THE NEW YORK CITY BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

FORMAL OPINION 2026-1: USING NEW YORK'S SCREENING NOTIFICATION RULE TO AVOID IMPUTATION OF A LATERAL ATTORNEY'S CONFLICTS TO OTHER LAWYERS IN THE FIRM

TOPIC: Preventing Imputation of a Lateral Attorney's Conflict to Other Lawyers in a Firm

DIGEST: This opinion analyzes a lawyer's and a law firm's ethical obligations in relying on Rule 1.10(c) to prevent a lateral attorney's conflicts from being imputed to other lawyers in the firm. The opinion clarifies (i) which lateral attorney conflicts fall within the screening notification provision's safe harbor; (ii) what the notification to the lateral's former client should say; (iii) what obligations a lawyer may have to discuss with current clients the firm's intended reliance on the screening notification provision; (iv) when a notification is not required because of confidentiality obligations; (v) when the notification should be sent; (vi) to whom the notification should be sent; and (vii) what obligations, if any, a lawyer has when the lawyer receives such a notification intended for the lateral attorney's former client.

RULES: 1.2, 1.4, 1.6, 1.9, 1.10, 4.2

QUESTION: What ethical issues should a lawyer or law firm consider when relying on Rule 1.10(c)'s screening notification safe harbor, and what should a lawyer do when the lawyer receives such a notification intended for a lateral attorney's former client.

OPINION:

Introduction

Ordinarily, an attorney may not take on a representation of a client in a matter materially adverse to a client that the attorney formerly represented in the same, or a substantially related, matter. Rule 1.9(a). That attorney's conflict of interest is then imputed to all the other attorneys in that attorney's law firm. Rule 1.10(a).

When an attorney in private practice joins a new law firm (referred to herein as a "lateral attorney" or "lateral"), the default rule in New York has long been that the lateral attorney's former client conflicts under Rules 1.9 and 1.10 are also imputed to all of the other lawyers associated with that new firm if the lateral attorney acquired material confidential information.[1] A law firm in that situation would then need to seek a conflict waiver from the lateral attorney's former client in order to resolve the imputed conflict. However, with rule changes effective January 1, 2025, New York joined the majority of other U.S. jurisdictions in allowing law firms to avoid the imputation of certain lateral attorney conflicts to the firm by (i) screening the lateral

[1] If the lateral attorney did not acquire any such material confidential information, the conflict did not (and does not under the current rules) get imputed to the firm. *See* Rule 1.10(c)(1).

attorney from the matter giving rise to the conflict and (ii) providing notification of the screen to the lateral attorney's former client.

This new screening notification provision is relatively straightforward. After identifying a covered lateral attorney conflict that would otherwise be imputed to the firm, the firm must act promptly and reasonably to (i) notify the appropriate lawyers and nonlawyer personnel within the firm of the lateral attorney's disqualification from the conflicting matter, (ii) effectively screen that lawyer from that matter, (iii) ensure that the disqualified lawyer is apportioned no part of the fees from that matter, and (iv) provide written notice of the screen to the lateral attorney's former client. Rule 1.10(c)(2).

However, not all lateral attorney conflicts can be resolved through this procedure (Rule 1.10(c)(3)), and there are a number of practical and ethical factors to consider before relying on this screening notification provision that are not immediately apparent from the face of the rule. In this opinion, we provide practical guidance on some of these issues.

I. What conflicts are not covered by the screening notification safe harbor?

A lawyer or law firm may not always rely on the screening procedures described above. A screen "will not prevent the imputation of conflicts within a firm" when (i) "the matter is a litigation, arbitration, or other adjudicative proceeding," *and* (ii) the lateral attorney, while at the prior firm, "substantially participated in the management and direction of the matter" *or* "had substantial decision-making responsibility in the matter on a continuous day-to-day basis." Rule 1.10(c)(3). If both (i) and (ii) are met, the screening notification safe harbor cannot be used and a waiver from the lateral attorney's former client will be the sole option to prevent the imputation of the conflict to the lateral attorney's new firm. Rule 1.10(d).

a. Meaning of "the matter is a litigation, arbitration, or other adjudicative proceeding."

The lateral attorney's matter giving rise to the conflict must be a "litigation, arbitration, or other adjudicative proceeding." The fact that a non-litigated matter ultimately ripens into a dispute or an actual proceeding *before, during* or *after* the lateral move is irrelevant. In other words, the carveout in subparagraph (c)(3) applies *only* if the lateral attorney *actually* worked on the current litigation, arbitration or other adjudicative proceeding giving rise to the conflict prior to the lateral move.[2]

[2] Comment [5F] to Rule 1.10 ("[T]he screening procedures set forth in paragraph (c)(2) are ineffective to prevent the imputation of disqualifying conflicts for lawyers … who move *during* a litigation, arbitration or other adjudicative proceeding to a law firm representing a party whose interests are materially adverse to the interests of the lawyer's former client in the same or a substantially related matter.") (italics added). There may be, however, conflicts-related issues if a lateral attorney who only worked on the transaction comes to a new firm involved in a litigation arising from that transactional work, and that lawyer potentially could be a significant witness in that litigation. *See* Rule 3.7(b)(1) ("A lawyer may not act as advocate before a tribunal in a matter if another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client").

b. "Substantially participated" or "substantial decision-making responsibility"

If the lateral attorney meets the first prong, the new law firm must next consider if the lateral either "substantially participated in the management and direction of the matter" *or* "had substantial decision-making responsibility in the matter on a continuous day-to-day basis." Because the prongs are stated in the alternative, meeting just one is sufficient to trigger the carveout under Rule 1.10(c)(3), thereby disqualifying the new law firm from taking advantage of the screening notification safe harbor.

Both prongs are highly fact dependent.[3] A senior partner who is leading the matter will generally meet the standard while a junior associate who has only performed document review will not. However, other than such clear-cut situations, making this determination may be difficult, and law firms may choose to err on the side of caution by seeking a conflict waiver.

II. What information must be included in the notification to the lateral's former client?

To take advantage of the screening notification safe harbor, the new firm must promptly and reasonably "give written notice to the former client to enable it to ascertain compliance with the provisions of" the rule. Rule 1.10(c)(2)(iv).

This notice should (i) identify the lateral attorney and generally describe the relevant prior work for the former client giving rise to the conflict, (ii) describe the matter at the new law firm giving rise to the conflict, (iii) describe the screening measures,[4] and (iv) state that the lateral attorney will not be apportioned a part of the fee from the new firm's matter giving rise to the conflict. A sample notification that should often be sufficient is provided in Appendix A.[5]

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[3] Although the lateral attorney can be helpful in providing the new law firm with information to make this decision, the lateral attorney may not reveal a former client's confidential information to the hiring firm. Nor should the hiring firm solicit such information. Rule 1.6, cmts [18A] – [18F]. Disclosure of such confidential information may make reliance on the screening notification provision impossible. Rule 1.10, cmt [5D] ("if any lawyer in the firm acquires confidential information material to the matter from the personally disqualified lawyer, the requirements of this Rule cannot be met, and any subsequent efforts to institute or maintain screening will not avoid the firm's disqualification.").

[4] According to Rule 1.0(t), screening "denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or the firm is obligated to protect under these Rules or other law." What makes such screening "effective" as required by Rule 1.10(c)(2)(ii) will depend on many factors. The Rules and comments provide some guidance. *See* Rule 1.0(t), cmts [8]-[10]; Rule 1.10, cmt [5D], [5E]. Court opinions discussing the effectiveness of screens in the context of disqualification motions may also be instructive. *See, e.g.*, *Dumbo Moving & Storage, Inc. v. Piece of Cake Moving & Storage LLC*, 2024 WL 3085052, at *3 (S.D.N.Y. 2024)*; Berkley Custom Ins. Managers v. N.Y. Risk Services Group*, 2020 U.S. Dist. LEXIS 196600, at *16–18 (S.D.N.Y. Oct. 22, 2020). Of note, the timeliness of implementing the screens is an important factor. Rule 1.10, cmt [5D] ("If the matter requiring screening is already pending before the personally disqualified lawyer joins the firm, the procedures required by this Rule should be implemented before the lawyer joins the firm. If a newly associated lawyer joins a firm before a conflict requiring screening arises, the requirements of this Rule should be satisfied as soon as practicable after the conflict arises").

[5] Although the former client may have questions about the screening procedures, unlike some other jurisdictions' screening notification provisions (*see* ABA Model Rule 1.10(a)(2)(ii)), New York's rule does not require the law firm to have further communications regarding the screen or the content of the notification. However, as a matter of

III. Timing of screening notification

The screening notification must be provided to the former client "promptly." As a practical matter, this means that the notification can be provided after the lateral attorney joins the new firm and is not required to be provided on the first day that the lateral joins the new firm. Indeed, as discussed below, there may be ethical and legal restrictions that may prevent certain communications with the former client prior to the lateral attorney joining the new law firm.

In most situations notification will be prompt if provided within the first couple of weeks after the lateral joins the new firm. Similarly, if the conflict arises after the lateral joins the firm (or was not apparent when the lateral joined the firm), the notification should be considered prompt if provided within a couple of weeks of the law firm becoming aware of the conflict.

This is not to say that implementation of the screening required to qualify for the safe harbor under the rule can be delayed even for that interval and still be considered effective.[6] Rather, it reflects that the notification is generally the last step in this process and law firms should not be penalized for carefully investigating the conflict issues and ensuring the effective screening procedures have been established before sending the notification.

a. Ethical and legal risks in communicating with the lateral's former client prior to the lateral attorney notifying the current law firm of the intention to leave

While, as discussed above, Rule 1.10(c)(2)(iv) provides that notice must be given to the affected former client "promptly," the question of when that notification is required, or even permitted, to be given raises issues beyond simply the screening issue. There are fiduciary obligations to consider as well. For example, Rule 1.6 cmt [18D] expressly cautions that in the context of exploring a new association, "all lawyers involved must individually consider fiduciary obligations to their existing firms that may bear on the timing and scope of disclosures to clients relating to conflicts" including those required under Rule 1.10.[7]

As set forth in NYC Bar Association Formal Opinion 2023-1[8], absent unique circumstances, any communication with clients by a departing lawyer concerning the potential departure, which necessarily would include discussions of potential conflicts, screenings and waivers, is generally prohibited prior to the departing lawyer giving notice to the lawyer's current firm. That opinion further noted that even though Rule 1.6 permits disclosure of non-confidential client information to a law firm the lateral attorney hopes to join for conflicts-checking purposes before the lateral attorney notifies his or her current law firm of the lateral

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professionalism, lawyers may respond to reasonable questions from the former client where there is no prejudice to the current client in doing so. Rules 1.2(e), (g).

[6] *See* note 4 *supra*.

[7] Comment [18F] further sets forth steps that can be taken as to when and how even the permitted disclosures can be made to minimize the risk of any improper, unauthorized or inadvertent disclosures, including agreeing not to disclose conflict information outside the firm(s) during the lateral hiring negotiations or merger process.

[8] Assoc. of the Bar of the City of N.Y. Comm. on Prof'l Ethics, Formal Op. 2023-1 (June 30, 2023), https://www.nycbar.org/reports/opinion-2023-1-ethical-obligations-of-lawyers-and-law-firms-relating-to-attorney-departures/ (All websites last accessed July 30, 2026).

attorney's intention to depart, "it does not authorize either the departing lawyer or the [lateral's new] firm to contact those clients to inquire about conflict waivers should a conflict be found." Although Formal Opinion 2023-1 noted that that question primarily involves legal issues beyond its scope, it stated that a departing attorney cannot circumvent his or her own obligations through a third party, such as the lateral attorney's new law firm.[9]

b. Confidentiality exception to "prompt" notification

What if the matter at the new law firm is confidential such that the law firm cannot ethically disclose the existence of the conflicting matter? For example, if the new law firm is representing a client in preparing to litigate against the lateral's former client with respect to a transaction that the lateral worked on while at the lateral's prior firm, prompt notification may compromise an element of surprise that may be key to the litigation strategy. There may be similar issues in a planned hostile takeover, or representation in a possible divorce, or representation in a grand jury or civil investigation where the new law firm's client plans to blame the lateral's former client. In such situations, "prompt" notification would disadvantage the new firm's client.

In response to such scenarios, Rule 1.10(c)(iv) states that prompt written notice is not required:

> if the notice would disclose confidential information protected by Rule 1.6 [in which case] the notice may be temporarily postponed but shall be sent promptly after such confidential information is known to the former client or is otherwise no longer protected by Rule 1.6;

Since the identity of clients may be itself confidential, and the existence of the new matter may also be confidential, the rule states that the notification may be delayed until the relevant information has lost the attribute of confidentiality.

But the subsection must also mean that if the information remains confidential indefinitely, for whatever reason, the obligation to disclose never arises. This necessarily creates a hazard for the new firm, since if its decision not to disclose is later challenged, both the new firm and its client will remain at risk of losing the benefit of the screen by reason of its failure to make the disclosure. Although that is not a necessary result, because a court might conclude that no harm resulted from the delay, it does mean that the firm should regularly consider if the information is no longer confidential and can be disclosed.

IV. To whom must the notification be sent?

A further complication arises from the subsection (iv) requirement that the lawyer or firm must "give written notice to the former client" because of the possible application of Rule 4.2, which states:

[9] This is not to say that the new law firm would violate any ethical rules by communicating with a departing lawyer's clients before the departing lawyer gives notice. Rather, such a law firm may expose itself to certain legal risks, an issue that is beyond the scope of this opinion.

> In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

The question is what should the lateral's new firm do if it knows that the former firm continues to represent the lateral's former client with respect to the matter giving rise to the conflict?

We are unaware of any other guidance on this issue. As such, in the absence of such guidance, the better approach may be to follow Rule 4.2 strictly and only send the screening notification to the lateral attorney's former firm. If the firm is uncertain as to whether the former firm continues to represent the lateral's former client in the matter, the better course may be to ask the former client or the former firm, and only if the firm is told that the former firm is not doing so may – and should – the firm communicate with the former client by sending the notification directly. [10]

However, a lawyer or law firm may also wish to consider whether or not Rule 4.2 applies to these notifications.

V. Must a law firm discuss with its current clients its decision to hire the lateral attorney and its choice to rely on the screening notification procedures to address the conflict?

Whether the law firm hiring the lateral attorney must discuss a potential conflict arising out of the lateral hire with its own current clients depends on whether the decision to hire the lateral attorney is material to the current representation of that client. Where, for example, there is a material risk of a disqualification motion if the lateral attorney joins the new firm, Rule 1.4 may require that, prior to the lateral attorney joining the firm, the firm explain to its current client the risk posed by the hire as well as the measures that the firm is taking to resolve those risks.

By contrast, where there is no such risk (for example, where the conflicting matter is transactional) there is no obligation under Rule 1.4 to inform a current client of the hiring decision and related conflicts issue. However, lawyers may err on the side of caution and inform their clients about these conflict issues. [11]

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[10] As discussed in Section VI below, the receiving law firm has no obligation to acknowledge receipt of the notification nor is it always required to tell the lateral attorney's former client of the notification. Therefore, if the lateral's former law firm is no longer representing the lateral's former client, the lateral's current law firm may not be alerted to the fact that it is not in compliance with the notification requirement when it sends the screening notification to the lateral's former firm.

[11] Although a law firm may have an obligation to discuss the conflict and the firm's proposed resolution of the issue, it is not required to follow its client's directions on how to proceed (*e.g*. by seeking a waiver or relying on the screening notification safe harbor) or on hiring the lateral attorney. Those decisions are not made on behalf of a client in seeking the client's objectives of the representation. *See* Rule 1.2(a).

VI. Obligations of lawyers or law firms receiving a screening notification

If the lateral's new firm sends the screening notification directly to the lateral's prior firm, on the understanding that the prior firm continues to represent the lateral's former client, what obligations, if any, does the prior firm have in these circumstances?

If the lateral's former client is no longer a current client of the firm, that firm has no affirmative obligation to communicate with that now former client under the rules, even if it learns of new information that may be relevant to the prior representation. *See* NYC Bar Association Formal Opinion 2024-3 (finding no obligation to communicate with former clients under Rule 1.4).[12] Neither is there an obligation if the lateral's former client is still a client of the firm, but in matters that are unrelated to the screening notification unless the screening notification is relevant to its *current* representation of the client. *Id*. ("the obligation to notify that current client only arises where the compromise of such confidential information could affect the client's interests in a current matter. Otherwise, Rule 1.4 is not implicated.").

Even if the screening notification is related to the law firm's ongoing representation of the lateral's former client, the firm is not always required to inform its client of the screening notification as it may not be a material development or "reasonably necessary to permit the client to make informed decisions regarding the representation." Rule 1.4(a), (b).

It may be that the client's former lawyer joining the new law firm, which is materially adverse to that client in the same or a substantially related matter, is material to the client in considering its options in the matter, such as by seeking to disqualify the lateral's new firm. Discussing the screening notification with the client may be required in that circumstance. By contrast, if the screening notification is for a junior associate who was engaged solely in document review, the receiving lawyer could reasonably conclude that such information, including the screening notification, is immaterial to the matter and would not need to inform the client of the notification.

Finally, the lawyer has no obligation to reply to the sender of the screening notification. Nothing in the rules requires acknowledging receipt of the screening notification by the receiving lawyer. However, as a matter of professionalism, we would encourage lawyers to acknowledge receipt where there is no prejudice to the client in doing so. Rules 1.2(e), (g).

Conclusion

The screening notification procedures established in Rule 1.10(c) should allow for attorneys in private practice more easily to join another firm as conflict waivers may no longer be required wherever there is a conflict that would, until the recent change to the rule, be imputed to the new firm.

For example, as this opinion clarifies, law firms can take advantage of the screening notification safe harbor for all lateral attorneys who engaged in transactional matters that give

[12] Assoc. of the Bar of the City of N.Y. Comm. on Prof'l Ethics, Formal Op. 2024-3 (July 18, 2024), https://www.nycbar.org/reports/formal-opinion-2024-3-ethical-obligations-relating-to-a-cybersecurity-incident/

rise to the relevant conflict, as well as many lateral attorneys who engaged in litigation matters giving rise to the conflict. Furthermore, prompt notification may not be required if doing so could disclose a client's confidential information and could be delayed indefinitely if the relevant representation remains confidential. This opinion also clarifies that the notification is not required prior to a lateral joining a new firm and should generally be considered prompt if sent within a couple of weeks after the lateral joins the new law firm.

Appendix A - Model screening notification

[Month DD, YYYY]

To: [Lateral attorney's former client]

Re: [Lateral Attorney Name]

To whom it may concern:

[Lateral attorney], a former [former title] at [lateral attorney's former law firm] has recently joined [law firm name] as a [new title].

While at [former law firm], we understand that [lateral attorney] represented [former client] with respect to [describe lateral attorney's matter(s) at former law firm giving rise to conflict].

[New law firm] is currently representing [name of client and description of new law firm's matter(s) giving rise to the conflict] (the "Matter"). In light of this, we have implemented the following measures:

[Describe notification of appropriate attorneys and nonlawyer personnel that the lateral attorney is prohibited from participating in the Matter as well as other screening measures]

Finally, [lateral attorney] will not be apportioned any part of the fee [new law firm] earns from the Matter.