



Components of an Effective Ethical Screen

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The lawyer ethics rules in the various states generally specify at least some circumstances when a law firm may erect an ethical screen and thereby prevent imputation of an otherwise disqualifying conflict of interest. However, these same state ethics rules generally provide little specific guidance on what constitutes an effective ethical screen.

Getting the process of establishing and maintaining screens right is vitally important, because the courts often blame flaws in firms' attempts to establish ethical screens when granting motions to disqualify based upon an imputed but ineffectively screened conflict of interest. This article offers guidance on what constitute the elements of an effective ethical screen, based on the ethics rules and case law.

It is important to note at the outset that disqualification decisions often turn on factors other than the thoroughness of an ethical screen. Courts frequently refuse to disqualify law firms that have relatively minor or technical conflicts, even if there is no, or only a porous ethical screen. On the other hand, courts disqualify firms where clients' interests, or the fair administration of justice is found to have been imperiled, despite the fact the tainted firm had actually erected an impermeable ethical screen. Nevertheless, while even the most effective ethical screen does not insulate firms from all risk of discipline or disqualification because of the

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existence of a conflict of interest, the timely erection of an effective ethical wall is often recognized by courts as an effective means to avoid disqualification, even where the applicable states ethics rules make no provision for the use of screens for this purpose

Background on ethical screens. Ethical screens are systems of safeguards and procedures that law firms employ in an effort to prevent the imputation of a conflict of interest from one or more lawyers or nonlawyers² to the rest of the law firm. Ethical screens are generally used where one or more lawyers or nonlawyers have a conflict of interest which disqualifies those persons (referred to here as “disqualified persons”) from handling the matter. Under ABA Model Rule 1.10, such a “disqualifying conflict” is imputed from the disqualified person to everyone else at the disqualified person’s firm, thereby preventing the entire firm from undertaking an engagement whenever a conflict of interest would prevent any one person at a firm from taking on the representation.

Ethical screens do not remove a disqualified person’s conflict of interest. Rather, they are intended to form a cordon around the disqualified person or persons and thus avoid the operation of the imputation rule from causing the disqualification of the disqualified person’s entire firm.

Ethics rules are used in order to avoid imputation of disqualifying conflicts of interest in a number of different situations. The ABA Model Rules of Professional Conduct permit the use of ethical screens to prevent imputation of conflicts where a disqualified lawyer has moved to a law firm from a judgeship or other decision-making role (Model Rule 1.12), or the disqualified lawyer is moving from a private firm to government or vice versa (Model Rule 1.11). In addition, Model Rule 1.18 allows a firm to prevent disqualification from a prospective client

² In some instances, an ethical screen may be used to prevent a nonlawyer’s disqualifying conflict from imputing to others in that person’s firm. (*See, e.g.*, ABA Model Rule 1.10 cmt [4].)



when a law firm receives confidences from that prospective client, but ultimately does not undertake representation of the prospective client, provided the screening requirements of the rule are met. Most recently, 2009 amendments to Model Rule 1.10 permit the use of ethical screens to prevent imputation of certain conflicts when a lawyer moves between private firms, and the disqualifying conflict arises from work done at the prior firm, under Model Rule 1.9

An affected client may also give consent for a firm to erect a screen and avoid imputation of a disqualifying conflict when the conflict of interest arises under other circumstances when the Model Rules would otherwise create a disqualifying conflict, such as a conflict arising from a concurrent conflict of interest (Model Rule 1.7) or from a former client representation where no lawyer changed firms (Model Rule 1.9). Notably, the elements of a screen erected with client consent, sometimes referred to as a “consensual screen,” are a matter of contract between the firm erecting the screen and the client granting consent, and thus are not directly addressed by this article. In such circumstances, however, this article may help guide both law firms and their clients in establishing criteria for determining what safeguards consensual screens should contain.

Elements of an effective ethical screen. Model Rules 1.0 and 1.10 offer a partial list of what a firm should do to erect an ethical screen. Model Rule 1.0, titled Terminology, defines “screening” by saying that ethical screening “*denotes the isolation of a lawyer [or other person with the conflict] 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.*” See Model Rule 1.0(k).



The Model Rules that permitted screening prior to 2009, Rules 1.11, 1.12, and 1.18, do not contain additional requirements. The 2009 amendments to Model Rule 1.10 that permitted screening to prevent imputation for certain lawyer moves among private firms did add three additional requirements before a screen erected after a lawyer has moved between private firms will be effective. Model Rule 1.10(a)(2) requires that, in addition to the screening lawyer being *“timely screened from any participation in the matter,”* the firm must ensure that (1) the conflicted lawyer is *“apportioned no part of the fee therefrom,”* (2) each affected client receives *“written notice”* that enables the former client to *“ascertain compliance with the provisions of this Rule,”* and (3) each affected client receives *“certification at regular intervals and upon an affected client’s written request from the firm and the conflicted lawyer that the firm and lawyer are complying with the Rules and screening requirements.”* Model Rule 1.10(a)(2)(i)-(iii). Model Rule 1.10(a)(2) also explains that the written notice should include *“a description of the screening procedures employed; a statement of the firm’s and of the screened lawyer’s compliance with these Rules; a statement that review may be available before 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.”*

These provisions of the Model Rules evidently provide only the most general guidance on what a firm must do to erect an ethical screen. But they do not give detailed or practical guidance on how to comply with these general statements of principle. Indeed, the Model Rules leave several issues unanswered, for example whether a physical separation – such as the lawyers being in different offices or geographic locations is by itself, sufficient to constitute an effective ethical screen.



Practical guidance. Despite the shortcomings in the ethics rules, reported cases – including three 2010 opinions discussed below – provide useful additional guidance on what firms can do to erect effective ethical screens. Using these cases and the newer Model Rules, as well as the classical statement of requirements for an effective ethics screen contained in *LaSalle National Bank v. County of Lake*, 703 F.2d 252 (7th Cir. 1983), we have identified eleven suggested elements for law firms erecting ethical screens:

1. *Provide law firm personnel information on ethical screens.* Even before firms consider erecting an ethical screen for a particular conflict, they should provide guidance on ethical screens at two levels. First, firms should ensure that lawyers and other relevant persons understand the conflict of interest rules and when a screen may be used. Such training will often occur during continuing legal education programs and other messages, such as risk management email bulletins or alerts. Second, firms should make sure that they have in place a written checklist or protocol for establishing and monitoring ethical screens. These preparatory steps will help to ensure that, when screens are actually erected, firms will not omit a crucial step in establishing appropriate requirements for an effective ethical screen. Additionally, the checklist will serve as evidence that a firm has evaluated its obligations and, unbiased by knowledge of any specific conflict, has prepared what the lawyers deem to be an appropriate response to a potentially disqualifying conflict.
2. *Notice to all screened persons.* Each disqualified lawyer or nonlawyer who will be screened from the matter should be informed that he or she is screened from



the particular matters and the reasons for the screen. Generally such notice is in writing, which may be an email. Firms may also circulate a written memorandum. As discussed below, it is often important for a firm to have clear proof it notified all affected and potentially disqualified persons of the screen in a timely fashion, *and* that they received the notification, normally shown by requiring and retaining written acknowledgment of the notice of a screen.

3. *Notice to all persons working on the screened matter.* In addition to notifying the disqualified (and thus screened) persons, firms erecting an ethical screen should also provide notice to all persons working on the matter for which the screen has been erected that (a) the screen has been erected *and* (b) how that screen will operate. Again, being able to prove delivery and receipt of notice on a timely basis may be crucial later.
4. *Prohibition of communications across the screen.* All persons on each side of the screen – that is, all disqualified persons and all persons working on the screened matter including both lawyers and support staff – should be notified that they should not communicate regarding the screened matter with persons on the other side of the screen. They should also be directed not to access files or share any other information across the screen.
5. *Maximize physical and operational separation.* Firms should, as far as practicable, employ physical and operational separation of the disqualified persons from the screened matter. This may include having the matter handled by personnel who are in different offices or portions of an office (such as on different



floors), or are in a separate and separated practice groups. Sometimes the firm will prohibit the disqualified persons from doing *any work* – not just work concerning the screened matter – with the persons handling the screened matter. At minimum, the firm should attempt to minimize the amount of communication and collaboration that occurs between persons on each side of the ethical screen, and should make sure that shared support personnel (including secretaries as well as paralegals) do not operate on both sides of the screen.

6. *Limit access to files (both physical and digital) concerning the screened matter.*
Only lawyers and staff working on the matters giving rise to the conflict should have access to the files on the screened matters. This should include the use of document management software controls to block disqualified persons from having access to specified electronic files, as well as physical locks – for example, on offices or file cabinets – to prevent disqualified persons from having access to or sharing any information with those handling the screened matter.
7. *Prevent fee sharing.* To the greatest extent possible, firms should seek to prevent each disqualified person from receiving any portion of the fees earned on the screened matter. This generally does not prevent a disqualified person from receiving a bonus based upon profitability of the entire firm unless that profitability – or the receipt of any particular funds – can be directly linked to the screened matter.
8. *Monitor the ethical screen.* Firms should maintain records of when it erects and dismantles ethical screens, and track all of the screens it is using at any given



time. Firms also benefit from designating someone as having responsibility to monitor screens, both because this improves effectiveness of screens and because the monitor will be able to attest as needed to the effectiveness of a particular screen. In addition, if access to physical files is limited as suggested above, it would be best to have the files in a particular room or set of file cabinets where access can be controlled and monitored. The firm's information technology staff or provider should also be able to audit and identify who does (and does not) access the screened files from the moment of the creation of the screen onwards.

9. Send reminders about the screen. Reminders should be sent to the disqualified persons and the team working on the screened matter on a regular periodic basis, reminding them of the screen and its elements, perhaps every 60 or 90 days.
10. Preserve documents evidencing the screen. All notices and reminders, as well as monitoring information should be preserved as long as the matter continues, in case the firm is later required to demonstrate the adequacy of its screen.
11. Consider notice to affected clients. Model Rule 1.10(a)(2) requires that a law firm give notice to affected clients when an ethical screen is erected for a conflict arising from prior work at a different law firm. Rule 1.10(a)(2) also requires subsequent certification of the screening procedures both at regular intervals and upon written client request. (See Model Rule 1.10(a)(2)(ii)). Obviously such notices create additional risks for firms, including that an affected client may further investigate or challenge the screen and possibly seek disqualification of the firm. Accordingly, firms erecting ethical screens must weigh risk of proactive



notice against the risk (and likelihood) that, if no notice is given, (a) an affected client may be more likely to seek disqualification or take other action against a firm that has identified and sought to screen a conflict without letting the affected client assess the dangers from the conflict or the adequacy of the screen, and (b) a court or other recipient of such a client complaint is more likely to find a screen that was established without notice to the affected (and now complaining) client was inadequate.

These eleven considerations or elements are not formal requirements. A court may deny disqualification, or reject a call for sanctions when only some of these safeguards are employed. On the other hand, a particularly egregious conflict may result in an adverse ruling against a firm even when that firm had carefully employed all eleven suggested elements and timely erected a gold-plated, impenetrable ethical screen. Firms will need to consider which of these elements fit each case, and employ the elements they believe appropriate in light of the nature of the conflict, the firms' operations, their risk tolerance, and the personalities of the affected clients.

When should an ethical screen be erected? In addition to the mechanics of screens, the timing of a screen's erection may be a crucial element in assessing whether a law firm will suffer adverse consequences from a conflict of interest. The definition of "screened" in Model Rule 1.0(k) actually refers to the "timely imposition" of screening procedures within the firm.

Normally, this requires that the screen be erected before or at the time the conflict arises. At a minimum, firms should erect a screen promptly after learning of a disqualifying conflict. Thus, if a lawyer with a disqualifying conflict of interest is joining a firm, the screen should be erected before or at the time when the lawyer joins the firm. Likewise, if a firm is accepting a



new matter and certain lawyers at the firm have a disqualifying conflict from which they need to be screened, those lawyers should be screened at or before the time when the firm undertakes the conflict-laden representation. Courts regularly find that screens erected after conflicts arose are not effective to prevent disqualification.

Recent decisions on the effectiveness of screens. Having discussed elements of an effective screen, we turn now to three recent cases that provide interesting illustrations of what courts require for an effective ethical screen, and when an ethical screen may prevent imputation of an otherwise disqualifying conflict. In order from the least to most effective screens, the three cases are:

In re Columbia Valley Healthcare System, L.P., 320 S.W.3d 819 (Tex. 2010), which examines whether the lateral move of a paralegal from a firm representing the defendant in a case to the firm representing the plaintiff in the same case should result in disqualification of the plaintiff firm. In opposing a motion to disqualify, the plaintiff firm offered testimony that the paralegal had been informally screened, and had been warned twice – including a second warning coupled with threat of termination – that she should not perform any work on the case giving rise to the conflict. The testimony also indicated, however, that both before and after receiving the second warning, the paralegal had performed administrative tasks on the case, including calendaring, docketing, copying documents, and filing correspondence, including at the direction of her supervising lawyer.

In reversing the trial court, and ordering the plaintiff firm’s disqualification, the Texas Supreme Court determined a firm cannot merely erect an informal screen and warn a conflict-tainted employee not to work on a file. Rather, a firm must also adopt “*formal, institutionalized*



screening measures that render the possibility of the [conflict-tainted person] having contact with the file less likely.” 320 S.W.3d at 826. The *Columbia Valley Healthcare System* court does not provide a definitive list of such measures, but cites the comment to Texas Rule 1.10 (restricting lateral moves of government lawyers) and suggests the restrictions should include that the screened employee has not and will not furnish “*information relating to the matter, will not have access to the files pertaining to the matter, and will not participate in any way as a lawyer or adviser in the matter.*” *Id.*

The second case, *Kirk v. First American Title Ins. Co.*, 183 Cal. App.4th 776, 108 Cal. Rptr.3d 620 (Cal. Ct. App. 2010), provides a clearer statement of what California courts, at least, require for an effective ethical screen. The lawyer at issue in *Kirk* worked as in-house counsel at one insurance company when asked by plaintiffs’ counsel to serve as consulting expert for a class action case against a different insurer. The in-house counsel and plaintiffs’ counsel had a seventeen minute telephone conference to discuss the proposed consulting expert engagement. During this telephone conference, plaintiffs’ counsel discussed confidential information including litigation strategy with the in-house lawyer/potential consultant.

Ultimately, the in-house lawyer declined the potential consulting role. Instead, the lawyer left his in-house position to join a private law firm. The lawyers defending against the same class action later announced they were joining this same private law firm as laterals.

After the defendants’ litigation team gave notice it was joining the new firm, plaintiffs’ counsel objected to the new defense firm’s involvement because they had shared litigation strategy with the former in-house lawyer when plaintiffs’ counsel had approached the former in-house counsel about serving, and that former in-house counsel now worked at the very firm that



defendants' litigation team intended to join. The defense firm then erected an ethical screen, screening the former in-house counsel from the class action litigation's defense team. In addition, the law firm sent a memorandum to all employees, notifying them the lawyer was screened. After the screen was erected, however, the former in-house counsel billed a few (less than four) hours on another class action against the same insurance company defendant, and pleadings from this second class action were later cited in the case from which the former in-house counsel had been screened.

Plaintiffs moved to disqualify the entire defense firm, claiming a conflict arose from the presence of the former in-house counsel – and almost consultant – at the firm where the defendants' litigation team now practiced. The trial court granted the motion. The appellate court reversed and remanded for further consideration, however, after concluding that “in certain cases” screening might prevent disqualification of a “party’s long-term counsel due to the presence of another attorney in a different office of the same firm, who possesses only a small amount of potentially relevant confidential information, and has been effectively screened.” 183 Cal. App.4th at 810, 108 Cal. Rptr.3d at 645.

After noting an ethical screen might prevent disqualification, the *Kirk* court examined what an effective ethical screen requires to provide guidance to the trial court for reconsideration upon remand. According to the California appellate court, the screen must be timely imposed when the conflict first arises. Also, “preventive measures” must be imposed to “guarantee that confidential information [would] not be conveyed.” These measures 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.* The *Kirk* decision provides extended discussion of these elements. The appellate court also emphasized the proper analysis is 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.” Having provided this guidance, the appellate court remanded the case for further proceedings.

In the final case, *Silicon Graphics, Inc. v. ATI Technologies, Inc.*, a lawyer billed 186 hours working in 2006-07 for a plaintiff in patent infringement litigation, and then changed firms before ultimately landing in 2009 at the firm that represented defendants in the same patent-infringement case. The potential conflict was identified before the lawyer joined the defense firm. The lawyer therefore requested a waiver of the conflict from the plaintiff in the patent infringement case, but the plaintiff did not respond. Then, upon determining he could likely join the firm despite the unwaived conflict, the lawyer gave notice to the plaintiff that he was joining the defendants’ firm. Both the waiver request and notice provided details of the anticipated screening procedures.

The plaintiff in the patent infringement litigation subsequently moved to disqualify the defense firm on the basis that the lawyer, who had provided legal services to the plaintiff in the patent-infringement matter, now worked at the firm that was representing the defendants in that same matter. In assessing the motion to disqualify, the *Silicon Graphics* court reviewed the screen erected by the defense firm under a five-element federal law test and found the screen adequate. This assessment of the screen mentions several protective measures beyond general



statements that the conflict-tainted lawyer did not work on, discuss, or share fees from the matter giving rise to the conflict, including that:

- (1) Three weeks before the conflict-tainted lawyer joined, the defense firm notified its litigation team in the patent-infringement case that the conflict-tainted lawyer would be joining the firm and would be screened from the patent-infringement litigation matter;
- (2) The defense firm's computer system blocked the conflict-tainted lawyer from accessing documents related to the patent-infringement matter, and the defense firm could demonstrate the screened lawyer had not accessed any related documents;
- (3) Although the conflict-tainted lawyer was in the same practice group as the litigation team, the practice group was quite large (more than 100 lawyers) and the conflict-tainted lawyer and litigation team were in different offices;
- (4) The defense firm had arranged that the conflict-tainted lawyer would not work on *any* case with any member of the litigation team; and finally
- (5) The conflict-tainted lawyer did not and would not attend any meeting with the litigation team handling the patent-infringement litigation, including department and partner meetings.

Considering these factors, as well as numerous non-screen-related aspects (such as the nature of work the lawyer had done), the *Silicon Graphics* court ultimately denied the plaintiff's motion to disqualify.

Conclusion. The *Columbia Valley Healthcare System*, *Kirk*, and *Silicon Graphics* decisions all demonstrate the importance of identifying potential conflicts when they arise, and timely erecting effective ethical screens. Such screens should isolate the lawyer from information on the matter giving rise to the conflict, and possibly also provide physical isolation; prevent the conflict-tainted person from working on the matter; and prevent the conflict-tainted person from sharing fees obtained in the matter. The firm erecting the screen should document its screen, and also consider giving notice to the impacted client (as occurred in *Silicon Graphics*) and



demonstrating it educated its staff (as suggested in *Kirk*). The more steps a firm undertakes to implement each of these components, the more likely the firm will be to survive a motion to disqualify arising from the screened conflict.

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