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The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

I am responsible for growth at a law firm based in States A and B. I have recruited a group of lawyers from another firm who would join our State A office, and we are currently working through conflict issues. Two of these issues relate to which state's rules apply, specifically because State A has adopted the current version of Model Rule 1.10(a)(2) which allows screening (with certain notices and certifications) to remove imputation of an incoming lateral lawyer's conflicts arising from association with a prior firm, while State B has a version of Rule 1.10 that does not permit screening to do so, without express consent of the affected clients. The first issue in this context is a litigation matter in State A for a State B client of our firm currently being handled by Lawyer A of our State A office adverse to a State B client of a lawyer from the firm the laterals would come from. The second issue relates to a transactional matter being handled by Lawyer B (licensed in both States A and B) of our firm's office in State B, for a client in State B, adverse to a State A client of the laterals' firm. In both circumstances, the other firm's client would be Rule 1.9(b) former clients of one or more of those laterals who acquired confidential information related to the matters. See Rule 1.9(b)(2). Therefore, given the versions of Rule 1.10 in effect in the two states, screening without client consent would work if State A Rules apply, but would not work if State B's Rules apply. This makes my head hurt – could you please help?

A: The increase in multistate lateral recruiting has indeed compounded the difficulty of navigating through conflict issues. Recent ABA Formal Opinion 504 (Mar. 1, 2023) ("Opinion 504") provides useful guidance, including several examples, at least when the state or states at issue have adopted the choice of law provisions of the current version of Rule 8.5 (adopted in 2013). In general, lawyers are subject to disciplinary authority of every state in which they are licensed, and may under some circumstances be subject to the authority of more than one state at the same time. Because not all states have adopted the same version of the Model Rules, or have amended or supplemented them, this can create difficult conflicts or inconsistencies. Opinion 504 recognizes and addresses what should happen when this occurs.

Concerning litigation or other proceedings before a tribunal (your first issue), consistent with Rule 8.5(b)(1), Opinion 504 expresses the view that the rules of professional conduct to be applied are those in which the tribunal sits, unless the rules of that tribunal provide otherwise. Thus, even though in your case both clients of the respective firms are State B based, because the litigation is located in State A, the rules of State A apply. This means that screening of the incoming laterals could be used to avoid imputation of the Rule 1.9(b) conflict, without the necessity of informed consent of the opposing client.

Concerning the transactional matter, the picture is a bit murkier as to whether your Lawyer B could avoid a conflict from the addition of the laterals without the opposing client's consent. Rule 8.5(b)(2) provides that for all conduct other than in connection with a matter before a tribunal, the rules of the jurisdiction of the "predominant effect" of the conduct govern, although there is a safety valve protecting the lawyer from discipline if the lawyer is incorrect in making that determination if the lawyer complies with the rules of a jurisdiction "in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur." Opinion 504 notes that the location of the conduct of the relevant lawyer (here, your Lawyer B) is but one consideration in addressing location of "predominant effect." The principal places of business of the affected clients is also relevant: if both affected clients are based in the same jurisdiction, then that jurisdiction's rules apply. Opinion 504 at 10. When, as here the affected clients are in different states, then additional factors apply: the locus of the transaction, i.e., the place of property, operations or services to be performed; the substantive law that applies, the location where funds are to be deposited, etc. Id. In the event these factors do not establish a "predominant effect" location with clarity sufficient for reliance (see reasonable belief standard of the safety valve provision of Rule 8.5(b)(2)), Opinion 504 suggests compliance with the more restrictive rule to be safe. In this case, that would mean trying to obtain informed consent from the opposing client before bringing in any lateral who had been exposed to protected information about the matter.

The Ethics Lawyer

About Dear Ethics Lawyer

The twice-monthly "Dear Ethics Lawyer" column is part of a training regimen of the Legal Ethics Project, authored by Mark Hinderks, former managing partner and counsel to an AmLaw 125 firm; Fellow, American College of Trial Lawyers; and speaker/author on professional responsibility for more than 25 years. Mark leads Stinson LLP's Legal Ethics & Professional Responsibility practice, offering advice and "second opinions" to lawyers and law firms, consulting and testifying expert service, training, mediation/arbitration and representation in malpractice litigation. The submission of questions for future columns is welcome: please send to mark.hinderks@stinson.com.

Discussion presented here is based on the ABA Model Rules of Professional Conduct, but the Model Rules are adopted in different and amended versions, and interpreted in different ways in various places. Always check the rules and authorities applicable in your relevant jurisdiction – the result may be completely different.