

What's With Screening?

From the Committee on Professional Responsibility, William Freivogel, Chair

Many in this audience are only somewhat aware of the role of screening in the operation of law firms. The purpose of this article is to provide some context for what has been going on in the world of conflicts of interest with respect to screening.

A law firm is representing the acquirer in a pending acquisition. It seeks to bring a lateral associate ("Lateral") from the law firm representing the seller. For ease of identification we will refer to the former firm as "New Firm" and to the latter as "Old Firm." While at Old Firm Lateral has worked on some discrete tasks in the acquisition. New Firm would like to bring in Lateral and screen her off from the acquisition team. Clearly, New Firm can ethically do this with the consent of the client of Old Firm. The issue is whether New Firm can ethically do this without that consent.

What are the elements of a screen? When Lateral arrives at New Firm, she is instructed in writing not to discuss the acquisition with anyone at New Firm. A memorandum goes out to all personnel at New Firm saying that they are not to discuss, or otherwise share information about, the acquisition. All files concerning the acquisition are prominently labeled. In some cases files are locked in drawers or rooms not accessible to Lateral. New Firm will also lock Lateral out of document management system files relating to the acquisition, if the firm's software permits that. If Lateral is a full partner at New Firm (or shareholder, etc.), she will not share in the fees paid for the acquisition work. (These requirements vary from state to state.)

When the ABA Model Rules were first adopted in 1983, there was no provision for screening where a lateral moves from one private law firm to another. Nevertheless, since 1983 approximately half the states have adopted non-consensual screening. In February of this year the ABA House of Delegates voted to adopt non-consensual screening by amending Model Rule 1.10. It remains to be seen how many additional states will follow suit.

Even where non-consensual screens are currently recognized, or may be recognized if a state adopts the new rule, a number of things can occur to defeat the screen's purpose. Some courts will not recognize screens where the new firm is too small for a screen to be, in the eyes of the court, effective. *See, e.g., Van Jackson v. Check 'n Go of Ill., Inc.*, 114 F. Supp. 2d 731 (N.D. Ill. 2000). In a recent Canadian decision the court would not recognize a screen, in part because the partner who set up the screen, supervised the lateral, and responded to the motion to disqualify, was the partner in charge of the matter from which the lateral was screened. The court said that the screen should have been established and supervised by someone in the firm not involved in the screened matter. *1964 Bay Inc. (Budget Car Rentals Toronto Ltd.)*, 2008 CanLII 54295 (Ont. S. Ct. Oct. 9, 2008, *leave to appeal denied*, 2008 CanLII 65753 (Ont. S. Ct. Nov. 28, 2008) (Canadian jurisprudence on conflicts of interest is virtually the same as that in the U.S.). The lesson is that screens should be handled by "experts" in the firm.

This audience comprises primarily business lawyers. Many may wonder what the client of Old Firm could do if it learned of Lateral's movement and objected to the screen. Certainly, in litigation, a motion to disqualify is available, and many such motions are made every year. In our acquisition example there is no litigation, and thus no forum, in which to bring such a motion. Several things could happen. First, the client of Old Firm could simply refuse to proceed with the deal until the Lateral issue is handled to the client's liking. Where client of Old Firm does not have that leverage, it might bring an injunction action against Lateral and New Firm. There have been a number of actions for injunction in conflict situations where a motion to disqualify is not available. *See, e.g., Tekni-Plex, Inc. v. Tang*, 674 N.E.2d 663 (N.Y. 1996) (not a screening case, but a good example of the availability of an injunction remedy). Nothing in the new Model Rule 1.10 prevents a court from considering similar actions in an appropriate case.
