

Screening to Avoid Conflicts of Interest— What, When, and How?

By Nathan M. Crystal

Conflicts of interest are one of the most common ethical problems that law firms face. One way of dealing with a conflict of interest is through the informed consent of the affected clients confirmed in writing. SCRPC 1.7(b)(4). See *Conflict Waivers [sic?]*—A Primer, S.C. Lawyer, March 2009 at 8. Firms can also handle some conflicts through screening (sometimes called a “Chinese Wall”) of the lawyer who is subject to the conflict. But what exactly is screening, when can firms use screening, and what steps are required for an effective screen?

What is screening?

The concept of screening is tied to the principle of imputed or vicarious disqualification found in SCRPC 1.10. Under that rule, if a lawyer in a firm faces a conflict under either Rule 1.7, which deals with conflicts between current clients; under Rule 1.9, which deals with conflicts with former clients; or under Rule 1.8(c), involving preparation by a lawyer of an instrument that makes a substantial gift to the lawyer or a member of the lawyer’s family, that disqualification is imputed to every member of the disqualified lawyer’s firm.

In general terms, screening is a method of avoiding the imputation of a conflict of interest from one member of the firm to other members of the firm. If the firm timely erects a proper screen of a disqualified lawyer (see below), the disqualification does not affect the ability of other members of the firm to represent a client.

When can screening be used?

The basic, but not the exclusive, purpose of screening is to establish procedures to protect

against the misuse of confidential information, SCACR 1.0, cmt. 9. When disqualification of a lawyer arises from circumstances other than the possession of confidential information, screening is normally not permitted. In particular, Rules 1.8(a)-(i) set forth a number of situations in which a lawyer has a conflict of interest in connection with representation of a current client. These special conflicts situations cannot be avoided by screening of the affected lawyer from participation in the representation of the client. Similarly, if the disqualification is based on the duty of loyalty rather than the duty of confidentiality, screening is generally not permitted. Thus, concurrent conflicts under Rule 1.7(a) are not subject to screening.

Comment 8 to Rule 1.0 lists rules in which screening is permitted—1.8(l), 1.10(e), 1.11, 1.12, or 1.18, but this list is not exhaustive.

1. *Screening of a disqualified lawyer who received confidential information from a prospective client, SCRPC 1.18.* If a lawyer interviews a prospective client, but does not undertake the representation, another member of the lawyer’s firm may undertake representation against the former prospective client if the interviewing lawyer took reasonable steps to avoid exposure to more confidential information than was reasonably necessary to decide whether to undertake the representation and the interviewing lawyer is properly screened from involvement in the matter. SCRPC 1.18(d)(2).

2. *Screening of a former government lawyer, SCRPC 1.11.* If a government lawyer leaves one government agency either to enter private practice or to work for another agency, the lawyer is disqualified from representing a client in con-

nection with any matter in which the lawyer participated personally and substantially as a public officer or employee, unless the agency gives its informed consent confirmed in writing. If the lawyer joins a private firm, the firm may avoid disqualification by properly screening the disqualified lawyer. See *S.C. Bar Ethics Adv. Op. #05-01* (firm may handle civil case against child molester in residential boys home by screening solicitor who joined the firm after prosecuting case against another molester in same home).

3. *Screening of a former judge, law clerk, or third party neutral under SCRPC 1.12.* Similar to SCRPC 1.11, Rule 1.12 provides that a lawyer shall not represent a person in connection with a matter in which the lawyer previously participated personally and substantially as a judge (or other adjudicative officer), law clerk, or third party neutral (including an arbitrator or mediator). The disqualified lawyer’s current firm may avoid disqualification by properly screening the affected lawyer. SCRPC 1.12(c).

4. *Screening of current governmental lawyers under comments 19 and 20 to SCRPC 1.8.* SCRPC 1.8(l) prohibits a lawyer from simultaneously serving as advocate in an adversarial proceeding while serving as advisor to the tribunal. However, the prohibition is personal to the affected lawyer. SCRPC 1.8, comment 19. One lawyer in a firm or governmental agency may act as advocate while another serves as advisor provided the lawyers are screened to prevent them from sharing information. SCRPC 1.8, comment 20.

5. *Screening of lawyers employed by public defense offices, legal services offices, or other indigent programs under SCRPC 1.10(e) and comment*

9. SCRPC 1.10(e) creates an exception to the rule of imputed disqualification for programs providing legal services to indigent clients, including public defender offices and legal services programs, provided the affected lawyer or lawyers are screened from participation in the representation of the other client and the lawyer retains authority over the objectives of representation. The purpose of the rule is “to increase the number of persons to whom each program can provide legal services, while at the same time protecting the clients from prejudice.” SCRPC 1.10, comment 9.

6. *Screening of law clerks and administrative employees under comment 4 to Rule 1.10.* If a non-lawyer—such as a secretary, paralegal, or law clerk before admission to the bar—possesses confidential information gained during prior employment by another lawyer about a matter being handled by that person’s current firm, the firm is not disqualified if it effectively screens the disqualified person. SCRPC 1.10, comment 4. See *S.C. Bar Ethics Adv. Ops.* #91-12 (paralegal) and 93-29 (secretary).

7. *Voluntary screening to encourage client consent.* Even if a conflict of interest is not “screenable”—for example, if the conflict is between current clients in unrelated matters under Rule 1.7—in most situations the affected clients could still give informed consent to the conflict. In order to encourage a client to give informed consent, the firm could offer to erect a screen to prevent any communication between the lawyers handling the matters that are in conflict. See *S.C. Bar Ethics Adv. Op.* #92-23 (indicating that erection of a screen may be relevant in obtaining a client’s consent).

8. *Precautionary screening when doubt of a conflict exists.* In some situations the existence of a conflict may be uncertain. For example, under Rule 1.9 a lawyer is only prohibited from undertaking representation against a former client if the matters are substantially related to each other. Whether a substantial relationship exists may be

uncertain. See comment 3 to Rule 1.9 for the factors to consider in determining whether a substantial relationship exists. In case of doubt a firm could adopt screening measures as a precautionary device to reduce the likelihood that a court would grant a disqualification motion if one were subsequently filed.

9. *Screening when a disqualified lawyer joins a new firm under revised ABA Model Rule 1.10(a)—not yet adopted in South Carolina.* In February the ABA adopted revisions

screening procedures. If the affected lawyer or nonlawyer has not yet joined the firm when the conflict is identified, screening procedures should be put in effect before the person joins the firm. If the matter does not arise or is not identified until after the person joins the firm, the firm should erect the screen as quickly as possible.

2. *Notice of the screen to lawyers and staff.* The notice should identify the disqualified person and matter and should direct lawyers and staff not to communicate with the dis-

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to Model Rule 1.10(a) allowing a firm that hires a disqualified lawyer to avoid disqualification by screening the disqualified lawyer. Under the previous version of Rule 1.10, if the lawyer who joined the firm actually possessed confidential information about an adverse party of the new firm, then the firm would be disqualified from handling the case, and screening would not remove the disqualification. Critics of the old rule argued that it unnecessarily limited the ability of lawyers to change firms without providing significant protection to clients. The text of the ABA’s new rule, which is subject to technical amendments, is available at www.abanet.org/cpr/professionalism/home.html.

What steps are required for an effective screen?

SCRPC 1.0(l) contains a general definition of screening: timely adoption by a firm of procedures that are reasonably adequate under the circumstances to isolate the lawyer from participation in the conflict matter so as to protect confidential information. Comments 8 and 9 to that rule are more specific. Based on the rule and comments, the following are important aspects of an effective screen.

1. *Prompt implementation of*

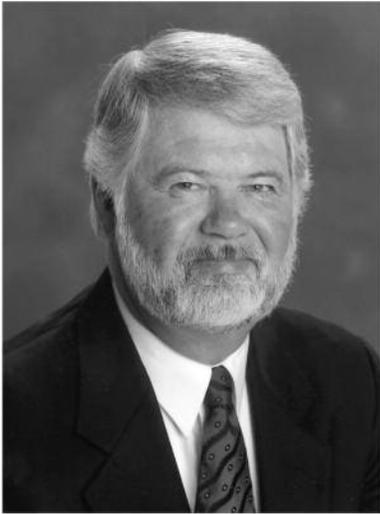
qualified person with respect to the matter. The comments do not require the notice to be in writing, but written notice is clearly desirable. If the disqualified person is already a member of the firm, the firm should send the notice as soon as it identifies the conflict, preferably the same day.

3. *Acknowledgement of confidentiality obligations by disqualified person.* The disqualified person should acknowledge his or her obligations not to communicate with any lawyer or staff member in the firm, or have any contact with firm files, with respect to the matter. A written acknowledgement, while not required, is strongly recommended.

4. *Denial of access to firm files with respect to the matter.* To provide further assurance of confidentiality, the comments suggest that the disqualified person should be denied access to firm files and others materials regarding the matter. Password protection of computer files would be an appropriate step.

5. *Periodic reminders.* As long as the screen is in effect, the firm should send periodic reminders, at least annually, to members of the firm and staff to refresh their memory (and to inform new hires) of the screen.

6. *Denial of compensation to the*



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affected person with regard to the matter. Several of the screening rules add a requirement that the disqualified lawyer receive no portion of the fee from the matter. See SCRPC 1.11(b)(1), SCRPC 1.12(c)(1), and SCACR 1.18(d)(2)(i). This requirement does not apply to all screens, for example, screens of current government lawyers who would not receive fees for their work.

7. *Notice to the affected client or agency to enable it to assure compliance with screening procedures.* Several of the rules also require notice to the affected client or agency to assure compliance with screening procedures. See SCRPC 1.11(b)(2), SCRPC 1.12(c)(2), and SCACR 1.18(d)(2)(ii)

The ABA amendments to Rule 1.10 dealing with screening of a disqualified lawyer who moves from one firm to another contain further details regarding screening. If the S.C. Supreme Court adopts this amendment, screening under this rule would need to meet these additional requirements. ■

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