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Elements of an Effective Ethics Screen

By Michael Downey

State rules of professional conduct and related authorities contain considerable guidance on *when* an ethics screen may prevent a conflict of interest from imputing or spreading from one person at a firm to taint everyone else at the firm with a conflict. Such authority on *how* to set an effective screen, however, is often surprisingly sparse. Moreover, state ethics rules are often inconsistent on what elements are required for a screen to be effective.

This article seeks to remedy this shortcoming by providing a clear account of what elements should be included for an ethics screen to be effective. It begins with an examination of what elements specific ethics rules require. This article then draws upon precedent to further establish and explain the components of an effective screen, and offers guidance on what components a law firm should consider employing to avoid imputation of an otherwise disqualifying conflict of interest.

Ethics Screens in the ABA Model Rules

The American Bar Association (“ABA”) Model Rules of Professional Conduct identify five circumstances when, without client consent, a law firm may use an ethics screen to prevent imputation of an otherwise disqualifying conflict of interest from one or more lawyers or nonlawyers who have the conflict to the rest of the law firm.

The five circumstances specified in four ABA Model Rules—Model Rules 1.10, 1.11, 1.12 and 1.18—are:

- * when the conflict arises from prior work performed by a nonlawyer, Rule 1.10 cmt. [4];
- * when the conflict arises from prior work by a lawyer who was a government lawyer when the work was performed, Rule 1.11;
- * when the conflict arises from prior involvement as a judge or other neutral, Rule 1.12;
- * when the conflict arises from communications with a prospective but declined client, Rule 1.18; and
- * when the conflict arises from work that a lawyer did when at a prior firm, Rule 1.10.

No state has adopted all five of these Model Rules verbatim. In fact, no state’s version of Model Rule 1.10 mirrors the Model Rule on private firm lateral attorney ethics screens. Yet a closer look at these four Model Rules, as well as the definition of ethics screens in Model Rule 1.10, reveals two points.

First, the Model Rules require up to six elements for ethics screens. Second, not all five circumstances require all six elements,

supporting the premise that there are varying levels of disqualifying conflicts that require differing levels of screening.

Specifically, three elements for ethics screens are in the Model Rules' definition of a screen, and therefore apply to screens in every circumstance. Model Rule 1.0, Terminology, states that in the Model Rules the term "screening" denotes the "isolation" of the disqualified lawyer or nonlawyer from "any participation in [the screened] 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." Model Rule 1.0(k).

From this definition, three requirements may be gleaned for all ethics screens under the Model Rules: (1) the timely imposition of procedures that (2) isolate the disqualified person from participation in the matter and (3) protect client information.

A fourth element is not established by the definition of a screen, but it is contained in each of the four Model Rules that describe circumstance where screening may prevent imputation of a conflict.

Model Rules 1.10, 1.11, 1.12, and 1.18 each state that a screened lawyer must be "apportioned no part" of fees generated on the matter from which the lawyer was screened. But this requirement is not a definitional aspect of an ethics screen. Consequently, it also does not impact the required elements of a screen used to prevent imputation from prior work performed by a nonlawyer, the circumstances referenced in Model Rule 1.10 cmt. [4]. Ordinarily legal fees may not be shared with nonlawyers. *See, e.g.*, Model Rule 5.4(a). But states often rely upon Model Rule 1.10 cmt. [4] to allow use of a screen when the person with the conflict is now a lawyer, but was not yet a lawyer when the work was performed. *See, e.g.*,

North Carolina Formal Ethics Op. 2010-12 (Jan. 2011). This suggests that, as long as a lawyer was not yet a lawyer when the work that gives rise to the conflict was performed, that lawyer could now share in legal fees generated from the screened representation.

The fifth element, notice to the affected client, appears in only two of the four Model Rules that discuss screening—and is far more detailed in the second and more recent of these rules.

The screening rule for former government lawyers, Model Rule 1.11, requires that the law firm using the screen promptly give "written notice . . . to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule." Model Rule 1.11(b)(2).

The rule that allows screening to cure certain conflicts related to lawyers who make lateral moves, Rule 1.10(a)(2), also contains a notice requirement, but the requirement in Model Rule 1.10 contains much greater specification regarding notice than does the requirement in Model Rule 1.11. Model Rule 1.10(a)(2)(iii) states:

written 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[.]

Model Rule 1.10 therefore specifies requirements for client notice that are not contained in the earlier Model Rule 1.11. Lawyers are left to wonder whether it is fair

to believe—as I do—that a client notice could be fully adequate under Model Rule 1.11 even if it did not contain all elements that Model Rule 1.10 requires for client notice.

Finally, the 2009 amendments to Rule 1.10 added a sixth requirement, unique to Rule 1.10, that a law firm screening a lawyer who has a conflict based upon work at a former private firm and the screened lawyer must certify certain information to the affected client.

Model Rule 1.10(a)(2)(iii) requires the screening law firm and disqualified lawyer to certify “compliance with these Rules and with the screening procedures . . . at reasonable intervals upon the former client’s written request and upon termination of the

screening procedures.”

This additional requirement is likely intended to ensure the implementation of the most rigorous requirements for screening to prevent imputation of a conflict from a private firm lateral attorney. After all, a prior private firm lateral screening rule recommended by the ABA Ethics 2000 Commission was rejected by the ABA House of Delegates in 2002, evidently based upon concerns for the safety of private clients and their information.

Depending upon the circumstances under which the disqualifying conflict arises, therefore, an ethics screen may need to satisfy as many as six elements. These six requirements are summarized as follows:

		Rule 1.10 (work at prior private firm)	Rule 1.10 (prior work by non- lawyer)	Rule 1.11 (prior work while government lawyer)	Rule 1.12 (involvement as judge or neutral)	Rule 1.18 (Communication with prospective client)
I	Timely imposition of screening procedures	Yes	Yes	Yes	Yes	Yes
II	Isolation of screened person from participation in matter	Yes	Yes	Yes	Yes	Yes
III	Protection of client information	Yes	Yes	Yes	Yes	Yes
IV	Prevention of apportionment of fee earned on the disqualified matter.	Yes	No	Yes	Yes	Yes

V	Notice of the screen to the (prior) client	Yes – details specified	No	Yes – no details	No	No
VI	Certification of compliance by firm and screened lawyer	Yes	No	No	No	No

Variables. In addition to summarizing the requirements for various ethics screens, the chart demonstrates that the Model Rules’ requirements for screening vary depending upon the conflict that necessitates the use of a screen.

If a lawyer had worked on the screened matter while the lawyer was a law clerk at a prior firm, under Model Rule 1.10 cmt. [4] the lawyer would need to be separated from the matter and have all confidences protected. However, the lawyer who had worked on the matter while a law clerk could still receive a portion of the fees the matter generated. If instead the lawyer had been a lawyer, and not a law clerk, while working on the matter at the prior firm, under Model Rule 1.10(a)(2) the lawyer would also need to avoid sharing fees and to provide notice and certify effectiveness of the screen.

Judicial Guidance on Elements of Screening

While establishing up to six requirements for screens, the Model Rules provide little detailed guidance on the two most crucial elements—what is required to isolate the screened lawyer (element 2) and protect client information (element 3). For example, may a screened lawyer work and communicate on other matters with the lawyers handling the screened matter?

For practical guidance on these points, we must turn to case law. *LaSalle Nat’l Bank v. Lake County*, 703 F.2d 252 (7th Cir.

1983), contains the classic statement of requirements for an effective ethics screen.

The *LaSalle National Bank* court reviewed several cases that had rejected motions to disqualify due to the firms’ use of ethics screens. It concluded the screens in those cases shared “certain common characteristics”: denying the conflicted lawyer access to relevant files; preventing the conflicted lawyer from sharing in fees or profits derived from the representation in question; avoiding discussions of the lawsuit in the infected lawyer’s presence; prohibiting the sharing of case-related documents with the screened lawyer (including using locked file cabinets); and, when challenged, providing affidavits attesting to these safeguards.

More recent decisions have suggested additional prophylactic measures. In *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App.4th 776, 108 Cal. Rptr.3d 620, 26 Law. Man. Prof. Conduct 239 (Cal. Ct. App. 2010), for example, the court advised that “preventive measures” must be imposed to “guarantee that confidential information [would] not be conveyed.” These measures include “[1] physical, geographic, and departmental separation of attorneys; [2] prohibitions against and sanctions for discussing confidential matters; [3] established rules and procedures preventing access to confidential information and files; [4] procedures preventing a disqualified attorney from sharing in the profits from the representation; and [5] continuing education in professional responsibility.”

Id.

In *Silicon Graphics Inc. v. ATI Techs. Inc.*, 741 F. Supp.2d 970, 26 Law. Man. Prof. Conduct 632 (W.D. Wis. 2010), meanwhile, the law firm identified a conflict that would accompany a lateral hire to the firm before the lateral hire arrived at the firm. Weeks before the conflict-tainted lateral arrived, the firm notified the team that was handling the matter that a screen was being erected. The firm also activated controls in its document management system to prevent the lawyer from accessing files on the screened matter.

In addition, the controls prohibited the screened lawyer from working on both the screened matter and any matters with the lawyers handling the screened matter. In fact, because the screened lawyer was in the same practice group handling the screened matter, the firm ensured that he and the lawyers handling the screened matter would not attend the same practice group meetings, partner meetings, and similar meetings.

Practical Steps for Effective Screening

From case precedent and the Model Rules, we can derive 14 elements for ethics screens. Those elements—only some of which may be appropriate or necessary for a particular screen—are as follows:

1. Plan, prepare, and train lawyers and nonlawyers (including paralegals, legal assistants, and file clerks) regarding why ethics screens are needed, how they will be erected, and what will happen if they are violated.

2. Identify a conflict on a timely basis and respond promptly by initiating a screen. At best, the conflict is identified and the screen erected *before* the conflict of interest arises, for example before the firm takes on a new matter or before a lateral

lawyer joins the firm. This requires careful due diligence throughout the lateral hiring and client intake processes.

3. Provide prompt written notice to affected clients, because either the relevant ethics rules or other circumstances make such notice appropriate.

4. Provide prompt—generally written—notice within the firm of the screen. This notice may be provided to the entire firm, or at minimum to all screened persons and all persons working on the matter from which those persons are screened (the “screened matter”). Often this is done by e-mail, or by e-mail and a paper memorandum.

5. Prevent transfers of documents and information about the screened matter across the screen to persons on the other side of it. Ideally, the screen should prevent the flow of information in both directions, but at minimum it must prevent a transfer from the person who has information about an opposing party or opposing client to the people at the firm who are working against that opposing party or opposing client.

6. Establish physical barriers that implement the screen. This may include, for example, placing screened persons in different offices or on different floors than those working on the screened matter; using different staff for the screened person and the persons working on the screened matter; and making paper files for the screened matter inaccessible to the screened person, for example by posting notices on file cabinets and locking file cabinet drawers that contain information about the screened matter.

7. Implement data access controls to prevent screened lawyers from accessing all digital files and documents relating to the screened matter. Passwords and privacy or access settings may be used to ensure

that only nonscreened persons may have access to documents and information about the screened matter.

8. Monitor and audit the screen on a regular basis to ensure continued compliance. Someone at the firm, usually an ethics or risk management counsel, should make sure that people are still aware of and observing screens that are needed. In addition, screens should be discontinued when they are no longer necessary. This reduces the number of screens in effect in the event that a firm later needs to defend its screening policy.

9. Issue warnings and impose consequences when ethics screens are violated or ignored. Serious or repeated violations should result in serious consequences, including termination of employment.

10. Send reminders of screens on a periodic basis and when circumstances make such notices appropriate. Examples would include an additional screened person joining the firm or a screened lawyer changing offices.

11. Prevent fee sharing on screened matters. A screened person may receive a bonus or compensation based upon the profitability of the entire firm (including the screened matter), but a screened person should not receive a bonus or compensation directly related to fees or revenues generated from a screened matter.

12. Certify compliance to the client when the relevant ethics rules require, or as the law firm deems appropriate. Rule 1.10(a)(2) provides guidance on possible contents for such a notice.

13. Audit specific screens and the firm's screening procedures on a periodic basis to ensure that the firm is taking proper steps to implement and maintain its screens.

Particular attention should be paid to changes in information or document management, or personnel responsibilities, that may require changes for screens to be effective.

14. Preserve records establishing that the client and appropriate firm personnel received notice and demonstrating that a particular screen was effective throughout its duration. Such records should be kept at minimum for the duration of the engagements where the screens are involved, plus the statute of limitations period for legal malpractice claims in the relevant jurisdiction.

Need for Case-by-Case Analysis

Precedent cases indicate that the appropriate features—and appropriateness—of an ethics screen must be determined on an individual basis. As stated in *Schiessle v. Stephens*, 717 F.2d 417 (7th Cir. 1983), the effectiveness of a screen should be “based on objective and verifiable evidence presented to the trial court and must be made on a case-by-case basis.” See also *Kirk*, 183 Cal. App.4th at 811 (stating the effectiveness of a screen should be determined on a “case-by-case inquiry focusing on whether the court is satisfied that the tainted attorney has not had and will not have any improper communication with others at the firm concerning the litigation”).

Thus, not every one of the 14 elements listed above will be necessary (or perhaps even appropriate) in all instances.

Factors for assessing which ones should be used to erect an appropriate screen “include, but are not limited to,” the following:

- * the size and structural divisions of the law firm involved;

- * the likelihood of contact between the “infected” attorney and the specific attorneys responsible for the present representation; and
- * the existence of rules that prevent the “infected” attorney from access to relevant files or other information pertaining to the present litigation, or which prevent him from sharing in the fees derived from such litigation.

Schiessle, 717 F.2d at 421 (citation omitted and bullet points added).

These factors may influence whether courts

disqualify or sanction law firms that timely erect tight screens, while refusing to disqualify law firms that erect and operate leaky screens. *See, e.g., Arista Records LLC v. Lime Group LLC*, No. 06 CV 5936, 2011 WL 672254, 27 Law. Man. Prof. Conduct 116 (S.D.N.Y. Feb. 22, 2011) (law firm’s screen, although “substandard” and “imperfect,” was effective and thus prevents need for firm’s imputed disqualification). A law firm can help influence, but ultimately cannot control, the outcome of a motion to disqualify or disciplinary proceeding based upon its erection and operation of a thorough, effective ethics screen.

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