

Advisory Opinion 1986-3

1. Where a lawyer leaves one law firm and joins a second firm such will not require disqualification of the second firm in representing its client against a client of the first firm if the matter is neither the same nor substantially related to a matter handled by the first firm while the attorney switching firms was with the first firm.
2. If, however, the matter is the same or is substantially related, the second law firm will be disqualified unless it carries the burden of proving that the lawyer switching firms had no actual knowledge of any confidential information and no actual knowledge of any matter, obtained while a member of the prior firm, which would cause disadvantage to the client of the prior firm.
3. In a disqualification proceeding, the burden of proving that the matter is the same or is substantially related is upon the party asserting disqualification; the burden of proving the absence of actual knowledge of confidential information, or of information which would disadvantage the prior firm's client, is upon the party resisting disqualification.
4. Presumptions and inferences may be employed in determining the issue of actual knowledge, but there is no irrebuttable presumption of "actual knowledge" merely because the element of "substantially related" has been proved or determined.
5. If disqualification would result under the rules stated above, screening the attorney switching firms from participation in the matter with the second firm may avoid disqualification, but screening is a device which should be available only in carefully limited circumstances, such as to avoid severe prejudice to a client of a second firm, when actual knowledge is clearly peripheral or otherwise when screening would avoid a demonstrably harsh result.
6. Screening the attorney from participation may be necessary, even though disqualification of the second firm is not required, to avoid the appearance of impropriety.
7. A disqualification prescribed by the above may be waived by the affected client.

A. Facts Set Forth in the Request for Advisory Opinion.

1. Law firm K wishes to employ lawyer H.
2. Lawyer H previously worked for law firm S.
3. While lawyer H worked for law firm S, law firm S was general counsel for corporation W.
4. Lawyer H, while a member of law firm S, performed no legal services for corporation W.
5. Law firm K has been representing the shareholders of corporation W in a suit against the management of corporation W.
6. Law firm K does not intend that lawyer H will participate in any manner in the representation of the shareholders of corporation W against the management of corporation W.
7. Law firm S, of which lawyer H was previously a member, employed approximately 50 attorneys when lawyer H was a member of law firm S.

Facts Not Set Forth in Requesting Letter.

1. Although it is indicated that lawyer H did no actual work for corporation W either on the specific matter now in contention between its shareholders and its management, or apparently on any matter involving corporation W, the facts stated do not expressly negate "actual knowledge" of
 - a. confidential information, or

b. information which, if imparted to law firm K, could cause disadvantage to corporation W or its management.

2. It is not indicated whether lawyer H provided any legal services to individuals associated with corporation W on non-corporate matters.

3. The specific issues in the proxy battle are not disclosed.

B. Advisory Opinion Requested.

1. Would law firm K be disqualified from representing the stockholders of corporation W against the current management of corporation W if lawyer H becomes a member of law firm K?

2. If the answer to question No. 1 is yes, would the answer be no if law firm K sets up mechanisms to insure that lawyer H has no connection whatsoever with any of the work in law firm K relating to the corporation W matter?

C. Opinion.

Issue No. 1: Would law firm K be disqualified from representing the stockholders of corporation W against the current management of corporation W if lawyer H becomes a member of law firm K?

The inquiry is phrased in terms of disqualification. Disqualification we would basically regard as a legal question, which we may not address. However, even though "disqualification" may connote a legal proceeding and we approach this opinion as one of ethics, we will phrase our conclusions in terms of "disqualification" because we recognize the term as a handy rubric for phrasing our conclusions.

The issues presented thrust us into the need to consider the "Imputed Disqualifications" provisions of the ABA Model Rules of Professional Conduct. This opinion squarely embraces the provisions of model Rule 1.10, although the Model Rules have not as yet been adopted in New Mexico. Under Model Rule 1.10(b), the answer to the first issue presented requires a two-part analysis:

1. Is the stockholder proxy fight either the same matter or substantially related to a matter in which the prior law firm provided legal services to corporation W while lawyer H was employed by the prior firm?

2. Did lawyer H while a member of law firm S obtain actual knowledge of confidential information imparted from corporation W to law firm S or any information which would work to the disadvantage of corporation W or its management?

If the subject matter of the representation by law firm S provided to the management of corporation W does *not* involve any issues which are the same or are "substantially related" to the issues involved in the representation by law firm K of the shareholders of corporation W, then no disqualification would result from hiring lawyer H.

If the subject matter of the representation by law firm S provided to the management of corporation W *does* involve issues which are the same or are "substantially related" to the issues involved in the representation by law firm K of the shareholders of corporation W, then in order to avoid disqualification, law firm K must do one of the following: (1) it must be able to demonstrate that, while a member of law firm S, lawyer H obtained no "actual knowledge" of any "confidential" information relating to corporation W or its management practices or otherwise lawyer H, while with law firm S, obtained no "actual knowledge" of any information which would work to the "disadvantage" of the management of corporation W (or to the corporation itself) if imparted by lawyer H to law firm K or to the shareholders of corporation W, or (2) it must obtain consent of corporation W to its representation of its own client in the same or substantially related matter. In certain limited instances, more fully described below, the law firm may avoid disqualification even if some "actual knowledge" exists, if it demonstrates (a) that the lawyer joining its firm has provided it (or its clients) with none of the actual knowledge obtained by such lawyer while a member of the prior law firm and (b) that it has had in place in all times material, and will continue to so operate, mechanisms for "screening" the new lawyer from any participation in the representation in question.

The applicable rules are set forth in bar opinions and case law now eclectically incorporated into Rule 1.10(b) of the Model Rules. The Model Code did not specifically address the issue of conflict of interest between an attorney and a former

client. Model Rule 1.10 does specifically address the issue and model Rule 1.10(b) further specifically addresses the issue of an attorney moving from one law firm to another. 1

Model Rule 1.10(b) specifically provides as follows:

"(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer has acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter."

Under the Model Code, courts have generally always applied a "substantially related" test. 2 Also, under Model Code cases, if the matter at issue between the new firm's client and the prior firm's client is not the same issue or substantially related to an issue concerning which the prior firm has advised its client, the inquiry relative to disqualification ceases. (As will be seen below, under certain circumstances, the attorney switching firms might have to be screened from participating in the matter, even in the absence of being "substantially related.")

Where the issues are the same or substantially related, jurisdictions operating under the Model Code split as to whether substantial relation in and of itself required disqualification. See ABA/BNA Lawyers Manual on Professional Conduct, 01:124 to 01:128, and 51:201 to 51:210.

The better view is that merely because the issues are the same or substantially related should not cause a *per se* disqualification. If the lawyer moving from the one law firm to another had no actual knowledge of either confidential information or information which could work to the disadvantage of the prior firm's client, no disqualification should be required.

This does not mean that the opinions or cases construing the Model Code and setting forth both irrebuttable and rebuttable presumptions may be or should be ignored. Although the mere finding of substantially related would, under model Rule 1.10(b), create no irrebuttable presumption of disqualification, there may be circumstances when an irrebuttable presumption might still be employed. One such instance of an appropriate irrebuttable presumption would be in the situation where the lawyer switching firms, while with the prior firm, "participated personally and substantially" in the substantially related matter. The just quoted language is borrowed from the provisions of model Rule 1.11(a) dealing with "Successive Government and Private Employment." It is our opinion that if such a relationship bars representation in the former government attorney context, (absent consent *and* screening), it should likewise apply to private practice. We decline to speculate on other circumstances where an irrebuttable presumption might be employed.

Generally, however, if presumptions are employed, they should be in the nature of rebuttable presumptions because it is knowledge in fact on the part of the attorney moving from one firm to another which is the focus of the inquiry.

"Paragraph (b).... (of Model Rule 1.10) operate(s) to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(B). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict." ABA/BNA Manual at 01:128.

Applying Model Rule 10(b) to the inquiry at hand, we would first note that merely because lawyer H while with law firm S did no work whatsoever for corporation W, such may not of itself preclude disqualification. Determination of actual knowledge requires inquiry into access to knowledge.

"Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions, or working presumptions that reasonably may be made about the way in which lawyers work together." *Id.*, at 01:127.

It may, therefore, be relevant to inquire into any one or more of the following:

1. Whether the attorney was a partner or shareholder with the prior firm. ABA/BNA manual at 01:127.

2. Whether the attorney worked on the same matters for the former firm's client although not necessarily on the specific matter found to be substantially related. *Id.*, at 01:127.
3. The size of the former law firm. *Id.*, 01:127.
4. The access of the lawyer only to files of clients he personally represented, or whether the lawyer had access to all files. *Id.*, 01:127.
5. Whether the lawyer regularly participated in discussions with lawyers specifically representing the client in question. *Id.*, at 01:127; 51:204.

The above is obviously not intended as an exclusive list of relevant areas of inquiry.

In the factual situation set forth in the inquiry under consideration, it is impossible to determine what is or could be involved in the proxy battle indicated. Generally, the "outsiders" seek to oust the "insiders" from management in a proxy fight on a host of alleged business judgment, profit or personal decisions many of which have been made in conjunction with advice of counsel. Nor is it indicated whether the lawyer switching firms has "actual knowledge" of the type referred to above.

Therefore, we are unable to conclusively answer the specific inquiry posed. Although the representation by law firm K appears to be "substantially related" to services performed by law firm S for corporation W, "actual knowledge" of lawyer H of confidential information or other information which could cause disadvantage to corporation W or its management is not negated by the facts stated.

We would conclude our discussion of Issue No. 1 by observing that in disqualification proceedings, the burden of proof is upon the party asserting disqualification to prove "substantially related," but the burden of proof to negate actual knowledge is upon the party resisting disqualification. *Id.*, at 51:207, 208.

Issue No. 2: If the answer to question No. 1 is yes, would the answer be no if law firm K sets up mechanisms to insure that lawyer H has no connection whatsoever with any of the work in law firm K relating to the corporation W matter?

Model Rule 1.10 does not contain any provision for "screening," and, under subsection (d) mentions only "waiver" by the former firm's client as a method of avoiding disqualification under 1.10(b). We conclude, therefore, that if the matters are "substantially related" and "actual knowledge" exists, setting up mechanisms to insulate the newly hired attorney from participation in the substantially related matter would normally not prevent disqualification in the absence of consent of the prior firm's client. The mechanism of "screening," sometimes referred to as the "Chinese Wall," is mentioned specifically only in Model Rule 1.11, dealing with former government attorneys. Under model Rule 1.11, screening is mentioned only in reference to consent having been actually obtained from the government. We decline, however, to state that screening might not avoid a disqualification, where consent is withheld, in those hard cases where actual knowledge is doubtful, where such actual knowledge would be minimal or would be very peripheral, or where disqualification would work a substantial hardship to a client. Substantial hardship to a client could arise where the attorney switches firms subsequent to substantial performance of services by the law firm acquiring the new member. *See, e.g., Silver Chrysler, Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F. 2d 751 (2d Ci r . 1975) , in which the court used reasoning other than "screening" to avoid a harsh result, and *see Smith v. Whatcott*, 757 F.2d 1098 (10th Cir. 1985), where the Tenth Circuit recognizes that courts have permitted "institutional screening," in both former government attorney cases and otherwise, but declines to adopt the screening device in the case before it.

So that there may be no question about the thrust of this opinion, we reject an irrebuttable presumption of knowledge of confidences by virtue of a showing only that the matters handled by the attorney's prior firm and that being handled by the present firm are "substantially related." In short, we refuse to adopt a fiction which would impute to all attorneys in a law firm the knowledge of one or a few attorneys performing services for a specific client on a specific matter. 3 We caution, however, in the application of that which is stated against any inference that merely because the attorney did not personally provide services to the former firm's client that "actual knowledge" of confidential information or of information which could disadvantage the former firm's client has been fully or properly negated. "Actual knowledge" may be obtained during informal discussions within the office, billing reviews, review of attorney's opinions to auditors, in partnership or shareholder meetings or in a myriad of ways "in which lawyers work together." We also caution that it is not just confidential facts communicated from a client to an attorney that must be considered in determining flactual knowledge." Information which if known to an opponent could cause "disadvantage" to the prior firm's client is a part of the "actual

knowledge" inquiry mandated by Model Rule 10(b), and actual knowledge of "work product" could certainly constitute one form of disadvantageous information.

Some final notes on "screening" should be stated, viz:

1. As indicated above, "screening" should not be regarded as a panacea to avoid declining of a conflict of interest representation or to avoid withdrawal from an existing representation where attorneys move from one firm to another. The bar and the courts must still be acutely conscious that "appearance of impropriety" and not just violation of confidence is necessary to maintain the integrity of the profession, both internally and in the eyes of the public. As the quantity and relevance of any "actual knowledge" increases the possibility of avoiding an ethical violation through screening (without consent), should correspondingly decrease.
2. Screening, if it is to be employed, would require institutional mechanisms in place prior to and at the time an attorney previously with the former firm joins the new firm. Delays in setting up the proper mechanisms may preclude the raising of screening as a defense to a disqualification motion.
3. Screening, if raised as a defense to any disqualification motion (legal proceeding) should require, as a prerequisite, proof that in fact, no confidential information or information which would disadvantage the prior firm's client has to date passed from the new attorney to the new firm or its client.
4. If information has passed, the law firm must decline representation or withdraw from representation.
5. The standard of proof in both the burden of proof or lack of actual knowledge and in the burden of proof of negating the passing of any actual knowledge to the new firm or its client should be a higher standard than a mere preponderance.
6. We recognize that there may be situations where a law firm would not deem it fair to an existing client to employ an attorney whose prior law firm affiliation could cause the hiring firm to be disqualified or to substantially risk disqualification. The ethics provisions, however, are deeply imbedded in the recognition that the former client's interests are paramount to the interests of any individual attorney or law firm.
7. By the same token, sensitivity to the changed and changing mode of private practice is necessary. Clearly peripheral or clearly slight actual knowledge, may, in appropriate circumstances, permit screening as a method of accommodating reasonable ability of attorneys to join other law firms, and of clients of the hiring firm to employ or to continue to employ the law firm of its choice.
8. Lawyers raising the disqualification issue should do so to legitimately protect their clients' confidences and to protect against disadvantage to their client but not out of a motive to create disadvantage to the client of another law firm or to impede legitimate career changes by former members of its firm.
9. The appropriateness of screening must necessarily be approached on a case-by-case basis. We think it would be entirely inappropriate to here attempt to articulate any purported all-encompassing test. We do emphasize that attorneys must be aware that consent, i.e., waiver, may be the only method of avoiding disqualification or ethical impropriety where actual knowledge on a substantially related matter exists, and that it should not be lightly assumed that "screening" would avoid this result.
10. Even where no "actual knowledge" was obtained by the attorney while with the prior firm, "screening" may be appropriate to avoid an appearance of impropriety. As a practical matter, such screening may well avoid ill feeling and/or a motion to disqualify.

CONCLUSION

We trust that it is easily discernible that this opinion is a significant departure from the irrebuttable presumption of taint and *per se* disqualification enunciated in *Smith v. Whatcott*, *supra*, Footnote 1. The circumstances where the even further departure, "screening," is permitted, we realize is not set forth in any specific or concrete test. It is our intention to leave the door slightly ajar regarding screening. Attorneys, when faced with "substantially related" and "actual knowledge" circumstances, would be clearly well advised to seek, through opposing counsel, consent from the prior client. Although the lawyers from the original firm will be ethically bound to protect the interests of their client, such consent should not be

arbitrarily or capriciously withheld, and counsel for the client from whom consent is sought should advise its client accordingly. If consent is withheld and the law firm seeking such consent feels that it is being withheld arbitrarily or capriciously, this will obviously place the law firm hiring or contemplating the hiring of the attorney in a dilemma. In matters in litigation this may be subject to resolution by the court; in matters not in litigation or where the issue is not otherwise in a proper posture for resolution by a court, methods of resolution may well have to be developed which are beyond the present advisory opinion mechanism, such as a panel specifically created to pass upon disqualification and screening.

1 The Tenth Circuit in March, 1985 declined to follow that which is set forth in the Model Rules, but explicitly recognized that the model Rules oppose the application of an irrebuttable presumption that merely finding the matter to be the same or substantially related disqualified the entire firm. *Smith v. Whatcott*, 757 F.2d 1098, 1101 (10th Cir. 1985).

2 New York has recently rejected the "substantially related" test, and adopted the test that the matter be "identical to or essentially the same as." *Berkowitz v. Estate of Roubicek*, N.Y. S. Ct. Nassau County, digested ABA/BNA Manual, Current reports at p. 34.

3 We explicitly recognize that the model Rules have not as yet been adopted in New Mexico. In the Model Code there is no rule which directly addresses the issue of "Imputed Disqualifications" but there is no New Mexico case law to compel our adoption of a series of irrebuttable presumptions. The "functional analysis" approach incorporated into the new and yet to be adopted Model Rules is, we believe, more consonant with modern law practice. The practitioner should, however, be alert to whether Model Rule 1.10 is ultimately adopted, and adopted in the form here cited, by the Supreme Court of New Mexico.