

**STATE BAR OF NEVADA
STANDING COMMITTEE ON
ETHICS AND PROFESSIONAL RESPONSIBILITY**

**Formal Opinion No. 39¹
April 24, 2008**

QUESTIONS

1. When a lawyer leaves one private firm and joins another (*i.e.*, lateral movement of a lawyer in private practice), may that lawyer represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of a former client represented by that lawyer while in the former firm?
2. When a lawyer leaves one private firm and joins another (*i.e.*, lateral movement of a lawyer in private practice), may the lawyer represent a person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of a client of the moving lawyer's former firm if the moving lawyer received material, confidential information about the matter while in the former firm?
3. When a lawyer leaves a private firm, may the former firm represent a person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of a former client represented by the leaving lawyer while in the former firm?
4. Does imputed disqualification apply to all members of the firm of a laterally moving lawyer who formerly participated personally and substantially in a matter? For example, can other members of the laterally moving lawyer's new firm participate in a matter in which the lawyer personally and substantially participated if the personally disqualified lawyer is screened from the matter within the firm?
5. May screening be employed to avoid imputed disqualification in situations other than a laterally moving lawyer, such as firm mergers and multi-city firms?
6. What are the requirements of an ethical screen?

¹This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to S.C.R. 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its board of governors, any persons or tribunals charged with regulatory responsibilities, or any member of the state bar..

ANSWERS

Answer No. 1 The Laterally Moving Lawyer

When a lawyer leaves one private firm² and joins another (*i.e.*, lateral movement of a lawyer in private practice), that lawyer is personally disqualified, and may not represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of a former client represented by the former firm if:

- (1) the lawyer formerly represented the now adverse client while in the former firm, Rule³ 1.9(a); or
- (2) the lawyer otherwise acquired confidential information material to the matter while in the former firm, Rule 1.9(b),

unless the former client gives informed consent⁴, confirmed in writing.

This is the situation where the lawyer either personally represented Client A in case A v. B while the lawyer was with former firm, White & Brown, or otherwise acquired confidential information material to the matter while in the former firm. The lawyer then moves to firm Red & Green, which represents Client B in the same or a related case. In that situation, *the lawyer* cannot represent Client B in the new firm unless former Client A gives informed consent, confirmed in writing.

Note two important clarifications:

- (1) If the laterally moving lawyer had no role in the case at the former firm, and did not otherwise acquire confidential information material to the matter, the moving lawyer is not personally disqualified from representing Client B while in the new firm, Red & Green. ABA Model Rule 1.9(b), Comment [5]; and
- (2) Even if the laterally moving lawyer did represent Client A in case A v. B while the lawyer was with former firm, White & Brown, or otherwise acquired confidential information material to the matter while in the former

²"Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. Rule 1.0(c).

³All references to "Rule" are to the Nevada Rules of Professional Conduct, effective May 1, 2006.

⁴Defined in Rule 1.0(b).

firm – and is personally disqualified from representing Client B in the new firm – that disqualification may be removed by the informed consent of former Client A. Rules 1.9(a) and (b).

Answer No. 2 Imputed Disqualification of All Lawyers in the Laterally Moving Lawyer's New Firm

When a lawyer leaves one private firm and joins another (*i.e.*, lateral movement of a lawyer in private practice), and the moving lawyer is personally disqualified under Rule 1.9 from representing a person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of a client of the moving lawyer's former firm, *all* lawyers in the new firm are also disqualified by imputation. None of the lawyers in the new firm may represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of a former client represented by the former firm, unless the former client gives informed consent, confirmed in writing. Rule 1.10(a); *Brown v. Eighth Judicial District Court*, 116 Nev. 1200, 1204, 14 P.3d 1266, 1269 (2000); *Nevada Yellow Cab v. Eighth Judicial District Court*, 123 Nev. ____ (Adv. Op. 6), 152 P.3d 737, 742 (2007).

In this situation the *new firm*, Red & Green, cannot continue to represent Client B, unless former Client A gives informed consent, confirmed in writing.

Again, note two important clarifications:

- (1) Of course, there is no imputed disqualification affecting the firm unless the moving lawyer is personally disqualified. If the lawyer changing firms had no role in the case at the former firm, and did not otherwise acquire confidential information material to the matter, neither the moving lawyer, nor the new firm, are disqualified from representing Client B while in the new firm, Red & Green. ABA Model Rule 1.9(b), Comment [5]; and
- (2) Even if the laterally moving lawyer did represent Client A in case A v. B while the lawyer was with former firm, White & Brown, or otherwise acquired confidential information material to the matter while in the former firm – and the lawyer and the new firm are disqualified from representing Client B in the new firm – that disqualification may be removed by the informed consent of former Client A. Rules 1.9(a) and (b).

Answer No. 3 Imputed Disqualification of the Moving Lawyer's Former Firm

When a lawyer leaves⁵ a firm, the former *firm* may not represent a person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of a former client represented by the leaving lawyer while in the former firm, if *any* lawyer remaining in the former firm has confidential information that is material to the matter – unless the disqualification of the former firm is waived by the affected client under Rule 1.7. Rule 1.10(b) and (c).

This is the situation where the lawyer who personally represented Client A in case A v. B while the lawyer was with former firm, White & Brown, leaves the firm. In addition, Client A discharges White & Brown. The former firm, White & Brown, is then asked by Client B to represent Client B in the same or a substantially related case. In that situation, the former firm cannot represent Client B if *any* lawyer remaining in the former firm has confidential information that is material to the matter – unless the disqualification of the former firm is effectively waived by affected client under Rule 1.7⁶. Rule 1.10(c).

Answer No. 4 Screening in the Laterally Moving Lawyer's New Firm

The traditional rule has long prohibited screening of the personally disqualified lawyer as a means of the elimination of the imputed disqualification of the entire firm to whom the lawyer has laterally moved. ABA Model Rule 1.10; *Brown v. Eighth Judicial District Court*, 116 Nev. 1200, 1204 14 P.3d 1266, 1269 (2000).

However, in 2006 Nevada adopted Rule 1.10(e) which authorizes limited screening as a means of eliminating imputed disqualification. Under Rule 1.10(e), a limited exception to the imputed disqualification of all members of the *new* firm of a laterally moving lawyer may apply

⁵In this situation it does not matter whether the lawyer laterally moves to a new firm or retires, since the focus is on the former firm itself rather than the lawyer.

⁶Waiver under Rule 1.7 requires:

- (1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) The representation is not prohibited by law;
- (3) The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) Each affected client gives informed consent, confirmed in writing.

when:

- (1) The personally disqualified lawyer did not have a substantial role in, or primary responsibility for, the matter that causes the disqualification under Rule 1.9; and
- (2) The personally disqualified lawyer is timely screened from any participation in the matter; and
- (3) The personally disqualified lawyer is apportioned no part of the fee therefrom; and
- (4) Written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

This is a Nevada specific Rule not adopted by the ABA Model Rules.⁷

Significantly, screening is allowed to avoid imputed disqualification without the consent of the former client – even if the laterally moving lawyer possesses confidential information from the former firm so as to be personally disqualified under Rule 1.9(b) – but only if the laterally moving lawyer did not have a *substantial role in, or primary responsibility for*, the matter. When the laterally moving lawyer did have a substantial role in, or primary responsibility for, the matter, the ABA rule prohibiting screening applies.⁸

Thus, screening cannot remove the imputed disqualification bar against all of the members of the laterally moving lawyer’s new firm if:

- (1) The personally disqualified lawyer had a substantial role in, or primary responsibility for, the matter that causes the disqualification under Rule 1.9; or
- (2) The personally disqualified lawyer is apportioned a part of the fee therefrom; or
- (3) Written notice is not promptly given to the affected former client to enable it to ascertain compliance with the provisions of this Rule.

⁷ABA Model Rule 1.10 has no subsection (e) authorizing screening. However, both the ABA and the Nevada Rules allow screening to remove imputed disqualification with respect to former judges, other adjudicative officers, law clerks to such a person, former arbitrators, mediators or other third-party neutrals, and former public officers or former government employees, who enter private practice in a firm. Rules 1.11 and 1.12.

⁸ ABA Model Rule 1.10.

For example, suppose the lawyer who was the lead or “2nd chair” counsel for Client A in case A v. B while the lawyer was with former firm, White & Brown, moves to firm Red & Green, which represents Client B in the same or a related case. In that situation, the lawyer’s new firm, Red & Green, cannot continue to represent Client B. In that situation, screening could not eliminate the imputed disqualification. However, even if screening did not remove the imputed disqualification, both the laterally moving lawyer and the new firm, Red & Green, could continue to represent Client B if Client A waives the conflict under Rule 1.7. Rule 1.10(c).

On the other hand, suppose the laterally moving lawyer had no direct role in case A v. B while the lawyer was with former firm, White & Brown – but did possess confidential information from the former firm so as to be personally disqualified under Rule 1.9(b) – and then moves to firm Red & Green, which represents Client B in the same or a related case. In that situation, the lawyer’s new firm, Red & Green, could continue to represent Client B without Client A consent if the personally disqualified lawyer is ethically screened from the case.

Finally, if the lawyer changing firms had neither a role in the case A v. B, nor the possession of confidential information about the case, then neither screening nor client consent is required for the lawyer and the new firm to represent the opposite party in the case.

Answer No. 5 Screening in Situations Other than a Laterally Moving Lawyer, Such as Firm Mergers and Multi-City Firms

The ABA rule prohibiting screening to remove imputed disqualification applies to all situations other than a laterally moving lawyer. In all other situations – such as law firm mergers and multi-city law firms – at least one lawyer in the merged or multi-city firm will necessarily have had a substantial role in, or primary responsibility for, the matter. Thus, in all other situations, the Nevada specific exception in Rule 1.10(e) cannot apply. Under the limited Nevada exception, screening can only apply to remove imputed disqualification from the new firm of a lawyer changing firms.

However, there is one other situation where screening is appropriate. Even when the disqualification is removed by the consent of the former client, all lawyers in possession of confidential information from the former representation are under a continuing obligation to protect and not reveal the information in the new representation. Rule 1.9(c). As a result, a voluntary ethical screen as described below in Answer No. 6, is a recommended “best practice”.

Answer No. 6

The Minimum Requirements of an Ethical Screen

An ethical screen must isolate the personally disqualified lawyer from any participation in the 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 the Model Rules or other law. Rule 1.0(k).

The elements of an effective ethical screen should at a minimum include:

- a. the personally disqualified lawyer must agree in writing not to participate in the representation and not to discuss the matter with any employee of, or person affiliated with, the firm;
- b. all employees of, and persons affiliated with, the firm must be advised in writing that the personally disqualified lawyer is personally disqualified and screened from the matter and not to discuss the matter with the personally disqualified lawyer;
- c. the isolation of files, documentation, and communications, including electronic communications, relating to the matter from the personally disqualified lawyer. For example, with respect to files, they could be labeled on the outside something to the effect that “name of the personally disqualified lawyer is screened from this matter”;
- d. the writings described in (1) and (2) above should be periodically resent so long as the screen is necessary; and
- e. at appropriate times the personally disqualified lawyer should swear or affirm to the tribunal, if any, that (s)he has not breached the agreement described in (1) above.

See, LaSalle v. County of Lake, 703 F.2d 252 (7th Cir. 1983); *Delaware River Port Authority v. Home Insurance Company*, 1994 WL 444710 (DC Pa. 1994); *Sufficiency of Screening Measures (Chinese Wall) Designed to Prevent Disqualification of Law Firm, Member of Which is Disqualified for Conflict of Interest*, 68 A.L.R. Fed. 687 (1984); Restatement of the Law Third, The Law Governing Lawyers, §124. In addition, the above minimum requirements of an ethical screen are consistent with those suggested by the Nevada Supreme Court for laterally moving nonlawyers (*i.e.*, legal assistants, paralegals, investigators, *etc.*), which were announced prior to its passage of Rule 1.10(e) to allow laterally moving lawyers to be screened. *Liebowitz v. The Eighth Jud. Dist. Ct.*, 119 Nev. 523,532 78 P.3d 515, 521 (2003).