

ETHICAL SCREENS IN CALIFORNIA: AN EMERGING TREND



Michael P. McNamara

In the old days, lateral hiring was rare. Lawyers commonly retired at the law firm where they started after graduating law school. Today the opposite is true: most large firms laterally hire both individual lawyers and practice groups. This increased mobility creates possible ethical conflicts whenever a firm engages a new lawyer who is or was adverse to a current client of the firm because, under the traditional rules, the new lawyer's knowledge is generally imputed to the entire new firm. This article explores the efficacy of using ethical screens as a possible solution to this issue in California.



Elizabeth Capel

While the emerging trend in California and many other states is for firms to employ ethical screens to avoid the imputation of conflicts where lawyers move laterally from one private firm to another, it is important to note that there is still some risk, given that California's rules of ethics do not yet explicitly state that ethical screens are effective against disqualification where conflicts are imputed among lawyers at the same firm. In fact, in 2010 the California State Bar Board of Governors Committee on Regulation and Admissions explicitly decided not to adopt a rule allowing ethical screens to guard against disqualification. It reasoned that the issue is better left to resolution by case law. So that is where lawyers must look for guidance.

The most significant recent California case on the issue of ethical screens is *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th. 776 (2010). *Kirk* establishes that once a party seeking

disqualification shows that the attorney at issue has confidential information that would support disqualification, a presumption arises that the attorney has shared that information with his or her law firm. Nonetheless, the presumption can be rebutted by evidence of an effective ethical screen. The Court of Appeal noted that the "typical elements" of an effective screen include "[1] physical, geographic, and departmental separation of attorneys; [2] prohibitions against and sanctions for discussing confidential matters; [3] established rules and procedures preventing access to confidential information and files; [4] procedures preventing a disqualified attorney from sharing in the profits from the representation; and [5] continuing education in professional responsibility." *Id.* at 810-811. However, the court also stressed that the inquiry should not be simply whether each element is met; trial courts should undertake a case-by-case analysis of whether the conflicted attorney "has not had and will not have any improper communication with others at the firm concerning the litigation." *Id.* at 811. Thus, the timing of the implementation of the ethical screen is also critical. *Kirk* makes clear that ethical screens can be effective in California, but because the California Supreme Court denied review, the issue is still not completely settled.

A number of recent published and unpublished cases that have followed *Kirk* suggest that courts are trending toward allowing ethical screens to avoid disqualification. *See, e.g., State Comp. Ins. Fund v. Drobot*, No. SACV 13-956 AG (CWx), 2014 WL 12579808, at *5 (C.D. Cal. July 11, 2014); *Heller v. NBCUniversal, Inc.*, No. CV 15-09631-MWF (KSx), slip. op. (C.D. Cal. June 30, 2017). For example, the Central District of California denied a disqualification motion in *Tawnsaura Group, LLC v. Threshold Enterprises, Ltd.*, No. SA CV 12-01364-SJO (AGRx), 2012 WL 12892439 (C.D. Cal. Dec. 26, 2012), noting that the rule in *Kirk* was satisfied given the limited nature of the confidential information shared and the seriousness and thoroughness with which the firm had established and maintained its screen. *Id.* at *11. Several

recent trial court orders from the California Superior Court cite *Kirk* favorably and appear to be integrating its rule into their regular decision-making processes. *Motion Point Corp. v. McDermott, Will & Emery LLP*, No. CIV521102, 2015 WL 4722326, at *9-10 (Cal. Super. July 9, 2015). On the whole, courts appear to view *Kirk*'s reasoning in a positive light, and a look at cases referencing it suggests that lawyers can expect judicial approval of ethical screens if they can satisfy the criteria set forth in *Kirk*.

Nonetheless, some courts have cited *Kirk* in finding that a particular ethical screen is inadequate to avoid disqualification. These cases do not suggest any disagreement with the holding of *Kirk*, but rather clarify what is necessary to have an effective ethical screen. For example, the Central District of California took a hard line on "belated ethical walls" in *W. Sugar Coop. v. Archer-Daniels-Midland Co.*, 98 F. Supp. 3d 1074, 1090 (C.D. Cal. 2015) when it disqualified a firm that had not acted quickly enough. And the California Court of Appeal cited *Kirk* in underscoring the rule that no level of screening can negate an imputed conflict "in cases of a tainted attorney possessing actual confidential information from a representation, who switches sides in the same case." *Castaneda v. Superior Court*, 237 Cal. App. 4th 1434, 1448 (2015).

The California Court of Appeal for the Fourth Appellate District recently relied on *Kirk* in *California Self-Insurers' Security Fund v. Superior Court*, No. G054981, 2018 WL 561707 (Cal. Ct. App. Jan. 29, 2018). Vacating the trial court's ruling that automatically disqualified a law firm from representation based on an imputed conflict, the opinion rejected the trial court's conclusion that "when an attorney switches sides, disqualification is mandatory; no amount of ethical screening can save the representation." *Id.* at *3. Rather, "[w]e agree with [*Kirk*] that whether disqualification of the entire firm is automatic is an open question." *Id.* at *7. The court instead required the trial court determine "whether confidential information was, indeed, transmitted." *Id.* The court thus continued the trend of applying a context-based inquiry to determine whether a conflict should be imputed when a lawyer switches to a firm representing the other side.

Outside California, the ABA's Model Rules of Professional Conduct explicitly allow the use of ethical screens. Rule 1.10 provides that a firm can negate the imputation of conflicts where the conflict arises from the disqualified lawyer's association with a prior firm, the

disqualified lawyer is timely screened from any participation in the matter and does not receive any portion of the fee from the matter, and written notice and certification of compliance with the Rules are given to the affected former client.

But states do not always follow the Model Rules. Although Illinois and New York's respective Rules of Professional Conduct essentially mirror the ABA's Model Rules, New York Rules of Prof. Conduct, Rule 1.11(b); Illinois Rules of Prof. Conduct, Rule 1.10(e), Vermont is stricter. It does not allow any type of screening to cure an imputed conflict of interest to a firm where the disqualified lawyer participated personally and substantially in the prior representation. Vermont Rules of Prof. Conduct, Rule 1.10(a)(2). Nevada, like Vermont, allows screening only where the personally disqualified lawyer did not have a substantial role in the matter that causes the disqualification. Nevada Rules of Prof. Conduct, Rule 1.10(e).

Clearly, then, a range of positions exists on the issue of ethical screens. That being said, the use, acceptance, and legality of ethical screens appears to be growing and solidifying. For California, it is unlikely that ethical screens will become less commonplace or reliable in avoiding disqualification, and screening could at some point be codified as an unequivocally approved tool.

In fact, the California Supreme Court is currently considering whether the state should adopt a new version of Rule 1.10. The proposed text states: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless...the prohibited lawyer did not substantially participate in the same or a substantially related matter; the prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and written notice is promptly given..." This language would align California with Vermont and Nevada: screening would be permitted so long as the conflicted lawyer did not "substantially participate" in the prior matter.

Although reasonable minds can differ on whether California should adopt the ABA approach or the narrower Vermont/Nevada approach, it would be best to have some rule formally adopted so as to end uncertainty in the bench and bar. Until that happens, firms hiring laterals would be well advised to proceed conservatively—and quickly.

Michael McNamara is a partner and *Elizabeth Capel* is an associate at Jenner & Block in Los Angeles.