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Third Circuit Holds Ethical Screen Insulates Side-Switching Lawyer's New Firm

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The Third Circuit recently affirmed a bankruptcy court's denial of a defendant's motion to disqualify the plaintiff's law firm in a large adversary proceeding, holding that it had not abused its discretion because the plaintiff law firm (W) had "complied with" American Bar Association Model Rule of Professional Conduct 1.10(a)(2). *In re Maxus Energy Corp.*, 2022 WL 4113656, *4 (3d Cir. Sept. 9, 2022). According to the court, a lawyer (B) who "moved from" the defendant's law firm "to the [plaintiff's] firm" was not cause for W (the new firm) to be disqualified. W's ethical "screen was sufficient to prevent [B's] conflict from being imputed to the entire firm [W]." *Id.* at *1. The Model Rules, applicable here, did not impute B's "conflict to her new firm," said the court, because "a timely screen, together with certain other requirements," prevented "conflict imputation." *Id.*

Relevance

Maxus shows the practical problems that arise when law firm partners move from one firm to another. The court's reading of the Model Rules is not controversial. The facts, however, are provocative, as shown below. Left unmentioned in the *Maxus* opinion is any concern for B's former client who apparently felt betrayed.

Facts

B worked on the litigation for her former firm (S) for roughly three years before moving to W. She was part of the S team that pitched the defendant as a client; participated in key strategy meetings; appeared on the client's behalf at bankruptcy court hearings, including a motion to dismiss; and billed at least 300 hours on the engagement. B "started dating the head of W's restructuring group" in 2017, "before she pitched [S] to [the defendant as a prospective client]" in 2018. *Id.* "In late 2018 [B and L's] relationship became exclusive, and they lived together starting in 2019." *Id.* According to the Third Circuit, it was "unclear from the record whether [the defendant, B's client] knew" about the relationship but the defendant denied any such knowledge. While engaged to marry [L], [B] moved to his firm [W]. *Id.* at *2.

W "followed the Model Rules" when B moved to the firm, going through "a standard conflict-screening process": an "ethical wall" or "screen"; B's acknowledgement that she would comply with it; her periodic certification of "her compliance"; no sharing by B of "any portion of [W's] fee from the litigation"; W explained to the defendant the nature of its screen with "a statement of the firm's and of [B's] compliance with the Model

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Rules" and a statement that "review may be available before a tribunal"; and W agreed "to respond promptly to any written inquires or objections about the screening procedures." *Id*. at *2. B "says she never breached the screen." *Id*.

The bankruptcy court denied defendant's disqualification motion, holding that "exceptional circumstances did not exist to impute [B's] conflict to the entire firm despite a screen." *Id*. The Court of Appeals authorized the defendant's appeal when the bankruptcy court had certified "two of the six issues" the defendant had requested. But the Third Circuit viewed "the entire order subject to this appeal" because "appellate jurisdiction applies to the order certified to the court of appeals, and is not tied to the particular question formulated by the [lower] court." *Id*., quoting *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996). The court then reviewed the bankruptcy court's "interpretation of the Model Rules as a question of law subject to *de novo* review" and the "denial of disqualification … for abuse of discretion." *Id*.

Model Rules

Model Rule 1.9 prohibits a lawyer who has formerly represented a client in a matter from "represent[ing] another person in the same or in a substantially related matter in which that person's interests are materially adverse to the interests of the former client."

Model Rule 1.10(a) bars a lawyer at a firm from knowingly representing "a client when any one of them practicing alone would be prohibited from doing so by Rule … 1.9, unless: (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; (ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule …; [including] a statement of the firm's and of the screened lawyer's compliance with these rules; a statement that review may be available for a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and (iii) certifications of compliance with these Rules and the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures."

Model Rule 1.0(k) defines a screen as "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 is obligated to protect under these Rules or other law."

Third Circuit Analysis

The parties agreed that B had not tried to participate in W's representation of the plaintiff here. The court then rejected the bankruptcy court's suggestion of an "exceptional circumstance" exception to Model Rule 1.10(a)(2), stressing that the rule does not create "such a standard or test." *Id*. at *3. As to whether W had created a proper "screen" under Model Rule 1.0(k), the Third Circuit said that a court "must determine, based on the facts of each case, whether a firm's conflict-of-interest procedures qualify as an effective screen." *Id*. It further rejected the defendant's argument that W had failed to "insure that [L]" was also "not apportioned any [part] of the fee" from the pending litigation. According to the court, Rule 1.10(a)(2)(i) "directs

that only the 'disqualified lawyer' must be 'apportioned no part of the fee' from the matter at issue." *Id*. at *4. In other words, B, "not her spouse, must not receive proceeds of fees arising from the conflicted representation." *Id*.

Finally, the Third Circuit explained how W had "complied with Model Rule 1.10(a)(2), and [was] not disqualified from representing the" plaintiff. It agreed with the bankruptcy court that W had "implemented a thorough, robust ethical screen between [B] and the [pending] adversary proceeding and all related issues immediately upon [her] joining the firm." B would not "receive any part of the fees from [W's] representation of [the plaintiff]." W also gave the defendant "prompt and exhaustive notice of the screening procedures, as well as repeated statements that [W] and [B] would comply with the screening procedures." Further, W "said it would respond promptly to any inquiries from [the defendant] about the screen, including inviting [the defendant] to provide input" and that review would be available for a tribunal. In sum, the bankruptcy court "reasonably concluded that [W and B] complied to the letter with the applicable ethical rule." *Id*.

Analysis

The Third Circuit's legal analysis is sound. But applying this analysis to the provocative facts here is controversial. Although the record showed no improper disclosure and no fee sharing by B, the former client made a tenable argument. Represented by eminent counsel, S stressed that B had spent 300 hours on its case, helped formulate strategy, and worked on a dispositive motion. Even the bankruptcy court admitted that B was "privy to client confidences, and [her former client's] strategy and tactics … [as] one of the senior attorneys" in the litigation — while she was "dating" and later cohabitating with the head of the opposing firm's restructuring group. *In re Maxus Energy Corp.*, 626 B.R. 249, 261 (Bankr. Del. 2021). The bankruptcy court rejected those facts, though, as "a shabby attempt" to embarrass the two lawyers who later married. *Id*. It assumed instead that B and L never discussed the pending litigation between 2018 and 2020. As comment 7 to Model Rule 1.10(a)(2) notes, though, "[l]awyers should be aware … that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation." In the words of a famous scholar, "[n]o rule is so general, which admits not some exception." Robert Burton, *The Anatomy of Melancholy*, §2 (1621).

Literally applying the Model Rules in *Maxus* is not the problem here. The objecting client felt betrayed on the undisputed facts. Despite the Third Circuit's closing the matter, it will be hard to explain this decision to the non-lawyer public on these facts. And the bankruptcy court's references to the former client's disqualification motion as "exaggerate[d]," "implausible", "shabby" and "a litigation tactic," 626 B.R. at 258, 261 n.68, were unfair. The Third Circuit never went that far.

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