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“Screening” New York’s New Rules—Laterals Remain Conflicted Out

Fallyn B. Reichert*

I. Introduction

You happened to be one of the lucky attorneys who got hired at a big New York City law firm before the economic crisis, but recently found yourself among the many that are laid off and looking for a new job at another firm. A potential employer is interested, but after submitting the vast list of cases and clients that you have actively worked on, it declines to hire you because of a conflict of interest that it is unwilling to risk. This problem is real and alive more today than ever before. New York failed to address this problem in its recently adopted ethics rules that do not include a provision allowing for the use of screens for laterally moving attorneys. Unfortunately, this leaves the state’s law firms and courts with no clear standard to follow and hampers the mobility of lateral moving attorneys in an already depressed economy.

Amidst the excitement of the news that New York finally decided to join the forty-eight other states that had already adopted the format of the American Bar Association’s (ABA) Model Rules of Professional Conduct,¹ a close look revealed that, while the new Rules reflect a change in format, they are substantively not much different from the old Code.² New

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1. See MODEL RULES OF PROF’L CONDUCT Preface (2009) (“[T]he American Bar Association has provided leadership in legal ethics and professional responsibility through the adoption of professional standards that serve as models of the regulatory law governing the legal profession.”).

2. Joan C. Rogers, *New York Adopts Format of Model Rules, But Keeps*

York's Rules are missing a few key provisions from the Model Rules, including one that allows laterally moving attorneys to be screened to avoid imputed disqualification. This provision is essential to attorneys changing employers in this economy.

The legal profession and attorneys are not exempt from today's economy; the unemployment rates in Professional and Business Services are over ten percent.³ At a time when law firms are laying off lawyers, reducing partner pay, and deferring hiring due to the economy,⁴ it would be ideal to implement a lateral screening provision, eliminating one less burden for attorneys. Any restrictions on mobility under these current economic challenges, where a substantial number of lateral attorney moves are involuntary, are going to be extremely detrimental to the lawyer. In the United States, during the first three months of 2009, "more than 3,000 lawyers lost their jobs due to downsizing and layoffs."⁵ This news came following a sixty-six percent increase to a new ten-year high of twenty thousand unemployed lawyers in 2008.⁶ Even before the economic downturn, the rate of mobility among young lawyers was high, with fifty-three percent of lawyers changing practice settings between their second and seventh year of practice (2002 and 2007, respectively).⁷ "Regardless of whether lawyers move between private firms voluntarily or

Much From Code and Omits MJP, 24 ABA/BNA LAW. MANUAL ON PROF. CONDUCT 666, Dec. 24, 2008.

3. As of December 2009, the unemployment rate for Professional and Business Services was 10.3 percent. BUREAU OF LABOR STATISTICS, ECONOMIC NEWS RELEASE; TABLE A-14: UNEMPLOYED PERSONS BY INDUSTRY AND CLASS OF WORKER, NOT SEASONALLY ADJUSTED, <http://www.bls.gov/news.release/empst.t14.htm> (last modified Oct. 8, 2010).

4. See Cynthia Cotts, *DLA Piper Lawyer Trades Big-Firm Perks for Boutique*, BLOOMBERG, July 31, 2009, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aqoEl_lhilg8.

5. Cassandra Melton, *Model Rule 1.10: Imputation of Conflicts and Private Law Firm Screening*, PP&D (Sec. of Litig., A.B.A., Chicago, Ill.), Fall 2009, available at http://www.abanet.org/litigation/litigationnews/trial_skills/pretrial-model-rule-110.html [hereinafter Melton, *Imputation of Conflicts*].

6. *Id.*

7. *Seven Years into a Lawyer's Career*, RESEARCHING LAW: AN ABF UPDATE (Am. B. Found., Chicago, Ill.), Spring 2009, at 3. When asked about their plans for the future, 32.7 percent of young lawyers reported that they planned to change practice settings within the next two years. *Id.*

involuntarily, such lawyers bring potential conflicts into new firms that hire them, which could disqualify entire law firms from representing clients. This increased movement underscores the need for a rule that reflects the realities of modern practice.”⁸ Unfortunately, New York’s new Rules did not come equipped with a screening provision to aid laterally moving private attorneys in this regard.

New York is not the only state struggling with the issue of lateral screening; the ABA just recently changed Model Rule 1.10 to allow screening after numerous failed proposals.⁹ The ABA has been criticized for its stalled action in changing the rule to allow for screening in order to reflect the current status of the legal profession.¹⁰ At the time of the ABA’s amendment, twenty-four states already had some form of lateral screening provision in place.¹¹ Amended ABA Model Rule 1.10 allows for screening of a laterally-moving lawyer as long as the disqualified lawyer has no part in the matter, is given no part of the fee,¹² and the affected former client is given prompt

8. Melton, *Imputation of Conflicts*, *supra* note 5.

9. The first proposal was submitted by the Ethics 2000 Committee in 2002 and was rejected by a vote of 176-130. Robert Mundheim, *General Information Form*, in A.B.A. COMM. ON ETHICS & PROF’L RESPONSIBILITY, REP. TO THE HOUSE OF DELEGATES: RECOMMENDATION 109, at 18 (2009), <http://www.abanet.org/leadership/2009/midyear/recommendations/109.pdf>. Then again in 2008, a similar recommendation was made to the House of Delegates who voted to postpone consideration of the Recommendation by a vote of 192-191. *Id.* Rule 1.10 was finally amended in February of 2009 by a vote of 226-191. Edward A. Adams, *ABA House OKs Lateral Lawyer Ethics Rule Change*, A.B.A. J. (Feb. 16, 2009, 4:04 PM), http://www.abajournal.com/news/article/aba_house_oks_lateral_lawyer_ethics_rule_change/.

10. See T. MAXFIELD BAHNER, A.B.A. COMM. ON ETHICS & PROF’L RESPONSIBILITY, IT’S TIME FOR THE ABA TO HAVE A SCREENING RULE (2009), <http://www.abanet.org/cpr/ethics/bahner.pdf>. “Our ‘Model’ Rules of Professional Conduct are intended to be just that: a trusted model that the states of the union can follow in crafting their own rules of professional conduct.” *Id.*

11. A.B.A. COMM. ON ETHICS & PROF’L RESPONSIBILITY, LATERAL LAWYER SCREENING STATUS (2009), <http://www.abanet.org/cpr/ethics/screen-status.pdf>.

12. Some states have removed the prohibition on fee sharing allowing the disqualified lawyer to receive a normal salary or distribution, including a part of the fee from the screened matter, stating that “attempting to preclude fee sharing . . . is impractical, particularly in large firms.” Douglas J. Brocker, *The Expansion of Attorney Conflict Screening*, N.C. ST. B.J., http://www.ncbar.gov/ethics/eth_articles_8,4.asp (last visited Aug. 25, 2010).

written notice and certifications of compliance.¹³

This Article offers a brief introduction on the use of screening and discusses the main arguments for and against allowing non-consensual lateral screening, including identification of the multiple situations where the New York Rules currently allow screening and discusses the evolution of screening through decisions from the state and federal courts deciding on motions to disqualify counsel (commonly favoring screening over imputed disqualification). The Article then addresses the trend in the legal profession towards uniform ethics standards through the teaching and examination of law students on the Model Rules. Finally, this Article recommends that New York adopt a provision in Rule 1.10 allowing lateral screening, similar to that of the Model Rules, setting forth key factors and definitions to be considered and included in the updated Rule.

II. Screening—the What, Why, and How

Generally, when evaluating a lateral hire, the hiring firm will generate a list of the current matters that it has against the prospective employee's old firm, and will consult with each lawyer regarding any matter that might be adverse.¹⁴ Before making an offer of employment, a firm will ask a candidate to supply a list of the clients and cases that she has worked on (noting whether the clients will also be coming to the firm) or was substantially involved in (where it is foreseeable that the client might object to the new firm taking an adverse position to them).¹⁵ The new firm should cross-check the candidate's list against their own database, as well as require each lawyer of the firm to check the list for any potential conflicts.¹⁶ Often, lateral hires will be abandoned because the conflicts of interest are too problematic.¹⁷

13. MODEL RULES OF PROF'L CONDUCT R. 1.10(a)(2)(i)-(iii) (2009).

14. Susan P. Shapiro, *Bushwhacking the Ethical High Road: Conflict of Interest in the Practice of Law and Real Life*, 28 LAW & SOC. INQUIRY 87, 251-52 (2003) [hereinafter *Bushwhacking*].

15. *Id.* at 252.

16. *Id.*

17. *Id.*

Screening is a term used to signify barriers created inside a law firm to isolate a conflicted attorney from the rest of the firm.¹⁸ The procedure allows a different attorney in the law firm to represent a client even though another attorney in the same firm is disqualified due to a conflict of interest.¹⁹ The primary goal of screening is to make sure that confidential information in the possession of the disqualified attorney remains protected.²⁰ A private attorney moving laterally from one firm to another inevitably brings confidential information and potential conflicts. Allowing screening as an alternative to imputed disqualification of the entire firm gives clients more freedom to choose attorneys, allows lawyers greater flexibility in moving among employment situations, and permits law firms to hire experienced attorneys without the risk of imputed conflicts.²¹

The ABA defines “screened” as 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 is obligated to protect under these Rules or other law.”²² The Comments to Rule 1.0 set forth additional information and guidelines as to what the law firm should do to effectively screen a lawyer. The Comment states that in order to insure client confidentiality:

[t]he 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 be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. . . . To implement, reinforce and remind all affected lawyers of the presence of the

18. See Brocker, *supra* note 12.

19. *Id.*

20. *Id.*

21. *Id.*

22. MODEL RULES OF PROF'L CONDUCT R. 1.0(k) (2009).

screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, . . . denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.²³

Although the amended Rule is not restricted to certain situations in lateral moves,²⁴ the Rule does set forth "stringent requirements" that must be followed in order for the screen to be effective and the imputation of conflicts avoided.²⁵ One half of the states with screening provisions in place have "limited" screens where the use of screening is not allowed in situations when the disqualified attorney had a "substantial role" in the former matter or when the present matter is "substantially related" to the former matter.²⁶ In contrast, New York Rule 1.10 does not allow for any non-consensual screening for laterally moving lawyers.²⁷

It seems ironic that New York State, having the largest population of attorneys (over 153,000),²⁸ took twenty-six years

23. *Id.* R. 1.0 cmts. 9-10 (2009).

24. In August of 2009, the ABA amended Rule 1.10 to clarify the language of the Rule explicitly stating that non-consensual screening is only applicable in situations where a lawyer moves from one firm to another. ROBERT MUNDHEIM, A.B.A. COMM. ON ETHICS & PROF'L RESPONSIBILITY, REP. TO THE HOUSE OF DELEGATES: RECOMMENDATION 109 (2009), http://www.abanet.org/cpr/mrpc/revision_to_rule_1_10.doc.

25. Melton, *Imputation of Conflicts*, *supra* note 5.

26. STEPHEN GILLERS, ROY D. SIMON & ANDREW M. PERLMAN, REGULATION OF LAWYERS: STATUTES AND STANDARDS 147-51 (2009).

27. *See* N.Y. RULES OF PROF'L CONDUCT R. 1.10(c)-(d) (2010).

28. A.B.A. MKT. RES. DEP'T, NATIONAL LAWYER POPULATION BY STATE (2009),

to get in line with the rest of the country and adopt the Model Rules, effective April 1, 2009.²⁹ After taking a close look at New York's new Rules, it is nothing short of shocking that approximately "three-quarters of the new rules embody" the then current state code.³⁰ Unfortunately, New York's Rule 1.10 does not allow for screening of a laterally moving lawyer; it states that an attorney's new firm may not represent a client in the same or substantially related matter in which the lawyer or lawyer's prior firm represented the client, unless the individual did not acquire any information protected under Rule 1.6 or Rule 1.9 that is material to the matter.³¹ The rule does provide that the conflict can be waived by the former client under the conditions stated in Rule 1.7.³² Under this New York Rule, the use of screening to avoid imputed disqualification of laterally moving attorneys is not allowed. Although adoption of the Model Rules format is a step in the right direction, "there is still work to be done."³³

III. Attorney vs. Client—Is this the *Real* Conflict of Interest?

The duty of confidentiality owed to current, former, and potential clients has no "statute of limitations"; it continues long after the lawyer-client relationship has ended.³⁴ This duty

http://new.abanet.org/marketresearch/PublicDocuments/2009_NATL_LAWYER_by_State.pdf [hereinafter NATIONAL LAWYER POPULATION].

29. Joel Stashenko, *N.Y. Adopts New Conduct Rules Aligned with ABA Model*, N.Y.L.J., Dec. 17, 2008, available at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202426814836> [hereinafter *New Conduct Rules*].

30. *Id.*

31. N.Y. RULES OF PROF'L CONDUCT R. 1.10(c) (2010). Rule 1.6 protects the confidentiality of all information relating to the representation of the client and Rule 1.9 extends that duty to former clients and also states that a lawyer shall not use the confidential information to the disadvantage of the former client. *Id.* RR. 1.6, 1.9.

32. *Id.* R. 1.10(d). Rule 1.7 allows representation with the existence of a conflict if: (1) the lawyer will be able to provide competent and diligent representation, (2) it is not prohibited by law, (3) it does not involve one client asserting a claim against another client, and (4) each affected client must give informed consent. *Id.* R. 1.7(b)(1)-(4).

33. *New Conduct Rules*, *supra* note 29.

34. *Bushwhacking*, *supra* note 14, at 107.

produces a long list of clients whose interests must be weighed in a conflict of interest analysis, including many that are "remote, unlikely, or [even] forgotten."³⁵ The more clients that law firms owe fiduciary responsibilities to, the greater the likelihood of conflicts, thus creating a severe risk for large firms.³⁶ "As lawyers navigate through the job market . . . from firm to firm, they accumulate weightier and weightier baggage that collects duties owed to each cohort of former and current clients they encounter."³⁷ Under imputed disqualification rules, migratory lawyers become so-called "Typhoid Marys, conflicting out thousands of their colleagues and forcing their new firms to turn away a substantial amount of prospective business" due to their prior affiliations.³⁸

Perhaps the biggest fear of those in opposition of lateral non-consensual screening is that it endorses "side switching," allowing a lawyer who has represented a party on one side of litigation to then represent the opposing side by moving to a new firm.³⁹ It is often argued that, before the screening amendment, clients had the security in knowing that a "side-switching" lawyer and that attorney's new firm would be prevented from representing the other side if the former client withheld consent.⁴⁰ This argument really focuses on clients' fear that attorneys are putting their own interests before those of their clients. The opposition argues that the fiduciary duties of loyalty and confidentiality are the "heart of the lawyer-client relationship" and the imputation of conflicts protects clients, which is the very purpose of the Model Rules.⁴¹

The arguments criticizing screening as allowing "side-

35. *Id.*

36. *Id.*

37. *Id.* at 108.

38. *Id.* at 156.

39. STEVEN C. KRANE, A.B.A. COMM. ON ETHICS & PROF'L RESPONSIBILITY, REP. (2008), http://www.aprl.net/pdf/SCEPR_Report.pdf.

40. See Susan R. Martyn & James M. McCauley, *Minority Report*, in A.B.A. COMM. ON ETHICS & PROF'L RESPONSIBILITY, REP. TO THE HOUSE OF DELEGATES: RECOMMENDATION 109, at 16 (2009), <http://www.abanet.org/leadership/2009/midyear/recommendations/109.pdf>.

41. Robert Rothman, *Rule 1.10 Report*, in A.B.A. COMM. ON ETHICS & PROF'L RESPONSIBILITY, REP. TO THE HOUSE OF DELEGATES: RECOMMENDATION 110, at 2 (2009), <http://www.abanet.org/leadership/2009/midyear/recommendations/110.pdf>.

switching” are misguided, as is the false and misleading choice of whether to protect the client’s interest of confidentiality or the personal interests of the lawyer. “Screening is a mechanism to give effect to the duty of confidentiality, not a tool to undermine it.”⁴² “Side switching” is not an issue with screening since the disqualified lawyer may never represent the opposing party by changing firms.⁴³ Furthermore, “[t]he point of screening is to isolate that lawyer from participation in or communications about the matter, underscoring that the transferring lawyer is disqualified from ‘switching sides.’”⁴⁴

A study of lawyers and law firms in Illinois, a jurisdiction that allows for lateral screening of private attorneys, revealed that law firms were not overwhelmed with screens.⁴⁵ The screens are “constructed most frequently where they are most appropriate—in large law firms where conflicts are more common and confidentiality easier to cloister, especially where conflicts span physical, social, or geographic distance within the firm.”⁴⁶ Although Illinois does not require client consent to screening, lawyers have reported that they are unlikely to use screening if it would not satisfy clients’ expectations of undivided loyalty.⁴⁷ Screening does not allow lawyers to undertake adverse representations; many times migratory lawyers must leave behind significant clients whose interests are adverse to those of the new firm.⁴⁸

Under a rule requiring consent, such as New York’s, the client of the former firm holds the “sword of an absolute veto over his adversary’s choice of law firm, simply by withholding consent, often solely for unfair tactical advantage without any

42. Robert H. Mundheim, *Report, in* ADOPTED RECOMMENDATION 109, at 11 (2009), http://www.abanet.org/leadership/2009/midyear/daily_journal/Adopted109.doc.

43. *Id.* at 13.

44. *Id.* The purpose of the screening amendment “is to avoid imputed disqualification of all the other lawyers in the new firm, lawyers who have not changed sides at all.” *Id.*

45. *Bushwhacking, supra* note 14, at 160.

46. *Id.*

47. *Id.*

48. *Id.*

substantive basis in fairness.”⁴⁹ This type of rule “presumes the likelihood of lawyer dishonesty or negligence in violating a screen,” which reflects poorly on the legal profession and undermines the confidence and trust that lawyers strive to gain in the public eye.⁵⁰ Although the interest of client confidentiality must be protected, doing so should not require a ban on the lawyer’s mobility unless the client’s consent is received.⁵¹ One important consideration is that former clients have no incentive to consenting, nor do they have any obligation not to withhold consent unreasonably.⁵² It follows that consent is rarely ever given under this system, although, when the screening judgment is left up to the attorney, as is the case in Illinois, screens are likely to be employed only in the appropriate situations. These restrictions on mobility affect not only the laterally moving lawyer, but also the interests of other clients in being represented by the attorney of their choice.⁵³

Recently, the ABA issued Formal Opinion 09-455, which discusses the issue of maintaining client confidentiality and disclosure related to conflict checking for lateral moves.⁵⁴ The ABA quickly responded to concerns that the information a firm will need a laterally moving attorney to disclose, in order to complete a conflicts check, is protected from being disclosed under Rule 1.6(a).⁵⁵ This opinion clarifies that while not explicitly stated in the Rules, disclosure of conflicts information during a lateral move is ordinarily permissible, subject to limitations.⁵⁶ The opinion states that any disclosure should be “no greater than reasonably necessary” and “must not

49. E. NORMAN VEASEY, A.B.A. COMM. ON ETHICS & PROF'L RESPONSIBILITY, THE PROPOSED AMENDMENT TO MODEL RULE 1.10 IS BALANCED AND IMPORTANT; THE ARGUMENTS OF THE OPPONENTS ARE STALE AND HOLLOW 1-2 (2009), <http://www.abanet.org/cpr/ethics/veasey.pdf>.

50. *Id.* at 1.

51. Mundheim, *supra* note 42, at 11.

52. *Id.*

53. *Id.*

54. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-455 (2009) (discussing disclosure of Conflicts Information when Lawyers Move Between Firms).

55. *See id.*

56. *Id.*

compromise the attorney-client privilege or otherwise prejudice a client or former client[,] . . . [nor be used] for purposes other than detecting and resolving conflicts of interest. Disclosure normally should not occur until . . . substantive discussions” have taken place between the lawyer and the new firm.⁵⁷ The opinion states that the rationale behind this opinion is to protect lawyer mobility and the clients’ choice of legal counsel after a change of association.⁵⁸

IV. New York Rules Allow Screening in Multiple Places

Screening is not a stranger to the New York Rules, as it is currently allowed in three different situations: under Rule 1.11 for government attorneys, under Rule 1.12 for judges, mediators, and non-lawyers, and under Rule 1.18 when dealing with prospective clients.⁵⁹ One argument for allowing screening of laterally moving attorneys is that government attorneys *can* be screened when they move into private practice. However, criticisms have been raised concerning the question of why screening is allowed to protect the mobility of government lawyers, but then is not allowed to protect the livelihood of private lawyers.⁶⁰ “Handicapping the ethics rules to encourage or favor one type of practice, however noble, is simply unfair.”⁶¹ It has never been said that government lawyers are more ethical or trustworthy than private lawyers; therefore, if government lawyers can be trusted to comply with the screening regulations, then private lawyers should be trusted as well.⁶²

Rule 1.11, which addresses government attorneys, is the only Rule that provides an explanation for allowing screening, stating that the provisions are “necessary to prevent the disqualification rule from imposing too severe a deterrent to

57. *Id.*

58. *Id.*

59. See N.Y. RULES OF PROF’L CONDUCT RR. 1.11, 1.12, 1.18 (2010).

60. See ROBERT A. CREAMER, LATERAL SCREENING AFTER ETHICS 2000 (2009), <http://www.abanet.org/cpr/ethics/screen-ethics.pdf>.

61. *Id.* at 9.

62. *Id.* at 10.

entering public service.”⁶³ Under Rule 1.12, judges, mediators, arbitrators, and law clerks can be screened to avoid disqualification, but there is no rationale provided in the comments.⁶⁴ Also, under Rule 1.18, lawyers who learn confidential information from a prospective client can be effectively screened to avoid imputation of conflict of interests to the entire firm and, again, no rationale is given for allowing screening in this circumstance.⁶⁵ This Rule did not exist under the New York Code and was only recently adopted under the implementation of the Model Rules in April 2009. In adopting Rule 1.18, New York recognized the duty of confidentiality owed to perspective clients, realized the threat of potential conflicts that would be created, and mitigated this risk by allowing screening.⁶⁶ The adoption of Rule 1.10, allowing for screening of laterally moving lawyers, would be a logical progression from here.

Many critics are further bothered by New York's use of selective screening, as stated in the Comments under Rule 1.10, to avoid imputation of conflicts from non-lawyers, specifically paralegals, legal secretaries, and law student interns.⁶⁷ To discriminate between laterally moving private lawyers and non-lawyers is illogical.⁶⁸ Why would a state allow non-lawyer employees to be screened to avoid imputation when they are under no personal professional duty to protect confidential client information and, at the same time, not allow screening of lawyers who *are* subject to these professional duties and who *can* be held personally responsible for their breach?⁶⁹ To further complicate the situation, Rule 6.5 exempts “Limited Pro Bono Legal Services Programs” from Rule 1.10 altogether, realizing that imputed conflicts can be a serious issue for many lawyers, but choosing to eradicate the problem for those serving in a pro bono program.⁷⁰ New York will not

63. N.Y. RULES OF PROF'L CONDUCT R. 1.11 cmt. 4 (2010).

64. *Id.* R. 1.12.

65. *Id.* R. 1.18.

66. *See id.*

67. *See id.* R. 1.10 cmt. 4.

68. CREAMER, *supra* note 65, at 10.

69. *See id.*

70. N.Y. RULES OF PROF'L CONDUCT R. 6.5 (2010). Rule 6.5 states that a

allow screening of lateral moving private attorneys, yet the state has granted exemptions for pro bono programs and made exceptions to protect government lawyers, judges, arbitrators, mediators, paralegals, law clerks, law secretaries, and lawyers when dealing with prospective clients. Conflicts of interest will arise at some point in every lawyer's career; it is not fair or just to protect only certain categories through exemptions or exceptions to screening, while not protecting others.

V. Effective Screening and Disqualification

A. *Evolution of Screening in the Courts*

More than fifty years ago, Judge Weinfeld announced the "substantially related" standard for successive representation, which required the disqualification of an attorney even though it was not shown that the attorney was privy to the former client's confidences.⁷¹ Disciplinary Rule 5-105(D) codified imputation of the disqualification to all of the lawyers affiliated with the disqualified lawyer.⁷² This Rule operated under the assumption that lawyers shared their client's confidential information with all of the other attorneys in the firm.⁷³ Perhaps this idea may have been more realistic when law firms were small and less specialized, but after concerns about lawyer mobility and the clients' right to an attorney of their choice, courts created a rebuttable presumption of imputed knowledge to avoid firm-wide disqualification in all cases.⁷⁴

lawyer "shall comply with Rule 1.10 only if the lawyer has actual knowledge at the time of commencement of representation that another lawyer associated with the lawyer in the law firm is affected by Rules 1.7, 1.8 and 1.9." *Id.* R. 6.5(a)(2).

71. See *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265, 268 (S.D.N.Y. 1953).

72. MODEL CODE OF PROF'L RESPONSIBILITY DR 5-105(D) (1980).

73. See *The Chinese Wall Defense to Law-Firm Disqualification*, 128 U. PA. L. REV. 677, 682 (1980) [hereinafter *Chinese Wall Defense*].

74. See generally *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 753-54 (2d Cir. 1975) (stating that "it would be absurd to conclude that immediately upon their entry on duty [associates of large law firms] become the recipients of knowledge as to the names of all the firm's clients, the contents of all files relating to such clients, and all confidential disclosures by client officers or employees to any lawyer in the firm.").

After the rebuttable presumption of imputed knowledge was accepted, the idea of using screening to avoid firm-wide disqualification began to have meaning.⁷⁵ In 1975, the ABA Ethics Committee issued Formal Opinion 342⁷⁶ endorsing the use of screening out of concern that inflexible application of Disciplinary Rule 5-105(D) would "unduly limit the employment opportunities of government attorneys upon leaving government service and impair the ability of government to recruit talented young professionals."⁷⁷ At that time, screening was not yet widely accepted because the then-current Code of Conduct required lawyers to avoid even the appearance of impropriety under Canon 9.⁷⁸

The firm disqualification rule was perceived as serving dual purposes, preventing actual impropriety and also avoiding even the appearance of impropriety.⁷⁹ "Only the first of these may fairly be characterized as ethical; the second is more of a matter of public policy."⁸⁰ Under this perception, when no actual impropriety existed, the firm could still be disqualified to avoid the appearance of impropriety as a matter of public policy.⁸¹ The idea of disqualification based on public policy left open the question of countervailing public policies such as lawyer mobility and a clients' right to their choice of lawyer. This argument became stronger when the ABA moved away from the Code and its appearance of impropriety standard, and adopted the Model Rules in 1983.⁸² Shortly thereafter, the Seventh Circuit decided the seminal case on the use of lateral screening in private practice.

75. See *Chinese Wall Defense*, *supra* note 78, at 684.

76. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 342 (1975).

77. *Chinese Wall Defense*, *supra* note 78, at 692.

78. See MODEL CODE OF PROF'L RESPONSIBILITY Canon 9 (1980).

79. *Chinese Wall Defense*, *supra* note 78, at 702.

80. *Id.*

81. *Id.*

82. See *generally About the Model Rules*, A.B.A., http://www.abanet.org/cpr/mrpc/model_rules.html (last visited Sept. 15, 2010).

B. *Judicial Interpretation of the Effectiveness of Screening*

In 1983, in *Schiessle v. Stephens*, the Seventh Circuit approved the idea of lateral screening in private practice and set forth an influential three-step test.⁸³ The first two steps of the test determine whether an individual lawyer is disqualified from representation and the third step determines whether a disqualification will be imputed to the lawyer's new firm.⁸⁴ The first step asks whether or not the subject matter of the prior representation and the subject matter of the present representation are substantially related; if so, the second step asks whether the presumption of shared confidences has been rebutted with respect to the prior representation.⁸⁵ Finally, the third step asks whether the presumption of shared confidences has been rebutted with respect to the present representation.⁸⁶ "After *Schiessle*, many other federal courts have endorsed the use of screening to rebut the presumption of shared confidences when a lawyer switches from one private firm to another."⁸⁷

While some state courts refuse to recognize screening as a mechanism to avoid imputed conflicts, some have adopted the three-part *Schiessle* test while others have taken an intermediate approach that allows for screening only under certain situations.⁸⁸ New York case law falls under the latter category. *Kassis v. Teacher's Ins. & Annuity Ass'n* is cited most often for finding screening effective to avoid imputed disqualification.⁸⁹ In *Kassis*, the New York Court of Appeals refused to grant a motion to disqualify a laterally moving attorney that was previously a first-year associate at another

83. 717 F.2d 417, 420-21 (7th Cir. 1983).

84. *Conflicts of Interest; Imputed Disqualification*, 51 ABA/BNA LAW. MANUAL ON PROF'L CONDUCT 2001 (2004) [hereinafter *Conflicts of Interest*].

85. *Id.*

86. *Id.*

87. *Id.* The fact that the federal courts do "articulate a vision of proper lawyering when they define the outer limits of an attorney's conduct under federal law, procedure, or rules of evidence" which have an important impact on state courts only further frustrates the goal of uniformity. Judith A. McMorrow, *Rule 11 and Federalizing Lawyer Ethics*, 1991 BYU L. REV. 959, 970 (1991).

88. McMorrow, *supra* note 92.

89. 717 N.E.2d 674 (N.Y. 1999).

firm.⁹⁰ The court held that it would provide a tactical advantage to *Kassis* if Teacher's Insurance would incur significant financial hardship in retaining new counsel, and that the "Chinese Wall"⁹¹ that the new firm had erected was effective in screening the new attorney from any participation or discussions on the matter.⁹² The court stated that:

[a] "per se rule of disqualification . . . is unnecessarily preclusive because it disqualifies all members of a law firm indiscriminately, whether or not they share knowledge of [the] former client's confidences and secrets" [B]ecause disqualification of a law firm during litigation may have significant adverse consequences to the client and others, "it is particularly important that the Code of Professional Responsibility not be mechanically applied"⁹³

Again in 2004, the District Court for the Southern District of New York approved of a law firm's use of screening.⁹⁴ Even though a lawyer at Frommer Lawrence & Haug had worked at Milbank Tweed Hadley & McCloy as an associate three years earlier, and was listed as a recipient on e-mails regarding the present matter, the court held that disqualification was not required due to its use of an effective screen.⁹⁵ More recently, in a situation involving a merger of firms, a district court judge in

90. *Id.*

91. The term "Chinese Wall" has not found favor among the legal community and is no longer widely accepted and used today due to criticisms of racial discrimination. *See Peat, Marwick, Mitchell & Co. v. Superior Court*, 245 Cal. Rptr. 873, 887-88 (Ct. App. 1988) (Low, J., concurring). Terms used more often are ethical "screen" or "barrier of silence." *Id.*

92. *See Kassis*, 717 N.E.2d 674.

93. *Id.* at 677 (citations omitted).

94. *See Papyrus Tech. Corp. v. N.Y. Stock Exch., Inc.*, 325 F. Supp. 2d 270, 282 (S.D.N.Y. 2004).

95. *Id.* The court analyzed this case under *Kassis*, the leading case on screening, finding no indication that the lawyer had received material information regarding the present case and that the screen was effective. *Id.* at 278-79.

the Eastern District of New York denied a motion to disqualify an entire firm on the basis that one of its attorneys had become disqualified because of the merger.⁹⁶ The lawyer in *Intelli-Check* had worked on a case while at the plaintiff's firm, Gibbons DelDeo, which he later left to join the firm of Kelley Drye, which was not involved with the case.⁹⁷ Two years later, Kelley Drye merged with Collier Shannon, which represented the defendants, and the plaintiff moved for disqualification of the entire firm.⁹⁸ The court denied the motion, finding that shortly after the merger, an effective screen was erected around the lawyer.⁹⁹ The court noted that it was influenced by the fact that the conflicted lawyer was located in Kelley Drye's New York City office, while the litigation team representing the defendants was located in Washington, D.C.¹⁰⁰ The New York courts have repeatedly used their discretion to approve of the use of screening, and thereby have avoided the harsh remedy of imputed disqualification, in the appropriate situations.

C. *Disqualification Still an Available Remedy*

With the formulation and efficacy of a screen varying from firm to firm, courts will ultimately have to exercise their "inherent power to rule on a motion to disqualify."¹⁰¹ "[C]ourts often consult the Model Rules and local rules for guidance, thus heightening the importance of devising standards that provide direction to attorneys as they seek to comply with their ethical responsibilities."¹⁰² "Both the Rules and the courts have a role in preserving confidence in the integrity of the [legal]

96. *Intelli-Check, Inc. v. TriCom Card Techs., Inc.*, No. 03 CV 3706 (DLI) (ETB), 2008 U.S. Dist. LEXIS 84435 (E.D.N.Y. Oct. 21, 2008).

97. *Id.* at *2-3.

98. *Id.* at *1-3.

99. *Id.* at *16.

100. *Id.* at *8. The plaintiff argued that the lawyer's work was significant or "appreciable" and therefore screening should not be effective under *Kassis*. *Id.* at *14. The court refused to accept this argument stating that it was not going to pay attention to such labels. *Id.* at *15.

101. Erik Wittman, *A Discussion of Nonconsensual Screens as the ABA Votes to Amend Model Rule 1.10*, 22 GEO. J. LEGAL ETHICS 1211, 1221 (2009).

102. *Id.*

profession" and therefore, while the Model Rules allow screening, they also explicitly state that a former client may still file a motion for disqualification where the court will be able to address their particular concerns with the representation.¹⁰³

It appears that, in effect, this is the very situation happening in New York; it only makes sense to conform our Rules to the modern realities of the legal profession. The requirements of screening are not to be taken lightly and compliance will have to be proven by the firm attempting to avoid the imputation of disqualification should the issue be brought before the court.¹⁰⁴ On a motion for disqualification, a court is likely to consider multiple factors with regard to the screen, including: (1) the timeliness of invocation; (2) the procedures invoked to isolate the lawyer from the matter and all communications; (3) the time lapse between the matters in dispute; (4) the size of the firm; and (5) the firm's policy against breaches of a screen.¹⁰⁵

New York courts have made it clear that they do not have a problem with, and are very capable of, analyzing the use of screens and disqualifying a law firm when it appears necessary. In recent years, the courts have refused to disqualify entire law firms based on a laterally moving lawyer when: 1) she knew nothing about a certain case during her time at the prior firm,¹⁰⁶ 2) the prior client's allegations of the lawyer's possession of confidential information material to the representation were conclusory,¹⁰⁷ and 3) she was being disqualified as part of a scheme to gain tactical advantage over the opponent.¹⁰⁸ It should also be noted that the courts have

103. See Mundheim, *supra* note 42.

104. See *Conflicts of Interest*, *supra* note 89.

105. Melton, *Imputation of Conflicts*, *supra* note 5.

106. See generally *Nimkoff v. Nimkoff*, 797 N.Y.S.2d 3 (App. Div. 2005); *Telesco v. Bateau*, 749 N.Y.S.2d 811 (App. Div. 2002).

107. See generally *Med. Capital Corp. v. MRI Global Imaging, Inc.*, 812 N.Y.S.2d 118 (App. Div. 2006); *Telesco*, 749 N.Y.S.2d 811.

108. See generally *Kassis v. Teacher's Ins. & Annuity Ass'n*, 717 N.E.2d 674 (N.Y. 1999); *Lopez v. Precision Papers, Inc.*, 470 N.Y.S.2d 678 (App. Div. 1984). One clear example of exploiting an imputed disqualification rule to gain tactical advantage is where law firms are known for a rare specialized expertise, such as the merger and acquisition specialists at Skadden, Arps,

not hesitated to disqualify firms where they have found the screen to be ineffective¹⁰⁹ or the firm size too small.¹¹⁰

The Rules must be clear for lawyers to be able to follow them and for law firms to be able to predict the results of their actions. In New York, there is no clear rule and the courts have taken it upon themselves to determine when screening will or will not be effective and when it is or is not allowed. The Rules of Professional Conduct are supposed to be a lawyer's guide to the practice of law in New York. The straight-forward "no" to lateral screening under Rule 1.10 will hardly suffice in today's economy, as is evident by the numerous court opinions and the actions of law firms that have implemented lateral screening on their own.

While New York's Rules do not allow for lateral screening of private lawyers, courts have repeatedly ruled in favor of screening, finding the mechanism a favorable alternative to disqualification in situations where disqualifying the entire firm would be extremely detrimental to the law firm and its clients.. It is understandable that New York law firms and lawyers have received unclear messages about the use of screening; the Rules were adopted without a screening provision, yet the courts seem to be allowing screening in certain situations.¹¹¹ It would be in the legal profession's best

Slate, Meagher & Flom. *See Bushwhacking, supra* note 14, at 114. When corporate executives feared that they may become potential takeover targets, they immunized themselves from a possible attack by a Skadden Arps client by giving the firm business and "thereby creating a direct adversity between their company and any potential client that might engage the firm to go after them." *Id.*

109. *See generally* Panebianco v. First Unum Life Ins. Co., No. 04 Civ. 9331 (JSR), 2005 U.S. Dist. LEXIS 7314 (S.D.N.Y. Apr. 26, 2005).

110. *See generally* Young v. Cent. Square Cent. Sch. Dist., 213 F. Supp. 2d 202 (N.D.N.Y. 2002); Mitchell v. Metro. Life Ins. Co., No. 01 Civ. 2112 (WHP), 2002 U.S. Dist. LEXIS 4675 (S.D.N.Y. Mar. 20, 2002); Decora, Inc. v. DW Wallcovering, Inc., 899 F. Supp. 132 (S.D.N.Y. 1995).

111. "This lack of uniformity and clear distrust of lawyers' abilities to construct and respect screens directly conflicts with the goals and principles as stated in the ABA Model Rules. It is . . . these actions which undermine the integrity of the profession." Erin A. Cohn, *The Use of Screens to Cure Imputed Conflicts of Interest: Why the American Bar Association's and Most State Bar Associations' Failure to Allow Screening Undermines the Integrity of the Legal Profession*, 35 U. BALT. L. REV. 367, 393 (2006) [hereinafter Cohn, *Use of Screens*].

interest if everyone were reading from the same page, ideally, of the New York Rules. If New York were to set forth a detailed screening provision in its Rules, law firms would know what to expect when confronting a situation involving a lateral private move and potential conflicts, and courts would also have guidelines to use in allowing screening as an alternative to imputed disqualification.

VI. Self Regulation and Uniform Standards

The legal profession prides itself on being wholly self-regulated. Indeed, self-regulation "is at the core of a viable legal profession."¹¹² It appears that the "privilege of self regulation could so easily drift towards the view that it is but an option, one that can be easily removed if not treated with the serious sense of purpose it deserves."¹¹³ But query whether today's legal profession is wholly self-regulated. There has been much criticism on this issue and some argue that the ABA's Model Rules are "no longer . . . sufficient to foreclose other regulation . . ."¹¹⁴

It seems likely that uniformity among state ethics rules would strengthen the idea of self regulation. States that adopt the Model Rules have the benefit of common experience and persuasive authority through multiple sources. This includes opinions from other state courts, formal and informal opinions on the meaning and application of the Rules issued by the ABA's Committee on Ethics and Professional Responsibility, and the Restatement of the Law Governing Lawyers, where the influence of the Model Rules is "heavy and readily apparent."¹¹⁵

112. Charles B. Plattsmier, *Self Regulation and the Duty to Report Misconduct: Myth or Mainstay?*, 2007 PROF. LAW. 41, 45.

113. *Id.* (internal quotation omitted).

114. Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1171 (2009) (arguing that "[a] variety of regulators external to the ABA—including the courts—interpret, adjust, and enforce the rules and provide their own regulations when the prevailing professional code seems inadequate").

115. Gregory C. Sisk, *Iowa's Legal Ethics Rules - It's Time to Join the Crowd*, 47 DRAKE L. REV. 279, 290 (1999). The Restatement was not designed to track any particular set of ethics rules but rather to "reflect the informed and deliberate consensus of the profession on professional conduct." *Id.*

Uniform ethics standards would also be beneficial to lawyers that engage in multi-jurisdictional practice by allowing them the benefit of familiar rules. These benefits will not be shared in a state which adopts the Model Rules in format, though not in substance, as was done in New York.

It seems that the legal profession is moving towards a trend of national ethics standards. Today, all American law schools that are accredited by the ABA “shall require that each student receive substantial instruction in . . . the history, goals, structure, values, rules and responsibilities of the legal profession and its members.”¹¹⁶ This includes “instruction in matters such as the law of lawyering and the Model Rules of Professional Conduct of the American Bar Association.”¹¹⁷ If our law schools operate under a national accreditation system which mandates that every student receive substantial education under the Model Rules, it seems illogical and inefficient for a state to implement rules any different from those which every lawyer who attended an ABA accredited law school is familiar with.

Furthermore, as a condition for admission to the bar in all but four U.S. jurisdictions, applicants must pass the Multistate Professional Responsibility Examination (MPRE).¹¹⁸ The purpose of the MPRE is to “measure the examinee’s knowledge and understanding of *established standards* related to a lawyer’s professional conduct.”¹¹⁹ The examination tests on the law governing the conduct of lawyers and “is based on the disciplinary rules of professional conduct currently articulated in the ABA Model Rules of Professional Conduct”¹²⁰ Therefore, not only are law students subjected to substantial instruction based on the Model Rules, but they are also examined on the Model Rules as a condition to gain admittance

116. SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, A.B.A., 2009-2010 STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 302(a)(5), <http://www.abanet.org/legaled/standards/2009-2010%20StandardsWebContent/Chapter3.pdf>.

117. *Id.* at Interpretation 302-9.

118. *Description of the MPRE*, NAT’L CONFERENCE OF BAR EXAM’RS, <http://www.ncbex.org/multistate-tests/mpre/mpre-faqs/description0/> (last visited Sept. 28, 2010).

119. *Id.* (emphasis added).

120. *Id.*

to the bar. The benefits of adopting rules in unison with the Model Rules are twofold; it saves resources for the state by eliminating the need to promulgate its own Rules, and it furthers the goals of self regulation of the legal profession when attorneys are educated on and proficient with the Rules.

VII. Recommendation

New York has more attorneys than any other state.¹²¹ It should follow that the ethics rules for the state's legal profession would serve as a guide to other states, but unfortunately this is not the case. In an attempt to modernize the ethics rules, New York has taken a step in the right direction by adopting the Model Rules format, but it did not go far enough. New York should follow the example set forth in the Model Rules and allow lateral screening without limitations under Rule 1.10.

Experience has shown that, even without limitations, screening has not been problematic in states that allow it and the courts have had no hesitation exercising their power in deciding on motions to disqualify.¹²² It does not make sense to forego a favorable alternative to firm-wide imputed disqualification when there is no showing that screening can not or should not be used in the appropriate situations. As seen through the survey of Illinois lawyers, screens are not being abused; they are being used in the appropriate situations.¹²³ Even when appropriate, firms will weigh the price of bringing on a new attorney with that of losing a client if the client is likely to disapprove of the screen.¹²⁴

Many states that have adopted rules allowing screening of lateral attorneys have further explained the rule and how it should be implemented, most commonly in the definitions

121. NATIONAL LAWYER POPULATION, *supra* note 28.

122. Robert H. Mundheim, *Report*, in A.B.A. COMM. ON ETHICS & PROF'L RESPONSIBILITY, REP. TO THE HOUSE OF DELEGATES: RECOMMENDATION 109, at 4-10 (2009), <http://www.abanet.org/leadership/2009/midyear/recommendations/109.pdf>.

123. See *Bushwhacking*, *supra* note 14, at 160.

124. *Id.*

section and also in the Comments to the rule.¹²⁵ One addition that should be adopted, in hopes to win favor among those in opposition, is a requirement that firms implement their own policy against breaches of the screen.¹²⁶ The rule should go a step further, stating the wisdom of explicitly providing for imposition of court ordered sanctions where appropriate.¹²⁷ A strong firm-wide policy against breaches will serve as a deterrent to violating a screen and, when coupled with the threat of sanctions, should prove sufficient in controlling the use of screens and ensuring that client confidentiality is protected.

To make screening as effective as possible, New York should include in its Rule notice that implementation of the screen must be “timely.” Logically, the next step would be to define what will suffice as “timely.” There is no uniformity among the courts on this issue. Some courts have held that, in order for a screen to be effective, it must be implemented at the time the new attorney joins the firm.¹²⁸ Recently in New York, a district court held that, even though a lateral lawyer knew of a conflict and did not disclose it, a screen implemented two days after opposing counsel demanded the firm withdraw from representation was considered “timely.”¹²⁹ Although the *Intelli* court’s method, which weighed the interests of both parties involved,¹³⁰ is a sound approach to conflicts, a much stronger approach would be to provide a clear guideline in the Rules which would allow lawyers to mold their behavior accordingly. Thus, Rule 1.10 of the New York Rules of Professional Conduct should contain a provision allowing for timely screening of laterally moving attorneys, a requirement for a strong firm policy against breaches, and the threat of court ordered sanctions, to sufficiently protect both the interest of the attorney in mobility and the client in maintaining

125. See, e.g., N.C. RULES OF PROF’L CONDUCT RR. 1.0(l) cmt. 9-10 & 1.10 cmt. 7-8 (2003).

126. See generally Wittman, *supra* note 106, 1224-25.

127. *Id.*

128. See *id.* at 1225-26.

129. *Intelli-Check, Inc. v. TriCom Card Techs., Inc.*, No. 03 CV 3706 (DLI) (ETB), 2008 U.S. Dist. LEXIS 84435, at *17 (E.D.N.Y. Oct. 21, 2008).

130. See *id.* at *18.

confidentiality.

VIII. Conclusion

"In a profession there should be certain ethical rules from which no derogation is allowed, and professionals in a position to create and amend these rules should strive for uniformity."¹³¹ By not allowing lateral screening of private attorneys, New York is effectively saying that its private attorneys cannot be trusted. Although adopting the Model Rules in New York was one step towards modernization and uniformity, the movement has not come far enough. The substantive Rules are more important than their format and New York should aim to tailor its Rules as closely to the Model Rules as possible to take advantage of the benefits that come with uniformity. With more attorneys than any other state,¹³² New York should be a leader in the profession, protecting clients and attorneys with rules modeled to reflect current issues being experienced in practice.

We have all recently learned that the legal profession is not recession proof and New Yorkers know very well the tough job market that exists today. As a self-regulated profession, it is unacceptable that we are hindering our own lawyers from landing new jobs through the risk of firm-wide imputed disqualification created under our Rules.¹³³ Knowing this, New York must reconsider Rule 1.10 in light of the recent steps towards modernizing the Rules of Conduct for the legal profession. Uniformity and consistency among the Rules encourages ethical behavior by ensuring that attorneys are educated and familiar with them. If New York wants its Rules to be worth their weight in paper, it must correlate with how the State's courts are ruling in light of this issue and how the situations addressed are playing out in the legal profession today.

131. Cohn, *Use of Screens*, *supra* note 116, at 392.

132. NATIONAL LAWYER POPULATION, *supra* note 28.

133. *See generally* N.Y. RULES OF PROF'L CONDUCT R. 1.10(c)-(d) (2010); BUREAU OF LABOR STATISTICS, ECONOMIC NEWS RELEASE; TABLE A-11: UNEMPLOYED PERSONS BY INDUSTRY AND CLASS OF WORKER, <http://www.bls.gov/news.release/empst.t11.htm> (last modified Oct. 8, 2010).