

LATERAL HIRES: A PRIMER TO MINIMIZING IMPUTED DISQUALIFICATION

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Firms frequently hire lateral lawyers and nonlawyer employees to provide immediate experience with minimal training. However, the benefit of experience can be overshadowed by ethical conflicts that could ultimately prohibit the firm's continued representation of existing clients due to imputed disqualification under Nevada Rule of Professional Conduct (RPC) 1.10(a). Fortunately, the rules afford procedures to rebut the presumption of imputed disqualification and, in appropriate circumstances, continued representation may occur.

An Overview of Imputed Disqualification

A lawyer who represented or otherwise acquired confidential information from a former client during employment at a prior firm may not represent a client at a new firm if such client's interests are materially adverse to those of the former client in the same or a substantially related matter. *See* RPC 1.9. Nonlawyer employees are likewise personally disqualified under similar circumstances. *See* RPC 5.3(b); *Leibowitz v. Eighth Judicial Dist. Court*, 119 Nev. 523, 530, 78 P.3d 515, 520 (2003). Where such personal disqualification occurs, *all* members of the new firm are disqualified by imputation. *See* RPC 1.10(a). Accordingly, the rule of imputed disqualification places a heavy burden on a new firm to vet potential and, where possible, ameliorate actual conflicts occasioned by lateral hiring.

Identifying Conflicts Prior to Hiring

Imputed disqualification can be avoided by properly identifying and vetting potential conflicts before hiring. During the hiring process, the hiring firm should conduct an internal conflict check identifying those matters where the applicant's former firm serves as opposing counsel. *See Leibowitz, supra*. If hiring is imminent, the hiring firm should request a client list from the applicant for conflict check purposes. While RPC 1.6(a) imposes a duty to keep client information confidential, an applicant may ethically disclose general information to enable the hiring firm to perform a conflict check. *See*



ABA Formal Opinion 09-455. Such limited disclosure necessarily enables the applicant and the hiring firm's complience with their respective ethical duties to avoid conflicts of interest (Rules 1.7, 1.9 and 1.10). However, such disclosure should be limited to client identity and a general description of the representation. Further, the hiring firm must keep such information confidential. *See id.*

Assessing the Nature and Extent of the Lateral Hire's Prior Involvement in the Conflicting Matter

If a conflict is identified, the hiring firm should determine the nature and extent of the applicant's prior involvement in the matter. If the conflict is merely between firms and the applicant neither worked on nor acquired confidential information, then no conflict arises. *See* RPC 1.9(b) and Formal Opinion No. 39. An applicant's general access to client files of the former firm does not rise to the level of acquiring confidential information. *See*

Ryan's Express Transportation Services, Inc. v. Amador Stage Lines, Inc., 279 P.3d 166, 171, 128 Nev. Adv.

Op. 27 (2012). However, where the applicant was actually exposed to confidential information or worked on the matter at the former firm, then the hiring firm is disqualified by imputation absent a conflict waiver or implementation of adequate screening measures.

Overcoming Imputed Disqualification

Obtaining a written conflict waiver from the affected former client is the best solution to overcoming imputed disqualification. *See* RPC 1.9(b)(3) and 1.10(c). If a waiver cannot be obtained, ethical screening may be available to rebut imputed disqualification. Screening means shielding the lateral hire from any personal participation in the matter and taking additional steps to avoid any rule violations by that person. *See* RPC 1.0(k). Significantly, screening may occur without the consent of the former client – even if the lateral hire possesses confidential information from the former client so as to be personally disqualified under RPC 1.9(b). Screening is insufficient, however, if:

1. The lateral lawyer had a *substantial role in, or primary responsibility for*, the matter;
2. The lateral lawyer is untimely screened from the matter;
3. The lateral lawyer is apportioned a fee therefrom; or
4. Written notice is not promptly given to any affected former client. *See* RPC 1.10(c).

Similar provisions exist for former government employees and third-party neutrals. *See* RPC 1.11(b) and 1.12(c). Screening is also available as to nonlawyer employees. *See Leibowitz, supra.*

Factors Considered for Ethical Screening

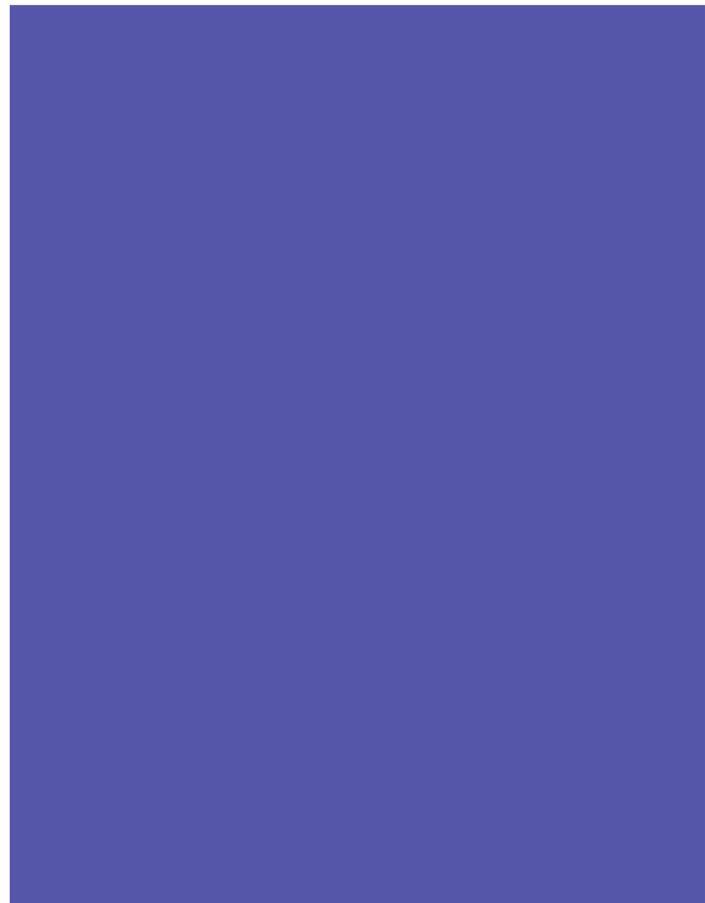
The effectiveness of an ethical screen is determined on a case-by-case basis. The Nevada Supreme Court established a list of “nonexhaustive factors” to determine the adequacy of screening. For lawyers, these factors include:

1. Instructions given to ban the exchange of information between the disqualified attorney and other members of the firm;
2. Restricted access to files and other information about the case;
3. The size of the law firm and its structural divisions;
4. The likelihood of contact between the quarantined lawyer and other members of the firm; and
5. The timing of the screening.

For nonlawyer employees, these factors include:

1. The substantiality of the relationship between the former and current matters;
2. The time elapsed between the matters;
3. The size of the firm;
4. The number of individuals presumed to have confidential information;
5. The nature of their involvement in the former matter;

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6. The timing and features of any measures taken to reduce the danger of disclosure; and
7. Whether the old firm and the new firm represent adverse parties in the same proceeding, rather than in different proceedings because inadvertent disclosure by the nonlawyer is more likely in the former situation.



Practical Guidelines for Implementing Screening Measures

While the Supreme Court has established general factors, it has not provided guidelines for implementation of the screening measures. As such, when implementing an ethical screen, the hiring firm should consider the following measures:

- A. Requiring written attestation by the screened individual that s/he had no substantial role in or primary responsibility for the prior matter and has not disclosed the former client's material confidential information or used the same in violation of the rules of professional conduct;
- B. Providing written instructions to all employees that:
 1. The screened individual must have no involvement in the firm's representation of the conflicting client;
 2. The screened individual is prohibited from disclosing any information relating to the prior representation;
 3. Employees of the firm are prohibited from discussing the current matter with or soliciting information relating to the prior representation from the screened individual;
- C. Requiring the screened individual and members of the firm working on the matter to agree in writing to abide by the written instructions;
- D. Requiring that discussions concerning the matter occur behind closed doors only with persons directly working on the matter;
- E. Restricting the screened individual's access to the files relating to the matter by: (1) labeling screened files (e.g. "[name] is screened from this matter"); (2) segregating the files from the firm's regular filing system; (3) limiting access to those working directly on the matter; and (4) placing physical files in a room that is locked after hours; (5) storing electronic files in a secured partition on the firm's server; and (6) password protecting electronic files.

- F. Situating the screened individual's work station away from the work stations of those working on the matter;
- G. Assigning support staff and printers/copiers for the screened individual separate from those working on the matter;
- H. Circulating a written policy to all firm employees setting forth the screening measures undertaken and admonishing firm employees that any violation of such policy will result in sanctions, up to and including suspension or termination;
- I. Periodically redistributing the written policies and circulating reminders to firm employees for the duration of the screen; and
- J. Sending written notice to the former client or client's counsel:
 1. Advising that the screened individual is now with the firm;
 2. Describing the firm's understanding of the screened individual's prior involvement with the former client;
 3. Identifying the screening measures implemented by the firm to ensure no disclosure of confidential information; and
 4. Providing the attestation of the screened individual.

The adequacy of these measures are determined on a case-by-case basis by the district court, with the hiring firm bearing burden of proof. *See Ryan's Express, supra*. Regardless of the screening measures implemented, automatic disqualification will likely still occur if confidential information has been disclosed to the hiring firm or where the hiring firm is simply too small to effectuate an adequate screen. *See Leibowitz, supra*.

Timing of Screening and Notification

The screen must be in place prior to the lateral hire's first day of employment. *See Ryan's Express, supra*. Similarly, notice to the affected former client should occur as soon as practicable. If the situation permits, the hiring firm is best protected by providing notice prior to employment. Obviously, if employment ensues and screening measures are implemented prior to notification, the hiring firm assumes the risk of imputed disqualification regardless of the screening measures taken.

While ethical screening is not a guarantee against imputed disqualification, a firm hiring lateral lawyers and nonlawyer employees minimizes the risk of imputed disqualification by proactively addressing the situation. Indeed, where the hiring firm has identified conflicts of interest prior to hiring, assesses the nature and extent of the lateral hire's prior involvement in the matter, promptly provides written notice to any affected former client, and timely implements adequate screening measures, ethical screening is at its most effective. ■



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