Lawyer Mobility and Imputed Law Firm Disqualification: Implementing Timely and Effective Ethical Screens

An Illustration of What *Not* To Do

By Marcy Tench Stovall

Imagine this situation: A lawyer has worked for a firm (Law Firm A) that focuses on the representation of lenders in prosecuting foreclosure actions. In the course of that employment, the lawyer has handled hundreds of foreclosure mediations across the state on behalf of numerous lenders. Perhaps wearying of representing banks, the lawyer leaves Law Firm A and joins Law Firm B. Not only is Law Firm B engaged primarily in foreclosure *defense* work, but in 70 percent of Law Firm B's defense cases, Law Firm A appears on behalf of the very lenders the lawyer formerly represented as plaintiffs' counsel. Prior to joining Law Firm B, the lawyer has several conversations with a member of the new firm about the foreclosure mediation *defense* work the lawyer will undertake in his new position. Somehow the topic of conflicts of interest never comes up.

In his transition from Law Firm A to Law Firm B, the lawyer neglects to do two tasks: (1) he does not check with Law Firm A or its clients about potential conflicts of interest before leaving Law Firm A, and (2) after joining Law Firm B, neither he nor his new employer take any steps to limit the lawyer's work to those matters *not* involving his former firm.

Inevitably, Law Firm A files a disqualification motion in a case in which the lawyer, while employed at Law Firm A, had filed a motion on behalf of the plaintiff-lender, to terminate the foreclosure mediation stay, and then, in his new position at Law Firm B, appeared at a scheduled mediation on behalf of the *defendant debtor*. Unsurprisingly, the court grants the plaintiff-lender's motion to disqualify the lawyer and Law Firm B on the basis of an imputed disqualification.

The foregoing is not a law school exam hypothetical, but a summary of a recent superior court decision granting a motion to disqualify.[1] The decision by Judge Julia L. Aurigemma is useful in providing an almost perfect illustration, in reverse, of what an attorney should consider in making a lateral move to another firm when the new position may give rise to one or more imputed conflicts of interest. And in writing the decision, Judge Aurigemma also identified the most common and effective means by which to avoid an imputed conflict triggered by the mobile lawyer's move to a new firm: an ethical screen around the laterally moving attorney to prevent both: (1) the moving lawyer's participation in the relevant client matter, and (2) the exchange or disclosure—inadvertent or otherwise—of the confidential client information obtained at her former firm. An ethical screen, properly constructed, will serve to protect against the very harms that imputed disqualification is meant to prevent.[2]

A Brief History of Imputed Conflicts of Interest and Ethical Screens

When the American Bar Association adopted the Model Rules of Professional Conduct (the Model Rules) in 1982, and when the judges of the superior court followed suit and approved the adoption of the Connecticut Rules of Professional Conduct in 1986, lawyer mobility was not a primary concern for lawyers, judges, or clients. Times have changed—the lateral transfer of an attorney from one firm to another, though once relatively rare, is now commonplace, and the rules and standards that govern attorney conduct are evolving to address that change in law practice.

With an increase in the number of attorneys moving from one firm to another has come an increase in the number of potential conflicts of interest between the moving attorney's former clients and clients of the new firm. It is generally well understood that when an attorney has formerly represented one party in a matter, Rule 1.9 of the Connecticut Rules of Professional Conduct ("Duties to Former Clients") prohibits the attorney from undertaking representation of another party in that matter, or one that is "substantially related," where the new representation will be adverse to the former client's interests.

Less well understood is that if Rule 1.9 would disqualify an attorney from representing a party in a matter, and the attorney joins a new firm, under Connecticut's current version of Rule 1.10 ("Imputation of Conflicts of Interest") it is presumed that every attorney at the *new* firm, and the firm itself, must *also* be disqualified. Put another way, like a contagion, the moving lawyer's conflict of interest infects every attorney at the new firm whether it is a solo practice or a large firm and whether the firm has one office or dozens of branches around the globe.[3]

In an effort to address the restrictive impact on lawyer mobility, the ABA, in February 2009, amended Rule 1.10 of the Model

Rules "to permit the screening of lawyers when they move from one firm to another so that, as long as all the procedural requirements of the Rule are fulfilled, the moving lawyers' new colleagues would not be subject to discipline for representing clients in matters that the moving lawyer would be prohibited from handling."[4]

The change in Model Rule 1.10 to permit screening came after a drawn out and contentious battle, with impassioned partisans on both sides. In overhauling the Model Rules in 2002, the ABA had rejected the recommendation of the Ethics 2000 Commission to include a provision permitting screening of attorneys making lateral moves so as to avoid imputed disqualification. When a similar proposal came up at the August 2008 annual meeting, the ABA's House of Delegates voted, by a margin of only one vote, to table the proposal. When the House of Delegates finally adopted the screening provision, in February 2009, it did so only after a spirited, and frequently heated, debate.

Those opposed to the amendment feared an erosion of the trust between clients and attorneys. They claimed not only that screens would not, and could not, be effective, but that proponents of the amendment were motivated primarily by profit and big firm priorities—including aggressive recruitment of lateral partners or acquisition of entire practice groups—over the traditional pledge of loyalty to client. Proponents of the screening amendment countered that screening protected the core concern of client confidentiality, and that states that had long permitted screening of laterally moving attorneys, including Illinois and Oregon, did not witness an outbreak of client betrayal or an increase in conflict of interest disciplinary complaints. Proponents also noted that the Model Rules had long permitted screening of attorneys moving from public employment to private employment, such as prosecutors. The opponents of loosening the imputed conflicts rule were hard-pressed to explain why screening was permitted when a firm took on a former prosecutor, but not when it recruited a lateral lawyer from another private law firm.

In February 2009, the delegates voted to adopt the amendment that would permit screening for attorneys moving laterally from one firm to another. At the ABA's next meeting, in August 2009, the House of Delegates voted to further amend Rule 1.10 to clarify that the screening provisions are available to prevent imputed disqualifications *only* in the case of lawyers moving from firm to firm. And over the last 20 years, about half of the states have adopted some version of screening in the rules governing lawyer conduct. Partisans on both sides of the issue continue to debate the wisdom and effectiveness of ethical screens.

Ethical Screens in Connecticut

The judges of the Connecticut Superior Court have not yet taken up the ABA's proposal to revise Rule 1.10 to add a screening provision. But even prior to the proposal to codify screening as a remedy for imputed conflicts, Connecticut's trial court judges consistently have approved the use of ethical screens to prevent the imputed disqualification of an entire firm when a lawyer (or paralegal) brings with him or her an unwaived conflict of interest in moving from one firm to another.[5] Indeed, there does not appear to be a reported decision in which the court granted a motion to disqualify when the challenged law firm had in place—or was expected to put in place—adequate screening. And even in granting the motion for disqualification in the case described at the beginning of this article, Judge Aurigemma nonetheless implicitly approved the use of properly and timely implemented ethical screens. She noted that there exists an "exception" to the imputed disqualification bar of Rule 1.10 when the new firm of an attorney who has previously represented an adverse party "takes specific steps to ensure that such attorney has no contact whatsoever with such matter."[6] However, given the circumstances in that case—where the majority of the caseload in two-lawyer Firm B *directly* involved the migrating lawyer's former clients—it was unlikely that Firm B could have implemented an effective ethical screen.

The core concern in any transaction or litigation involving adversity against a former client is the protection of the former client's confidential information from either disclosure or its use to disadvantage the former client.[7] For this reason, when presented with a disqualification motion based on an imputed disqualification, the court will look to the migrating attorney's new firm for the following: assurance that the former clients' confidences are protected and not at risk of disclosure, even though the clients' former lawyer now works for the very firm appearing on the other side of the case. To the extent the court is reassured that the former clients' confidences are not at risk, the balance will tip in favor of the competing interest: that is, the non-moving party's interest in continuing with its chosen counsel.[8] Lawyers and law firms can readily address the legitimate worry about the protection of client confidences with an ethical screen that is both timely and meaningful.

How to Create an Effective Ethical Screen

When an attorney moves from one firm to another, effective screening must begin during the hiring process, not after the moving attorney has started work at the new firm. The new firm must undertake due diligence to ascertain whether the new lawyer's employment at the firm will give rise to any conflicts of interest with his or her former clients. In any matter in which the firms have been representing directly adverse parties, the migrating lawyer—in order to fulfill his or her duty of loyalty to the clients left behind—must personally remove himself from any participation in the conflicting matter after leaving the former firm. And in order for the new firm to meet its duty of loyalty to its clients, and "immunize" itself from the new lawyer's conflict, it must put in place comprehensive screening procedures.

An effective ethical screen should include the following components, all of which should be: (1) in place *prior to* the disqualified attorney beginning work at the new firm, and (2) described in a Screening Memorandum provided to, and signed by, the disqualified attorney, as well as any firm attorneys or staff that have been, or are anticipated to be, working on any of the affected client matters:

• All attorneys and non-attorney staff (paralegals, secretaries, summer associates, etc.) at the new firm must be strictly forbidden from having any discussions or other communications, by electronic mail or otherwise, with the disqualified attorney regarding the representation; and the disqualified attorney must be similarly forbidden from communicating about any aspect of the

matter with any new firm lawyer, paralegal, assistant, or other staff.

• The disqualified attorney must be barred from access to any firm files relating to the representation, including files in electronic form; and all of the new firm's files in the matter must be kept secure in rooms or cabinets that will be locked and to which the disqualified attorney cannot have access. The optimal approach is to have all electronic files pertaining to the matter password protected or otherwise subject to limited access, but the case decisions in Connecticut and elsewhere do not (yet) reflect any trend that the courts will insist on such measures. Software vendors offer various products to law firms seeking to "quarantine" electronic data in client files subject to a screen.

• The disqualified attorney must not have kept or maintained any material concerning the former client, and no such materials may be shared with attorneys or staff at the new firm.

• The disqualified attorney should, if feasible, be physically located at a remove from firm attorneys and staff working on the matter. If the firm has offices in more than one city, it is preferable to have the disqualified attorney be resident in a firm office other than the office in which the attorneys involved in the matter are resident. If that is not possible, then the disqualified attorney should be otherwise physically removed from attorneys and staff working on the matter, with an office located on another floor or end of the firm office.

• All firm files on the matter should be marked with brightly colored written notices indicating that the disqualified attorney may not be permitted access to such files.

• Copies of the Screening Memorandum should be provided to any additional lawyers, paralegals, or assistants who subsequently are assigned to the matter.

• All outside vendors, experts, agents, and other personnel engaged by the firm to work on the matter should be required to sign a certification that they have read and will comply with the terms of the Screening Memorandum.

• The firm's newsletter should include no reference to the matter.

• The managing partner should inform affected clients about the potential conflict prior to the day the new attorney begins work at the firm.

• The new firm should inform the disqualified attorney's former client of the conflict and the measures taken to protect the former client's confidences.

• Finally, as an added precaution, if the new attorney is an equity member, he or she should not derive compensation from the file at issue. **CL**

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Notes

1. *U.S. Bank National Association v. Morales*, 2010 WL 3025615 (Conn. Super. Ct. June 30, 2010) (Aurigemma, J.)
2. Ethical screens have also been called "Chinese walls," and courts frequently use that term. The author prefers the less colorful but more precise term "ethical screen."
3. "While lawyers are associated in a firm, none of them shall represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 . . ." Connecticut Rules of Professional Conduct, Rule 1.10.
4. American Bar Association, Standing Committee on Professional Responsibility, Section of Litigation, Standing Committee on Professionalism, Report to the House of Delegates, Recommendation on 109 Housekeeping Amendment (August 2009).
5. See *Laprise v. Paul*, 2007 4636533 *5 (Conn. Super. Ct. 2007) (Leuba, J.) (disqualification motion denied where screening in place and no evidence offered to show attorney disclosed former client's confidences); *Klein v. Bristol Hosp.*, 50 Conn. Supp. 160, 167-68 (2006) (Shortall, J.) (denying motion for disqualification, citing numerous Connecticut decisions approving ethical screening); *Beckenstein Enterprises-Prestige Park LLC v. Lichtenstein*, 2004 WL 1966863 *3, *4 (Conn. Super. Ct. 2004) (Alander, J.) (denying disqualification motion where affidavit established attorney's timely implementation of screening procedures); *Milne v. Ryea*, 2004 WL 423117 *1 (Conn. Super. Ct. 2004) (Beach, J.) (motion denied where construction of "an adequate 'Chinese wall' could guarantee" no accidental disclosure of client confidences); *Horch v. United of Omaha Life Insurance Co.*, 1999 WL 511165 *2 (Conn. Super. Ct. 1999) (Devlin, J.) (because of the timely implementation of an ethical screen, "no opportunity for disclosure of confidential information ever existed as a result of [the lawyer's change of firms] . . . this issue was anticipated and immediately efforts were made to seal [the conflicted attorney] from this case"); *Temkin v. Temkin*, 1993 WL 392941 (Conn. Super. Ct. 1993) (motion to disqualify firm where paralegal changed firms denied where screen was in place); *Rivera v. Chicago Pneumatic Tool Co.,*1991 WL 151892 (Conn. Super. Ct. 1991) (Teller, J.) (same).
6. *U.S. Bank National Association v. Morales*, 2010 WL 3025615 at **4.
7. "The standards for disqualification are directed at protecting client confidences." *Bergeron v. Mackler*, 225 Conn. 391, 400 (1993) (reversing order of disqualification on ground that disqualification may not be ordered "on the basis of nothing more than a litigant's subjective perception that another litigant is influencing the proceedings"). "[T]he core interest at stake in rules 1.9 and 1.10 [is] the protection of confidential information gained from a former client by the attorney and at risk of disclosure in his subsequent adverse representation." *Klein v. Bristol Hosp.*, 50 Conn. Supp. 160, 165 (2006) (Shortall, J) (denying motion for disqualification; *citing* 1 G. Hazard & W. Hodes, *The Law of Lawyering* (3d Ed.2001 & 2005-1 Sup.) § 13.5, p. 13-13). *See also Draper v. Danbury Health Systems, Inc.*, 2009 WL 1054102 (Conn. Super. Ct. 2009) (disqualification motion denied in absence of any indication of misuse of confidential information).
8. *See Goldenberg v. Corporate Air, Inc.*, 189 Conn. 504, 507 (1983), *overruled in part, Burger & Burger, Inc. v. Murren*, 202 Conn. 660 (1987) (competing interests at stake in a motion to disqualify include the non-moving party's "interest in freely selecting counsel of its choice" and the moving party's "interest in protecting its confidential information from disclosure to an adversary in the pending litigation").