

**KENTUCKY BAR ASSOCIATION**  
**Ethics Opinion KBA E-354**  
Issued: May 1993

Attorney was in Firm 1 at the time of its representation of Client A. Thereafter, Attorney resigned and obtained employment with Firm 2. Firm 2 is representing Client B in the same or a substantially related matter in which the adverse party is Client A.

**Question 1:** If Attorney did not participate in the representation of Client A (or in a substantially related matter), and obtained no actual knowledge of the protected information of Client A, is Attorney or Firm 2 prohibited from continuing to represent Client B?

**Answer 1:** No.

**Question 2:** If Attorney participated in the representation of A, or has actual knowledge of protected information of Client A, is Attorney and are all other attorneys in Firm 2 prohibited from continuing to represent Client B?

**Answer 2:** Yes.

**Question 3:** Does the result change if Client A consents to the prohibited representation?

**Answer 3:** Yes.

**Question 4:** Does the result change if Firm 2 establishes rigorous screening at the first hint of a conflict?

**Answer:** Qualified no.

**References:** Rules 1.6, 1.9, 1.10, R. Underwood & W. Fortune, Trial Ethics sec. 3.8.3 (1988); Manning v. Waring, Cox, James, Sklar & Allen, 849 F.2d 222 (6th Cir. 1988); Roberts v. Hutchins, 527 So.2d 1231 (Ala. 1990); Michigan Op. R-4 (1989); Restatement of the Law Governing Lawyers (Proposed) sec. 204.

**OPINION**

These questions are frequently presented to the Ethics Committee and to members of the Hotline Committee. Unfortunately, the issue tends to be presented in cases that are “in litigation,” and shortly before the trial. The Committee cannot reasonably be expected to entertain arguments from both sides or resolve disputed factual allegations, or decide disqualification motions. Furthermore, “resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation.” Comment (14) to

Rule 1.7. The Committee offers this Formal Opinion in order to provide some guidance and reduce the need to address these questions in the context of litigated cases.

The answer to Questions 1 follows from a reading of Rule 1.9 and 1.10(a). While Lawyer is in Firm 1, Lawyer may be presumed to have access to information possessed by others in the Firm. However, this presumption no longer attached when Lawyer leaves the firm. Comment (13) to Rule 1.10 clearly states that:

if a lawyer while with one firm acquired no knowledge of information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer 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.

Just as clearly, if prior to changing firms Lawyer performed substantial work on the same or on a substantially related matter on behalf of Client A, or otherwise obtained actual knowledge of information protected by Rules 1.6 and 1.9, then Lawyer and all other members of his or her new firm have a conflict under Rule 1.10(b).

Under the Rules, such conflict is “disqualifying” in the absence of consent from Client A. However, the conflict is consentable under Rule 1.9.

The final question relates to “screening” as a substitute for consent, or as a device for avoiding disqualification. We note that the Rules do not allude to “screening” as a solution to conflicts except in Rules 1.11 and 1.12, which deal with former government lawyers and former judges or arbitrators, respectively. Comment (5) hints that the “screening” solution should not be extended to scenarios involving job-changing by lawyers in private practice. See Roberts v. Hutchins, 527 So.2d 1231 (Ala. 1990) (under the Code and Rules screening provides no solution for firm that hired associate from opposing firm, with knowledge that associate had been working on same case for opposing party); Underwood & Fortune at sec. 3.8.4.

On the other hand, some courts have ruled that rigorous screening at the first hint of conflict might protect a firm from imputed disqualification. *See, e.g., Manning v. Waring, Cox, James, Sklar & Allen*, 849 F.2d 222 (6th Cir. 1988). We also note that a trial judge may decide to deny a disqualification motion for a number of reasons including delay, docket control and relative hardship. For all of these reasons, it may be appropriate in some circumstances for a lawyer to make a good faith argument in resisting disqualification and relying on “screening,” in spite of an apparent 1.10(b) conflict. Such a good faith argument may protect a lawyer from discipline, especially in light of the absence of controlling authority in the state courts. The Committee cannot rule on such arguments or determine the effectiveness of a “screen”.

We answer the last question with a “qualified no” because the Rules do not explicitly provide for screening, and because we do not wish to encourage reliance on “screening” in the absence of a rules change. Compare Restatement of the Law Governing

Lawyers (Proposed) sec. 204 (proposed rules for screening in context of private practice); Michigan Op. R-4 (Rule 1.10 amended to permit screening for lawyers changing firms). Rule 1.10(b) and the comments thereto are clearly written. Lawyers should be expected to follow them and resolve such conflicts when they change firms rather than on the day of trial.

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***Note to Reader***

*This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). Note that the Rule provides: "Both informal and formal opinions shall be advisory only; however, no attorney shall be disciplined for any professional act on his part performed in compliance with an opinion furnished to him on his petition, provided his petition clearly, fairly, accurately and completely states his contemplated professional act."*