

The ABA's Screening Proposals (Part II)

BY ROY SIMON

Last month's column noted that at its August 2008 annual meeting, the ABA House of Delegates was scheduled to debate proposals to permit screening to remedy imputed conflicts of interest. At the last minute, however, the House voted 192 to 191 to postpone consideration of the screening proposals "indefinitely." Nevertheless, the proposals are expected to be reconsidered at the ABA's February 2009 mid-year meeting. This month's column examines the proposal by the ABA Standing Committee on Ethics and Professional Responsibility to amend ABA Model Rule 1.10 to endorse screening, as well as three proposed modifications to that proposal suggested by various lawyers.

Background: Existing Law Governing Screening

To understand the impact a screening Rule might have, we first need to understand the world without screening Rules. In most places the governing rule closely resembles ABA Model Rule 1.10(a), which provides, in pertinent part, as follows: "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 Rule 1.9. In New York, the governing rule is DR 5-105(D), which is nearly identical to Rule 1.10(a) for our purposes.

In the world of Rule 1.10(a) and DR 5-105(D), every conflict with a former client in a substantially related matter is imputed to the entire firm – thus disqualifying the entire firm – unless the former client consents. (I say "former client" because no one is proposing that a screening Rule overcome a current client's objection to a conflict.)

The effect – which I illustrated in last month's column – is to give a former client effective veto power over whether a lateral attorney who previously represented the former client in a matter substantially related to a matter your firm is handling may join your firm. If your firm hires the lateral over the former client's veto, the former client will move to disqualify your firm from continuing to oppose the former client in the related pending matter. No amount of screening will satisfy the imputation Rule, at least under the formula now followed by ABA Rule 1.10 and New York DR 5-105(D).

The various screening proposals bandied about at the ABA meeting in August (but not voted upon) would have changed this world. I will now describe the proposals.

The Standing Committee's Proposal to Amend Rule 1.10

The ABA Standing Committee's proposal would amend Rule 1.10(e) to provide as follows:

(e) notwithstanding paragraph (a), and in the absence of a waiver under paragraph (c), when a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

The criteria in proposed Rule 1.10(e)(1) and (e)(2) are essentially the same as the criteria in ABA model Rule 1.11, which – like New York’s DR 9-101(B) – allows screens to overcome conflicts created when a firm hires a former government lawyer. If those protections are sufficient to protect against breaches of loyalty and confidentiality by former government lawyers who move into private practice, why are they not sufficient to protect against breaches of loyalty and confidentiality by lawyers who move from one private firm to another? That, in a nutshell, is the debate over screening.

Of course, some lawyers would say that preferential treatment is not warranted in the case of former government lawyers either, and that ABA model Rule 1.11 and New York DR 9-101(B) (the screening Rules for the benefit of former government lawyers and their firms) should be abolished, but the naysayers have lost that argument ever since the Second Circuit decided *Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980), vacated on other grounds, 449 U.S. 1106 (1981) (denying a motion to disqualify where a former government lawyer was “properly screened from the case”).

The *Armstrong* opinion, essentially codified today in Rule 1.11 and DR 9-101(B), has prevailed ever since, and I am unaware of any grisly stories about breaches of the screens set up to isolate government lawyers. But the opponents of screening would say that we simply never hear about breaches because the breaches are subtle (like body language) or clandestine (and therefore never become known). Proving a negative is difficult at best, but if any readers have heard rumors about breached screens in the case of former government lawyers, please let me know about those rumors so I can factor them into my analysis.

The Standing Committee proposal also would have amended Comments 9 through 11 to Rule 1.10 as follows:

[9] When the conditions of paragraph (e) are met, no imputation of a lawyer’s disqualification occurs, and consent to the new representation is therefore not required. Lawyers should be aware, however, that courts may impose more stringent obligations in ruling upon motions to disqualify a lawyer from pending litigation.

[10] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (e)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[11] Notice, including a description of the screened lawyer’s prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

Regarding Comment 10, the reference to Rule 1.0(k) is to the definition of screening, which provides as follows:

(k) "Screened" or "screening" denotes 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 or the firm is obligated to protect under these Rules or other law.

The ABA amplifies this in Comment 1 to the definition of "screened" as follows:

The purpose of screening is to ensure 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 promptly 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. In any event, procedures should be adequate to protect confidential information.

Thus, the screening Rule advanced by the ABA Standing Committee would effectively permit a private firm to hire any lateral lawyer, no matter how deeply involved that lateral lawyer was in the prior case, as long as the hiring firm promptly screened off the lateral, took the internal bookkeeping steps to ensure that the lateral would receive no part of the fee attributable to the matter in question, and promptly notified any affected former client of the lateral to enable it to ascertain compliance with the rule.

Alternatives to the Standing Committee's Proposal

Before the scheduled debate on the Standing Committee's proposal, three different lawyers (Ronald Minkoff, Tom Fitzpatrick, and Stephen Salzburg) proposed amendments to the Standing Committee's proposal.

The Minkoff Amendment. The Minkoff amendment reflects disappointment that the Standing Committee's proposal does not distinguish between lateral lawyers who come into a firm with little or no confidential information about a former client, on the one hand, and lateral lawyers who come into a firm after playing a significant, perhaps central, role in the case creating the conflict, on the other hand. For example, the Standing Committee proposal does not differentiate between a young associate who reviewed a huge volume of documents on a crash basis solely to ferret out privileged items but had no other involvement in the case (the kind of lawyer I wrote about in last month's column), and the litigation partner who was in charge of a case, or the real estate associate from a satellite office who had no involvement in the matter.

The poster child for the situation that troubles Minkoff – a case found in many law school legal ethics textbooks to spark de-bate over a liberal Standing Committee-style screening rule – is *Cromley v. Board of Education*, 17 F.3d 1059 (7th Cir.1994), where a high school teacher who was suing a school board for retaliatory discharge suddenly found her lawyer in the opposing firm (the Scariano firm) two years into the litigation. She moved to disqualify the firm but her motion was denied because both the district court

and the Seventh Circuit concluded that “the Scariano law firm successfully rebutted the presumption of shared confidences by proving that the screening procedures were timely employed and fully implemented.” The Standing Committee follows this approach, treating former individual clients the same as former organizational clients and treating lateral attorneys who personally handled an entire matter the same as lateral attorneys who were at the periphery of the matter, or even totally uninvolved in it.

The Minkoff amendment would resolve this problem by inserting a new subparagraph (e)(1) requiring that “(1) the personally disqualified lawyer had no substantial involvement in the matter.” Thus, a law firm that hired a lateral attorney who was substantially active in a conflict-creating matter while at his old firm could not overcome the former client’s objection by screening off the lateral. A screen would work only for laterals who were moderately involved or un-involved in the matter.

What is “substantial”? In the ABA model Rules, Rule 1.0(l) says: “‘Substantial’ when used in reference to degree or extent denotes a material matter of clear and weighty importance.” This definition doesn’t fit very smoothly into the concept of “substantial involvement,” but the Minkoff amendment draws on the definition by inserting into Comment 9 the sentence: “‘Substantial’ is defined in Rule 1.0(l).” Thus, a screen would not be effective if a lateral lawyer had “clear and weighty” involvement in the matter creating the conflict while working at his former firm. In that situation, the only available route will be to obtain the former client’s informed consent.

The Saltzburg Amendment. The Saltzburg amendment takes a different approach. Rather than narrowing the group of laterals whose conflicts with former clients can be cured by timely screening, the Saltzburg proposal broadens the obligations of the hiring firm to ensure that the screening procedures are adequate. Saltzburg does this by expanding the hiring firm’s notice obligations in subparagraph (e)(2) to provide as follows (with the added language in italics):

(2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule *and such notice shall state that upon request, the firm will seek a judicial determination that screening is adequate to protect the interests of the former client.*

Thus, any firm taking advantage of the screening option in Rule 1.10(e)(1) must include in its notice to all affected former clients that if the former client wants the law firm to get a court ruling on whether the screening procedures are adequate, the law firm will do so. But what if no litigation is pending, either because it has not yet been filed or because the matter creating the conflict is a transaction rather than litigation? In that case the screening option is probably not available because the Saltzberg amendment replaces the Standing Committee’s proposed Comment 9 with the following:

[9] The notice to the former client must be adequate to insure that the former client is able to ascertain that screening complies with the Rule and to enable the client to request that the firm seek a judicial ruling that screening is adequate to protect the former client’s interests. If no judicial determination is available screening is impermissible. [Emphasis added.]

Perhaps the hiring firm would have some way of asking a court to Rule on the adequacy of a screen in a transaction or a not-yet-commenced litigation, but that would have to be part of an independent action (like a declaratory judgment action), not a routine motion. And a court might say that it lacked

jurisdiction because there is no “case or controversy.” That would especially be true if the former client did not actually object to the screening procedures but simply wanted a court’s impartial perspective. a simple request for a judicial determination does not rise to the level of a case or controversy but is a request for an advisory opinion. Courts do not give advisory opinions, at least when no litigation is already pending before the court.

The Fitzpatrick Amendment. The Fitzpatrick amendment, like the Saltzburg amendment, would expand the notice requirements imposed on the hiring firm by Rule 1.10(e)(2), and would add a significant gloss on those requirements by adding to Comment 9. Specifically, Fitzpatrick would amend subparagraph (e)(2) to read as follows (with the added language in italics):

(2) written notice, *which shall include a statement regarding the availability of judicial review*, is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule. [Emphasis added.]

The Fitzpatrick amendment is thus Saltzburg lite – it notifies the client that judicial review is available, but the onus re-mains on the former client to seek that review. However, the Fitzpatrick amendment also expands Comment 9 to instruct courts to place the burden of proof on the hiring firm, as follows (with the new language in italics):

[9] When the conditions of paragraph (e) are met, no imputation of a lawyer’s disqualification occurs, and consent to the new representation is therefore not required. Lawyers should be aware, however, that courts may impose more stringent obligations in ruling upon motions to disqualify a lawyer from pending litigation. *In any such motion, the law firm shall have the burden of proving, among other things, that no material confidential information relating to the former representation was transmitted by the personally disqualified lawyer to other lawyers in the firm before the implementation of screening.*

Ensuring that the screen was not breached before it was even set up is a worthy objective, and is consistent with case law in New York and other states holding that screening will not avoid a disqualifying conflict unless the law firm can show that it set up the screen before the disqualified lateral attorney had any opportunity to convey confidential information to lawyers at his new firm. *See, e.g., Mitchell v. Metropolitan Life Insurance Co.*, 2002 WL 441194 (S.D.N.Y. 2002) (granting motion to disqualify where firm did not promptly set up screen); *SK Handtool Corp. v. Dresser Industries, Inc.*, 619 N.E.2d 1282 (Ill. app. Ct. 1993) (disqualifying Winston & Strawn, even though it had already worked over 10,000 hours on the case, because it did not set up a screen until a month after the lateral arrived). It is also consistent with Comment 2 to the definition of “screened” in the Terminology section of the ABA model Rule, which states, *supra*: “In order to be effective, screening measures must be implemented as soon as practicable after a lawyer or law firm knows or reason-ably should know that there is a need for screening.” But a Comment to an ethics Rule has no power to tell a court how to handle a matter, and if a court does not agree with the Comment, it will just ignore it.

The Fitzpatrick amendment also adds the following new Comment 12 to Rule 1.10 (italicized to indicate that it is all new):

[12] *The law firm, the personally disqualified lawyer, or an affected client may seek judicial review of the screening mechanism used, or may seek court supervision to ensure that implementation of the screening procedures has occurred and that effective actual compliance has been achieved.*

This proposed Comment not only suffers from the same “case or controversy” problems that mar the Saltzburg amendment, but also adds significant burdens to the court system. Now the court is available not only for “judicial review” of the screening mechanism, but also ongoing “court supervision” of the screen’s implementation and post hoc review to determine whether “actual compliance has been achieved” throughout the life of the matter. Despite the word “or” before the clause allowing various parties to “seek court supervision,” the way seems open for the affected client (or a nervous law firm, or an anxious lateral) to try for a triple play – (1) to seek “judicial review” of the screening mechanism when the hiring firm first gives notice that it has set up a screen, (2) to seek ongoing court supervision of the implementation of the screen as the matter progresses, and (3) to examine the screen at the end of the matter to determine whether it actually worked. In my view, any one of these tasks would place a significant burden on the court system, and all three together would be overwhelming.

Conclusion: Striking the Right Balance

We are weighing five options – the Standing Committee’s proposal (which broadly endorses screening as an alternative to obtaining a former client’s consent), the three alternative proposals (all of which endorse screening with some additional restrictions), and the existing version of ABA Model Rule 1.10 (which does not recognize screening as an alternative to obtaining a former client’s consent).

As I suggested in last month’s column, I believe that the current no-screening regime gives former clients too much power and imposes potentially harsh burdens on attorneys – especially young attorneys – who want to move laterally from one private firm to another. I believe that Rule 1.10 must be amended to permit screening to substitute for client consent in appropriate circumstances.

The Standing Committee’s proposal, however, is troubling because it treats all laterals alike whether they had significant involvement in a matter or virtually no involvement. The Minkoff amendment addresses this problem by ruling out the screening option whenever the lateral attorney had “substantial involvement” in a matter. This is a tempting solution, but in the end I cannot support it. It forces courts to draw lines that will take time and may not be the right lines. Suppose a lateral who had substantial involvement in the conflict-creating matter at his old firm will be working in the real estate department of a megafirm’s Hong Kong office, while the commercial litigators in the megafirm’s Chicago office handle the litigation from which the lateral is personally disqualified. Isn’t that different from a situation in which the lateral joins a small law firm and works cheek by jowl every day with the lawyers who are handling the litigation in question? The Minkoff proposal looks only at the former firm side of the equation, with no attention to the circumstances that exist at the firm that hires the lateral. Courts ought to take into account all of those circumstances, all with the goal of ensuring an effective screen. To say categorically that a screen can never be effective (or, more accurately, can never substitute for client consent), when the lateral had substantial involvement at the old firm, unduly downgrades the importance of examining the situation at the hiring firm and puts too much emphasis on a single factor (the lateral’s level of involvement at his old firm).

The Fitzpatrick amendment would impose tremendous supervisory and fact-finding burdens on courts, if they pay any attention to it – but I suspect that courts will simply refuse to engage in the kind of supervision and after-the-fact compliance review that the Fitzpatrick amendment envisions. Therefore, I do not support it.

The Saltzburg amendment, despite its flaws, has the greatest potential to strike the right balance between the value of lawyer mobility and the rights of former clients to protect their confidential information. Many clients, especially corporate clients with in-house legal departments, can fend for themselves and seek judicial review if they are unhappy with a screen. But many other clients, especially individual clients without much experience in the legal system, have no idea that a court might review a screening situation and might intervene to prevent a lawyer from changing sides the way Mrs. Cromley’s lawyer changed sides in *Cromley v. Board of Education*. Simply giving such an inexperienced client a “statement regarding the availability of judicial review,” as the Fitzpatrick amendment contemplates, is not enough. An inexperienced individual client may have no idea what to make of that statement, and even an inexperienced client will be put to the effort and expense of retaining a lawyer to seek judicial review.

The Saltzburg amendment solves that problem by forcing the hiring firm to initiate the request for judicial review if the former client asks for it. A sophisticated client, such as a corporate client, will probably initiate the request for judicial review itself so that it can frame the issues and control the timing. But an individual client may very well ask the hiring firm to seek judicial review. That is fair. A hiring firm that wants to take advantage of screening ought to have some corresponding burdens, and seeking judicial review is an appropriate burden. The Saltzburg amendment should perhaps be qualified by saying that the hiring firm shall “make a good faith effort” to seek judicial review upon the former client’s request, or shall seek judicial review “where readily available,” but the overall concept of the Saltzburg amendment – placing some burden on the hiring firm in exchange for the benefit of the screen – is sound.

At the same time, the Saltzburg amendment – unlike the Minkoff amendment – does not restrict the court’s ability to take into account all of the facts and circumstances, both at the lateral’s old firm and the new firm, in deciding whether the screen will be effective in protecting the former client’s confidential information. Thus, the common law of disqualification can develop as courts see fit, looking at each screening situation on its own merits. A court may still decide not to engage in the judicial review requested by the hiring firm, but if it does engage in a review, it will be free to consider every relevant factor, and the single factor of “substantial involvement” will not be dispositive.

Thus, among the four proposals, I favor the Saltzburg amendment. I hope that the opponents of screening will allow it to come to the floor for a vote when the ABA House of Delegates reconvenes next February in Boston. Reasonable minds can differ on whether screening is ideal, but at least the House should debate and vote on the merits of screening without further delay.

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