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Dear Ethics Lawyer™

The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

We want to hire a terrific associate attorney, but that attorney currently works for a law firm that is on the opposite side of a still-pending case from our firm. We do not believe that the attorney we wish to hire is or has been actively involved in the suit. Are there any circumstances under which we could hire that attorney? What if the attorney is actively involved on the other side of the suit?

A: If the attorney has not been involved on the opposite side of the pending case, and has not been exposed to confidential information of the other firm's client, then that attorney's hiring would not disqualify the lawyer or your firm from the case. Model Rule 1.9(b). Alternatively, if the lawyer was or is involved in the matter at the prior firm and/or otherwise exposed to confidential information of the prior firm's client, while hiring that lawyer would ordinarily be cause for disqualification of your firm, there are two possible avenues to avoid an issue. First, the lawyer may be hired and be adverse to the prior firm's client despite having material confidential information, with informed consent of the prior firm's client.

Second, Rule 1.10(a)(2) provides a mechanism to hire the lawyer (who would remain disqualified from representation adverse to the prior firm's client in the same or substantially related matter) without creation of a disqualifying conflict affecting the lawyer's new (hiring) firm or other lawyers of that new firm. This path requires: (i) screening of the affected lawyer (including from any fees obtained); (ii) notice to the former client that meets specified requirements; and (iii) certifications of compliance provided to the former client by the moving lawyer and a partner of the hiring firm at reasonable intervals as requested and upon termination of the screening. Of course, the moving lawyer cannot use or disclose confidential information relating to representation of the client at or by the prior firm. Rule 1.9(c).

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.