderate these demands by promising again to erect a high screen around the lateral associate, but Techetron did not respond. The associate, who had by now moved to New York and taken an apartment in anticipation of her new job, waited patiently for an answer, all while out of work, a lateral associate's version of *Waiting for Godot*. Eventually the hiring firm proposed some new language in the waiver letter that might rescue the situation. The out-of-work associate herself also wrote a personal letter to express her exasperation – after all, she had merely scanned the Techetron documents for privilege, had not read the documents for substance, would not have understood the sub-stance anyway because it was outside her neurobiology field, could not remember anything about the late-night blur of documents she had reviewed, and no one had billed a nano-second to Techetron for her services for more than a year.

Furthermore, our budding neurobiologist did not anticipate being asked to work on any invisibility cloak matters, whether or not there was a screen in place at the hiring firm, because invisibility cloaks were outside her technical expertise. The hiring firm planned to deploy her, quite rationally, on biotechnology cases, not defense electronics cases. Meanwhile, as the associate pointed out, she was stuck in limbo, unemployed, and had even seen her back-up offer expire while waiting for a reasonable resolution of the waiver issue at her first-choice firm.

The New York firm, through its inside and outside counsel, sought to break the logjam by explaining to Techetron's counsel the ethical obstacles and practical problems with the harsh waiver terms proposed by Techetron. As a result of these discussions, the New York firm submitted a revised waiver letter that promised to erect a high ethics screen around the lateral associate, keep her away from any matters involving Techetron or invisibility cloaks for five years, and notify Techetron within five days if any evidence suggested that the New York firm had breached the screen. The New York firm genuinely believed that this reasonable formula would break the impasse, but Techetron turned it down. Through its outside counsel, Techetron reported that it generally did not waive conflicts at all, that it had no obligation to waive conflicts, that it found the revised waiver draft unacceptable, and that unless the New York firm agreed to the original waiver letter from Techetron (which the New York firm considered ethically objectionable, not just imprudent), Techetron considered the matter closed.

Faced with Techetron's rigidity, the New York firm had to make a choice. It could hire the associate and hope that a judge would ultimately side with it, not Techetron, if Techetron filed a motion to disqualify the New York firm. Or the New York firm could notify the associate that the conflict condition in the offer had not been met and that the associate should look elsewhere. Taking the safer course, the firm told the associate that she should look elsewhere, and the associate—who had gotten rave reviews from her prior firm and had demonstrated mature drafting skills and persuasive powers during the negotiations over the conflict letter—was back to looking for an IP position elsewhere, perhaps this time with smaller firms who are unlikely to represent companies adverse to Techetron or to handle matters touching on invisibility cloaks.

Conclusion: Some Questions about Screening

Should a former client have such unfettered power to derail a young lawyer's career? Or should the rules permit some play in the joints and permit a screen that would adequately protect both loyalty and confidentiality when a lawyer wants to change firms? In more than fifteen jurisdictions today, screening will substitute for client consent or overcome a former client's objection when a lateral lawyer would be personally disqualified from opposing the former client. But that statistic simply mirrors the nearly even division over Rule 1.10 among the states. The real debate in the House of Delegates is therefore likely to be the nature of a screening rule, if one is adopted.

That raises some questions about screening. If screening is to substitute for a former client's consent or overcome a former client's objection to a move by a lateral associate who had only a tangential role in a substantially related matter at her old firm, should the screening rule also facilitate lateral moves by partners, or by those who were significantly involved in the matter creating the conflict? And if the firm erecting the screen (the firm hiring the lateral) must notify the former client that it has erected a screen (as the ABA Standing Committee proposes), precisely what information must the hiring firm include in the notice? And who has the burden of proving that the personally disqualified lawyer did not transmit any material confidential information relating to the former representation before the hiring firm implemented screening?

I will address those questions next month, in Part ii, by looking at the proposed screening rule formulated by the ABA Standing Committee and at the three "tweaking" amendments to the Standing Committee's proposal that were advanced by individual members of the House of Delegates. Until then, Happy Labor Day.

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