

The Uncertainty Surrounding the State of the Law of Ethical Screens



ETHICALLY SPEAKING

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by Scott B. Garner and
Isabelle Carrillo Smith

The last couple of decades have seen the end of the era when lawyers began and ended their careers with the same law firm. Indeed, whatever was left of this “cradle-to-grave” era saw its demise in the current economic recession, which has seen more than its share of layoffs, lateral hiring, law firm collapses, and law firm combinations. This increase in lawyer mobility leads to many profes-

sional challenges.

For instance, a lawyer who changes firms has a continued duty of loyalty and confidentiality to the clients that he or she and other lawyers at his prior firm represented. Upon switching firms, there is a risk that the lawyer will have a conflict of interest in connection with one of his or her new firm’s clients. This is further complicated by the general rule that when a newly hired lawyer is conflicted, that conflict is presumptively imputed to the entire new firm. And, unlike the ethical rules in many states, California’s Rules of Professional Conduct do not expressly allow law firms to screen off a conflicted, newly hired individual lawyer and permit the new firm to represent, or continue representing, the client.

For a brief moment last year, it appeared that this might change, as the California Commission for the Revision of the Rules of Professional Conduct proposed a rule (modeled

after ABA Model Rule 1.10) allowing law firms to avoid imputed conflicts in limited situations by erecting an ethical wall—that is, by separating a conflicted lawyer from other lawyers in the firm for purposes of avoiding the unwarranted disclosure of confidential client information. The Commission reversed course several months later, however, and the current version of the proposed Rules—out for public comment since March 5, 2010—does not include a provision for ethical screens in the private practice context. (It does, however, provide for ethical screens in certain governmental contexts, as well as in connection with pre-engagement communications—neither of which is the subject of this article.)

Assuming the Commission does not again reverse course, what does its refusal to expressly allow ethical screening in the private practice context mean? Will lawyers laid off by their firms see their opportunities for new employment limited by real or imagined conflicts? Will an increasing number of clients be required to find new counsel when their counsel of choice either voluntarily withdraws or is disqualified because a newly hired lawyer once worked for a firm who represented a competitor?

In the absence of a new ethical rule expressly addressing these issues, the answers to these questions will remain somewhat uncertain, answered by judicial decisions that are not always consistent.

Pending adoption by the state Supreme Court of new rules of professional conduct (expected as early as this fall), current Rule 3-310(E) provides the standard by which a lawyer must determine whether it can accept a representation that may be adverse to a former client. It states: “A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.” Cal. R. of Prof’l Conduct, Rule 3-310(E). Although Rule 3-310(E) speaks only in terms of individual lawyers or “members,” and not of law firms, case law makes clear that if an individual attorney in a firm has a conflict, the conflict is presumed to be imputed to the entire firm, thereby potentially requiring disqualification of the entire firm. See *Henriksen v. Great Am. Savs. & Loan*, 11 Cal.App.4th 109, 114 (1992).

The first step in determining whether the

new law firm has a conflict is to determine whether the individual newly hired lawyer has a conflict. Only if he does will the law firm have to address the second step—determining whether it can avoid the imputation of that conflict through the use of an ethical wall.

Adams v. Aerojet-General Corp., 86 Cal.App.4th 1324 (2001), primarily addressed the first question—that is, whether the firm-switching lawyer himself has a conflict—albeit in the context of whether such a conflict would be imputed to his new firm. In *Aerojet*, the court of appeal applied a modified “substantial relationship” test to determine whether the firm-switching lawyer should be disqualified from representing at his new firm a client adverse to Aerojet—a client at his prior firm. Notably, although a principal at his previous firm, the lawyer had not billed any time to any matters for Aerojet and, according to declarations, had not obtained any confidential information from or about Aerojet. The trial court nonetheless disqualified the lawyer and, thus, vicariously his new firm from representing a party adverse to Aerojet in a substantially related matter. The trial court effectively applied a “reverse” imputation rule, finding that the old firm’s knowledge of confidential information of Aerojet was imputed to the lawyer merely by virtue of him having been a member of that firm. The trial court then imputed to the new firm the individual lawyer’s conflict (which itself had been imputed from the old firm), disqualifying the lawyer and the new firm.

Refusing to “extend the doctrine of imputed knowledge” that far, the court of appeal rejected the notion of an irrebuttable presumption of imputed conflict to the individual lawyer, and then to the new firm. *Id.* at 1333. In so doing, however, the court actually focused on whether the individual lawyer himself had a conflict by examining three factors: “(1) factual similarities between the two representations, (2) similarities in legal issues, and (3) the nature and extent of the attorney’s involvement with the case and whether he was in a position to learn of the client’s policy or strategy.” *Id.* at 1332 (citing *H.F. Ahmanson & Co. v. Salomon Bros. Inc.*, 229 Cal.App.3d 1445, 1455 (1991)).

The focus of the court’s discussion was on the third factor and, in particular, on the likelihood that the attorney actually received confidential information from the first client that was material to the matter at issue. Looking to Model

Rule 1.9, the court stated that: “[I]f a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict.” *Id.* at 1338-39 (quoting *Dieter v. Regents of Univ. of Cal.*, 963 F.Supp. 908, 911 (E.D.Cal. 1997), quoting ABA Model Rules, Rule 1.9). (It is worth noting the irony of the court relying on the ABA Model Rules, which—in direct contrast to California’s Rules of Professional Conduct—expressly provide for ethical screening in private practice contexts.)

Although *Aerojet* did not discuss ethical screens in any detail—instead remanding the case to have the trial court apply the three factors, rather than the automatic disqualification it previously had applied—the court did indicate that, in some circumstances, ethical screens may be appropriate to avoid disqualification. Specifically, the court stated: “It is now firmly established that where the attorney is disqualified from representation due to an ethical conflict, the disqualification extends to the entire firm *at least where an effective ethical screen has not been established.* (see *SpeedDee Oil, supra*, 20 Cal.4th at 1151).” *Id.* at 1333 (emphasis added) (internal citations omitted).

Once it is determined under the *Aerojet* factors that the firm-switching lawyer has a conflict, the question becomes whether that conflict should be imputed to the entire new firm. After *Flatt v. Superior Court*, 9 Cal.4th 275, 283 (1994), it was understood that the California Supreme Court supported automatic vicarious disqualification of a law firm once it was determined that a lawyer within the law firm was disqualified: “[W]here an attorney is disqualified because he formerly represented and therefore possesses confidential information regarding the adverse party in the current litigation, vicarious disqualification of the entire firm is compelled as a matter of law.” *Id.* (quoting *Henriksen*, 11 Cal.App.4th at 114). Although not specifically addressing ethical walls, by endorsing the mandatory imputation rule in *Henriksen*, the California Supreme Court has been viewed as not embracing ethical screens to avoid vicarious disqualification of law firms.

The court in *Henriksen* did express an absolute rule against ethical walls; nonetheless,

it added a caveat to the rule by noting that the acceptance of ethical walls may be fact specific. Specifically, the court stated: “the ethical wall concept has not found judicial acceptance in California on our facts: a nongovernmental attorney armed with confidential information who switches sides during the pendency of litigation.” *Id.* at 115. In *Henriksen* the firm-switching lawyer had filed a declaration acknowledging that he had spent in excess of 200 hours on the case representing the former client. Thus, there was no dispute that the lawyer acquired confidential information and was himself disqualified from representing an adverse client. *Henriksen* therefore was limited to the situation where the lawyer, while at his previous firm, represented an adverse client *in the same litigation*.

In *People ex rel. Department of Corporations v. SpeedDee Oil Change Systems, Inc.*, 20 Cal.4th 1135 (1999), the California Supreme Court again applied the automatic disqualification rule: “When a conflict of interest requires an attorney’s disqualification from a matter, the disqualification *normally* extends vicariously to the attorney’s entire law firm.” *Id.* at 1139 (emphasis added). The Supreme Court, like the *Henriksen* court, was faced with a law firm that had confidential information about adverse parties in *the same litigation*, albeit in *SpeedDee Oil* there was no former firm, and the adverse parties had disclosed confidential information to attorneys at the same firm. In this circumstance, it was easy for the court to conclude that an ethical wall would not suffice: “For attorneys in the same firm to represent adverse parties in the same litigation is so patently improper that the rule of disqualification is a *per se* or ‘automatic’ one.” *Id.* Nevertheless, the Supreme Court in *SpeedDee Oil* at least appeared to acknowledge the concept of ethical screens, stating: “[t]he declarations the Shapiro firm submitted fail to demonstrate that any formal screening procedure prevented attorneys working on respondents’ behalf from being exposed to Mobil’s confidences.” *Id.* at 1151-52. Thus, the Supreme Court could be seen as showing some departure from the automatic rule of vicarious disqualification. Beyond, *Flatt* and *SpeedDee Oil*, however, the California Supreme Court has not weighed in on the propriety of ethical screens.

The most recent court to enter the fray has provided the strongest language yet in favor of

ethical screens. In April 2010, the Second Appellate District court of appeal expressly held in *Kirk v. First Am. Title Ins. Co.*, No. B218956, 2010 Cal.App. LEXIS 478 (Cal.App.2d Dist. Apr. 7, 2010), that the presumption of imputed conflict can be rebutted by adequately screening a lawyer from others at the firm representing an adverse party. In *Kirk*, attorney Cohen consulted with plaintiffs' counsel in several class actions against defendant title company and, in so doing, indisputably obtained confidential information related to the class actions. Cohen later joined the law firm of Sonnenschein Nath & Rosenthal, who represented the title company. Thereafter, the attorneys representing the title company also joined the Sonnenschein firm—albeit in different offices than where Cohen was located. Upon plaintiffs' counsel's objection to Sonnenschein's representation of the title company, Sonnenschein's General Counsel set up an ethical wall around Cohen to separate him from the lawyers representing the title company.

The first issue the court addressed is whether a presumption of shared confidences, and hence conflict imputation, is rebuttable. The court easily concluded that “vicarious disqualification is not automatic, but may be rebutted by a proper ethical wall, . . .” *Id.* at *18. In so doing, the court pointed out the narrow circumstances in which previous courts—and, in particular, the California Supreme Court—had rejected ethical walls, and found that its holding was consistent with prior case law.

The court then went on to discuss the standards by which an ethical wall will be judged. The court stated that: “[t]he specific elements of an effective screen will vary from case to case,” but determined that the following two elements are necessary, timely imposition of the screen (*i.e.*, when the conflict first arises, and not when the opposing party first threatens disqualification), and “the imposition of *preventive measures* to guarantee that information will not be conveyed. *Id.* at **65-66. The court described “the typical elements of an ethical wall” as including: “[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 *67

(citing *Henriksen*, 11 Cal.App.4th at 116 n.6). The court was careful to note, however, that each instance warranted “a case-by-case inquiry focusing on whether the court is satisfied that the tainted attorney has not had and will not have any improper communication with others at the firm concerning the litigation.” *Id.* at **67-68. Thus, *Kirk* is a clear approval of ethical screens—in the right circumstances and done correctly—as a means to avoiding the imputation of a conflict and, consequently, imputed disqualification.

Notwithstanding *Kirk* and other cases that at least imply the ability to avoid imputed conflicts through an ethical screen, law firms still must tread lightly in this uncertain area of law. The safest course would be for a law firm not to hire a lawyer who at one time, while working for a different firm, performed several hours of work for a party who is adverse to a current client of the new firm. That, however, may not be the best course from the firm's economic perspective, from a policy perspective, and certainly from the lawyer's perspective. Thus, unless and until an ethical rule on screening is clearly pronounced or the state Supreme Court ends the ambiguity, law firms likely will continue using ethical screens to avoid the imputation of conflicts. In so doing, law firms must find what guidance they can from the confusing amalgam of case law.

First, law firms should assume, based on the Supreme Court's language in *Flatt*, that it faces the biggest risk of disqualification if it hires a lawyer who represented a client at his old firm who is adverse to a client at the new firm in the *same litigation*. Even if the law firm erects an ethical wall that meets the standards identified in *Kirk* to screen off the side-switching lawyer, the attorney's duty of loyalty to its former client likely will result in the court vicariously disqualifying the entire firm. Based on *Kirk*, however, although a case-by-case analysis is required, a properly erected ethical wall can be used to screen a lawyer who worked for an adverse party on a substantially related matter.

Second, before erecting a wall, the law firm should analyze its ability to effectively screen off the tainted attorney, and whether that ability will be sufficient based on the standards set forth in *Kirk*. For example, if the tainted attorney resides in a different office from the attorneys working on the matter at issue, that should give the firm some comfort. If all affected attorneys work in a small firm or a small office, however,

the ethical wall is less likely to be deemed sufficient to avoid an imputed conflict and, consequently, potential disqualification.

Third, if a law firm decides to proceed with the ethical wall as a means of staving off disqualification, it needs to take as many precautions as possible to protect the former client's interests. Again, *Kirk* is helpful in laying out precautions that should be taken. These include: (1) erecting the wall as soon as possible after the conflict is discovered; (2) establishing express prohibitions against screened off attorneys discussing the matter with each other; (3) establishing protocols to ensure that computer and paper files of one client are not accessible to the attorneys representing the other client; and (4) preventing the screened off attorney from sharing in the profits of the firm's representation of the other client. *Kirk* at **68-72. In addition, although not adopted in California, ABA Model Rule 1.10 sets forth a number of procedural steps that also could and probably should be followed. These include: (1) providing written notice to the former client, including a description of the screening procedure; (2) a statement of the firm's and the screened lawyers' compliance with the procedures; (3) a statement that review may be available to the former client before a tribunal; (4) an agreement by the firm to promptly respond to any written inquiries or objections by the former client about the screening procedures; and (5) upon request from the former client, provide periodic certificates of compliance with the screening procedures.

Following as many of these precautions as possible will minimize the risk that a law firm will find itself disqualified from continuing to represent a good client merely because it hires a lawyer who formerly represented a party that is or has been adverse to that client.



Scott B. Garner and Isabelle Carrillo Smith are partners in the Irvine office of Howrey LLP. Both Mr. Garner and Ms. Smith practice in the area of complex business litigation, with an emphasis on attorney liability defense. Mr. Garner is the co-chair of the OCBA Professionalism and Ethics Committee.