The Rules Bless "Screening" But Firms Should Focus on Erecting "Firewalls"

by BRIAN S. FAUGHNAN

When it comes to recognizing the legitimacy of screening as a method for avoiding firm-wide imputation of a conflict of a lateral lawyer moving to a new law firm, Tennessee has, for the most part, been a very progressive jurisdiction. Long before I was practicing law, Tennessee embraced what ethics nerds like me now refer to as "full-bore screening." Following on the heels of a 1988 Sixth Circuit decision arising from litigation against a Memphis law firm, the Board of Professional Responsibility issued Formal Ethics Opinion 89-F-118 in 1989 that blessed, as an ethical matter, the prompt and effective implementation of screening by a firm that brings in a lateral lawyer from another firm "as a viable method to avoid the imputed or vicarious disqualification" of the other lawyers in that firm even in the face of an objection from the lateral lawyer's former client. Unlike Tennessee, for example, the ABA Model Rules had historically rejected the use of screening to cure conflicts that would arise from the movement of lawyers in private practice from one firm to another.

In 2001, Tennessee scaled back the availability of such nonconsensual screening in litigation matters in *Clinard v. Blackwood*, 46 S.W.3d 177 (Tenn. 2001). *Clinard* adopted a "litigation" exception to the use by firms of nonconsensual screening to avoid imputed disqualification. In 2003, the Court codified that exception as RPC 1.10(d). As a result, for the past several years, it has been unethical for a lawyer defending a $50,000 slip/fall lawsuit, for example, to move to the firm representing the plaintiff while that lawsuit is still pending without consent of her former client no matter what type of screening is implemented by her new law firm. But because that exception to screening is limited to adjudicative matters, a transactional lawyer who is substantially involved in the handling of a multi-million dollar deal can ethically move to the firm on the other side of the transaction before completion of the deal and the receiving firm can continue to represent its client in the deal, even over the objections of the transactional lawyer's former client provided that the receiving firm complies with the screening requirements in RPC 1.10(c).

While the ABA dropped its long-standing opposition to screening and adopted new ABA Model Rule 1.10(a)(2) in 2009, the Tennessee Supreme Court was not persuaded in connection with its recent rules revisions to do away with RPC 1.10(d). As a result, RPC 1.10(c) screening remains unavailable when a lawyer who had been substantially involved in the representation of a client in an adjudicative proceeding while at Firm A moves to Firm B while the proceeding is still pending, if Firm B represents a client directly adverse to the lawyer's former client in that adjudicative proceeding.

Although RPC 1.10(d) certainly seems, at the very least, unfair to litigators, Tennessee still remains a very progressive jurisdiction when it comes to nonconsensual screening. In addition to the screening permitted by RPC 1.10(c), screening is recognized as a valid tool to avoid imputed disqualification when a lawyer leaves government employment for private practice (RPC 1.11(b)), when a judge or arbitrator (or their law clerk or staff attorney) leaves such a position to join a firm (RPC 1.12(c)), and when a lawyer in a firm has been tainted by communications with an adverse party who at one time was the tainted lawyer's prospective client (RPC 1.18(d)). In each of these instances, the measures required to comply are described in the rules by variations of the verb "to screen." "Screening" and "screened" are defined in RPC 1.0(k) to mean "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."

I believe that Tennessee lawyers would be well-advised to think not in terms of screens but in terms of firewalls. I hold this belief not out of any dissatisfaction with the term "screening" itself—and, for the record, I don't think much of the flippant criticism directed at the term screening by those who don't believe that lawyers can be trusted. ("Screens have holes to let things in.") Rather, my belief that lawyers should think in terms of firewalls arises from the role that technology plays in modern law practice.

As Comment [9] to RPC 1.0 regarding screening makes clear, the purpose of screening "is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected." That same Comment also goes on to describe at some length the kinds of efforts that may be required depending on the circumstances and talks not only of the possibility of written undertakings by the personally disqualified lawyer regarding not communicating with others

but also includes the possible need for "denial of access by the screened lawyer to firm files or other materials relating to the matter." Therefore, the measures necessary for a firm to erect an effective screen are those that control access to information. Today, for all but a very small percentage of lawyers practicing in Tennessee, the overwhelming majority of the information we deal with daily is created and stored electronically. Given the reliance upon technology that pervades the modern law practice, the days when Tennessee lawyers in a firm erecting a screen can simply send around a memo about the need to screen one or more of their lawyers from involvement in a matter and then simply lock up a client's file in a cabinet without giving serious consideration to whether electronic access to documents needs to be restricted to certain lawyers or staff are certainly numbered. Focusing on creating an ethical firewall will better help lawyers and their firms make sure all of the bases are covered when it comes to limiting access to information.

If you practice in a firm with a document management system or any type of shared network drive, any effort to avoid disqualification by imputation through screening, whether undertaken to comply with RPCs 1.10, 1.11, 1.12, or 1.18, can only benefit from the use of password protection or other restrictive technological measures to block certain lawyers and staff from being able to access otherwise shared materials on the network relating to the matter being designated as off-limits. Given the robustness of current technology, and the rapid pace of change and improvement in the nature and capabilities of document management systems and similar network sharing arrangements, firms that are diligent in the creation of such ethical firewalls could also find themselves with some ability to actually prove a negative, i.e. be in a position to have a digital trail of proof that certain users never actually accessed (even inadvertently) restricted materials at any time after the firm's ethical firewall was implemented.

Another upside for firms that opt to implement ethical firewalls will be the deterrent effect doing so may have as to any subsequent effort to challenge the firm's measures as not being sufficient to comply with the ethics rules or to convince a court to disqualify the firm notwithstanding compliance with the ethics rules. All but one of the four Tennessee ethics rules permitting screening (RPC 1.18) require a written communication to the personally disqualified lawyer's former client detailing the actions undertaken in erecting the screen. Common sense dictates that the ability to tout in that writing that the firm's screen includes technological limitations on access to materials can help dissuade efforts to challenge the efficacy of the screen by the lateral lawyer's former client. And, while RPC 1.18 only requires the giving of written notice, the rule certainly does not prohibit firms from choosing to include a description of the type of ethical firewall it has implemented in such a notice. ♦

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