As Firms Modernize, So Should Law On Conflicts

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Thanks to the grab-the-bull-by-the-horns decision from Justice H. Walter Croskey of the Second District Court of Appeal, firms hiring a lateral attorney from a firm adverse to their client can sleep more soundly at night without worrying about a nasty disqualification motion.

For decades, California firms have had little guidance as to whether walling or screening off a "tainted" lateral hire would really stand up to a motion seeking to disqualify the entire firm. In fact, after mixed messages from the California Supreme Court, our appellate courts have run the spectrum, from automatic vicarious disqualification of the entire hiring firm to a case-by-case analysis of whether a screen would work or not. Inconsistent rulings created a situation that was hardly reassuring to an attorney moving to a new firm or to a firm considering whether to bring a new attorney on, because of the possibility of losing a long-standing piece of litigation or a valued client.

As prudent attorneys, we instinctively worry and prepare for the worst. Many lawyers shy away at the merest hint of a conflict of interest with a former client. While we may not be able to completely avoid risk, there are ways to manage it. The Second District has now given us a protocol to make economically profitable hiring decisions that also meet our ethical obligations to our clients and former clients.

In Kirk v. The First American Title Insurance Company, 183 Cal.App.4th 776, on April 7, Justice Croskey examined the uncertainties caused by the lack of guidance from the State Bar Board of Governors in designing rules or guidelines to assist practitioners. Forty years of inconsistent decisional law has led to an untold number of arbitrary disqualifications of law firms who thought they should be able to screen off a tainted lateral, only to find that a trial court disagreed and tossed the entire firm off a case.

The gist of this recent decision: If it's done right, a non consensual screen will prevent vicarious disqualification. The *Kirk* facts are compelling. First American Title Insurance Co. (fondly referred to as "FATCO") was a defendant in four separate class actions. Its team of attorneys was led by three Bryan Cave partners. One had been representing FATCO since 1997 and had been defending FATCO on the class actions since their initial filing. The team had defended some 80 class actions against the company throughout the nation. They knew the client and its "personnel, products, services, data systems, history and organization on a national basis." By April of 2009, FATCO had incurred over $6.5 million in fees and expenses in the four class actions. FATCO did not want to lose its team.

Gary Cohen was an attorney who had been deputy commissioner and then general counsel at the California Department of Insurance. By October of 2007, he had moved to Fireman's Fund Insurance Co., where he was chief counsel. That same month, he was contacted by counsel for the plaintiffs in the class actions filed against FATCO and asked whether he would be willing to serve as a consultant to the plaintiffs. The phone call, which took 17 minutes, involved the expected niceties and introductions, but also included confidential information regarding the class actions, including plaintiffs' counsel's work product, theories of the case, and concerns regarding defense strategy and tactics, along with estimates of the value of the case.

Cohen was interested, but after checking, learned that FATCO might be covered by a Fireman's Fund insurance policy. He declined the engagement by e-mail.

In January 2009, Cohen left Fireman's Fund and joined Sonnenschein Nath & Rosenthal in its San Francisco office. Plaintiffs' counsel in the class actions saw the announcement and contacted him again to see whether he would be available as a consultant. After checking conflicts, Cohen advised that FATCO was a client of Sonnenschein and he would not be able to assist.

The following month, the FATCO class action team joined Sonnenschein — two of the attorneys going to its St. Louis office and the third to Los Angeles. FATCO followed as a client and upon receipt of the Substitutions of Attorneys, plaintiffs objected to the defendants' representation by Sonnenschein, based on Cohen's receipt of confidential information in October 2007.

Sonnenschein's general counsel was contacted and after discussion with Cohen, immediately erected "mandatory screening procedures" between Cohen and the FATCO class action cases.

In March 2009, plaintiffs moved to disqualify Sonnenschein. The trial court applied an automatic vicarious disqualification of the entire firm. The trial court did not thoroughly analyze the effectiveness of the screen the firm had erected nor whether it had been breached; it simply held that because Cohen was "tainted" by the confidential information he had received, the entire firm had to be disqualified. Although recognizing the huge financial impact its decision would have on FATCO, the trial court held that the policy interests of representation by "independent counsel unencumbered by conflicts of interest" and public trust in the administration of justice and integrity of the bar necessitated disqualification. FATCO and Sonnenschein appealed.

The appellate court accepted the facts that Cohen had confidential information and that Cohen himself would be disqualified. The court's focus was (1) whether the entire firm must also be automatically disqualified and (2) whether an effective ethical screen would avoid vicarious disqualification.

In its lengthy opinion, the court first noted that the courts and practitioners have had no assistance in these issues from the Legislature or the State Bar. It then proceeded to explore some 40 years of decisional law on these issues, ultimately concluding that vicarious disqualification should not be automatic and, further, that the Supreme Court had tiptoed around the issue in dicta, but had never made a final ruling on the issue.

The *Kirk v. FATCO* court appears to have been assisted by the *amici* briefs supporting FATCO. These stressed the practical realities of large firm life: numerous offices across numerous continents; partners who not only did not exchange information about their cases in the hallway, but who often did not even know each other; and attorneys who move as frequently as the next enticing offer from another firm.

With a few gratuitous comments to the Commission for the Revision of the Rules of Professional Conduct of the State Bar — which had just rejected a recommendation to adopt a version of ABA Model Rule 1.10 (allowing for non consensual screening to avoid vicarious disqualification) — the court decided that evidence of an effective screen should be permitted to be presented to refute a presumption of vicarious disqualification.

So what does an effective ethical screen look like under the *Kirk v. FATCO* decision? It would include (1) physical and departmental separation of attorneys; (2) prohibitions against and sanctions for discussing confidential matters; (3) procedures preventing access to files; (4) procedures to prevent a disqualified at-

torney from sharing in profits from the representation; (5) the disqualified attorney cannot supervise those involved in the representation; and (6) notice to the former client. There was no attempt by the court to weigh these factors or to give trial courts and law firms much guidance on exactly what it would take to make them effective or not. But it is certainly a huge leap forward for law firms — big or small — who hire laterals with confidential information about a case or client that might otherwise lead to the entire firm being disqualified and the client being denied its representation of choice. This decision won't eliminate disqualification motions or the risk of receiving one upon hiring a lateral attorney, but its reasoning gives guidance and certainty to an area that desperately needed it.

Postscript: As anticipated, the Kirk plaintiffs petitioned the California Supreme Court for review. On June 23, 2010, the Supreme Court denied review with Justice Chen of the opinion that review should be granted. Thus, despite Justice Croskey's invitation to the higher Court for additional guidance on this important issue, the appellate decision should be considered final.

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