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“Ethical Screens: Building Electronic Barriers”

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When a law firm acquires a lateral hire who has been at a firm representing an adversary, the law firm becomes presumptively disqualified from continuing the representation opposing the adversary represented by the lateral hire's old firm. The presumption can be overcome by, among other things, instituting an “ethical screen” designed to insulate the new hire from the conflicting representation.

Screening Concerns

The key part of the ethical screen is keeping the new hire from divulging confidences of the old client to the new firm. However, the courts also consider whether the new hire has been adequately insulated from the documents relating to the representation at the new firm.

Although there is no reason in the abstract that the new hire should be isolated from the new firm's documents as long as the new hire does not disclose the old client's confidences or participate in the case, the reality is that full isolation makes it easier for the court to conclude that the new hire is indeed not improperly participating in the case. Also, the courts have expressed concern in these cases about the appearance, as well as the reality, of impropriety.

There was a time when locked file cabinets provided the necessary separation of documents. But with client documents now primarily created, revised and saved electronically, client information resides primarily on computers, not in file cabinets. For this reason, there is growing concern about how to create an ethical screen that protects electronic client information.

So, for instance, a lawyer moves laterally from Firm A, where he represented a purchaser, to Firm B, which represents a seller, in the same transaction. To avoid disqualification, Firm B promptly erects an ethical wall to screen the conflicted lawyer from participating in the deal or communicating with the lawyers working on it. To prevent his accessing seller's files, the firm keeps the files in a locked cabinet. But if no electronic screen is erected, the conflicted lawyer can easily access the firm's document management system and review the deal documents. What should the firm do to create an effective screen that will help defeat a motion to disqualify the firm?

ABA Proposes Electronic Screening

In May 2011, the American Bar Association Commission on Ethics 20/20 proposed an updated comment to the definition of “screened.” “Screened,” under current Rule 1.0(k) of the ABA Model Rules of Professional Conduct, means the isolation of a lawyer from any participation in a

matter. This is to be done by using procedures reasonably adequate to protect information that the isolated lawyer is obligated to protect under the ABA Model Rules or other law.

Comment 8 to the ABA Model Rules explains that the purpose of the procedure is to screen a personally disqualified lawyer in instances where screening is sufficient to remove imputation of a conflict of interest under the ABA Model Rules. Although the concern is to keep the screened lawyer from disclosing confidences, Comment 9 notes that a significant feature of a screen is to limit the screened lawyer's access to any information that relates to the matter triggering a conflict.

The ABA commission observed that technological advances have made client information more accessible to the entire law firm, and that screening should require more than making physical documents inaccessible. Screening should require protection of electronic information as well. The commission proposed that Comment 9 be updated to explicitly note that a screen should protect electronic documents as well as hard copies.

ABA, New York Screening Rules Compared

Under both the ABA Model Rules and the New York Rules of Professional Conduct, if a lawyer is personally disqualified from a representation, such disqualification is presumptively imputed to the entire firm, so that all firm lawyers are likewise precluded from the representation.¹ The rule is based on a presumption that associated lawyers share client confidences.

The definition of "screened" in Rule 1.0(t)² of the N.Y. Rules is similar to ABA Model Rule 1.0(k), except that under the ABA Model Rule, the isolated lawyer is required to protect his information from the firm, whereas under the N.Y. Rule, either the isolated lawyer is required to protect his information from the firm or the firm is required to protect its information from the isolated lawyer. Both rules are silent as to the form of information (i.e., hard copy or electronic) to which a screen would apply.

A potentially significant difference is that the N.Y. Rule does not authorize the use of screens for ordinary lateral hires. Both the ABA Model Rule and the N.Y. Rule accept the use of screens to avoid imputed disqualification involving former government lawyers, judges, arbitrators, mediators and prior interactions with prospects, but only the ABA Model Rule applies to other lateral hires.

New York Case Law

New York state and federal courts have allowed the use of ethical screens to avoid imputed disqualification of a firm beyond the scope of the N.Y. Rules. New York case law allows the use of screens in some instances to avoid disqualification involving ordinary lateral hires even under the N.Y. Rule.

The first New York Court of Appeals case to analyze the use of ethical screens for a side-switching lawyer was *Kassis v. Teachers Ins. & Annuity Ass'n* in 1999.³ There, the firm isolated the conflicted lawyer from the client files and instructed all attorneys and staff not to discuss the matter with the lawyer. However, the court found an ethical wall insufficient to eliminate the risk

of disclosure of client confidences because of the lateral lawyer's extensive involvement in his former client's matter.

New York state courts have since come around and in some cases have allowed the use of screens to avoid disqualification. See *320 West 111th St. Housing Dev. Fund Co. v. Taylor*.⁴

In 2005, the Second Circuit, in *Hempstead Video Inc. v. Valley Stream*,⁵ held that preventive measures such as a formal screen or de facto separation can effectively guard against any sharing of client confidential information. The federal courts have refused disqualification in some cases where screens were instituted.

Factors for Effective Screens

To determine whether a firm has effectively screened a personally conflicted lawyer from the rest of the firm, thus allowing it to represent a client with materially adverse interests in a substantially related matter, courts have evaluated a number of factors:

- ***Timeliness: A Stitch in Time?*** Prompt implementation of the screen is important. To be effective, “[T]he screening measures must have been established from the first moment the conflicted attorney transferred to the firm or, at a minimum, when the firm received actual notice of the conflict,” observed the Southern District in *Chinese Auto. Distris. of Am. LLC v. Bricklin*.⁶ There, the firm had notice of the conflict prior to the lawyer's arrival, but it did not erect an ethical wall until more than three months later. The delay, the court ruled, was much too long for the screen to be effective. However, the use of a screen was deemed timely in *In re Del-Val Fin. Corp. Sec. Litig.*,⁷ where the firm erected a screen “as soon as [it] did discover the conflict,” despite the fact that the conflict had arisen two months earlier.
- ***Proximity: De Facto Separation.*** Another factor is the physical proximity of the personally conflicted lawyer to the lawyers at the firm working on the relevant matter. In *Intelli-Check Inc. v. Tricom Card Tech. Inc.*,⁸ the Eastern District found the ethical wall to be effective due in part to the de facto separation between the disqualified lawyer and the litigation team at the time the conflict arose — the disqualified lawyer worked in the New York office, while the litigation team operated out of the Washington, D.C., office. Also, the computer networks of the two offices were separate — employees of one office had no access to documents created by employees of the other office. Similarly, in *320 West 111th St.*, the New York State Supreme Court found a firm's ethical screen to be “very solid” where the disqualified lawyer's office was physically secluded from the offices of the other attorneys, the disqualified lawyer was denied access to the client files, and the other attorneys' offices were locked when the law firm's staff was out of the office.
- ***Firm Size: Small is Worse.*** A screen's efficacy may depend on the size of the firm. Courts can be skeptical of a screen's adequacy in small firms, on the theory that lawyers in a small firm simply encounter each other more. In *Filippi v. Elmont Union Free School Dist. Bd. of Educ.*,⁹ the Eastern District acknowledged, “the presumption that client confidences are shared within a firm ... is much stronger within a small firm than a large firm.” In *Cheng v. GAF Corp.*,¹⁰ the Second Circuit reasoned that in a small firm “it is unclear ... how disclosures, admittedly inadvertent, can be prevented.” Several cases have disapproved of

screens in firms of less than 50 lawyers,¹¹ while other cases have found that the large size of a firm makes the risk of inadvertent disclosure of confidences less likely, and have assigned significant weight to this factor in favor of nondisqualification.¹²

- ***Affidavits: “See No Evil, Hear No Evil, Speak No Evil.”*** Apart from document screens, courts have accorded weight to affidavits submitted by (1) the conflicted lawyer stating that the lawyer has not shared client confidences with others at the firm and (2) the other lawyers at the firm confirming that they have not received those confidences. For example, in *Papyrus Tech. Corp. v. N.Y. Stock Exch. Inc.*,¹³ the Southern District ruled that the presumption of shared confidences was rebutted through affidavits stating that the conflicted attorney did not recall any confidential information regarding the case and did not share such information with any coworkers. Similarly, in *Intelli-Check*, affidavits were submitted by the conflicted lawyers stating that they had no communication about the case and that they did not disclose client confidences. The firm also denied the conflicted lawyer access to records and files relating to the case.
- ***Electronic Steps: Block and Track Access.*** Protecting electronic client information is critical. The Southern District in *Papyrus* concluded that the electronic screening measures adopted by the firm adequately segregated the disqualified lawyer from the case, “thereby immunizing [the firm] from [the disqualified lawyer’s] taint.” There, the firm sealed its document management system so that only members of the team working on the case — not including the disqualified lawyer — could access relevant electronic documents. In addition, the firm implemented a monitoring system that could track a lawyer’s access to certain electronic files.

Imperfect Screen Still Effective

Even where screening measures were “substandard,” the Southern District in *Arista Records LLC v. Lime Group LLC*[14] held that a firm can avoid disqualification if the side-switching litigator’s conflict posed no “substantial risk of trial taint.” Despite (1) the firm’s repeated failure to promptly enter the conflict into its conflicts database, (2) a seven-week delay to implement an electronic wall, (3) a three-month delay to circulate an internal screening memo, (4) the firm’s failure to send the screening memo to the entire firm, and (5) the disqualified attorney’s ability to access an electronic folder on the case after adoption of the screen, the court concluded that the firm provided sufficient evidence that the tainted lawyer did not share his former client’s confidences with his new firm. The court cited the following key factors:

- an “electronic audit” — a review of the electronic record of who had accessed documents — showed that the disqualified lawyer had not accessed any electronic documents relating to the firm’s current client;
- an affidavit from the disqualified lawyer stating that he had not disclosed confidential client information to anyone;
- affidavits from the attorneys working on the matter stating that they had not received any confidential information;

- a declaration from the firm's conflicts committee attesting that the disqualified lawyer had confirmed with the lawyers on the matter that he had not shared client confidences with them; and
- the large size of the firm which made inadvertent disclosures of client confidences less likely.

Another Brick In The Wall

The challenge for modern law firms is not physical insulation of documents (although that may remain necessary), but building an electronic barrier to electronic access to sensitive client information (without hampering proper representations either by the conflicted lawyer or the team working on the insulated matters). For example, one practical problem is how to exclude screened lawyers from firm-wide or practice group-wide emails but only those emails disclosing information about screened matters.

Therefore, in implementing electronic screening procedures as a means of information risk management, firms should consider the following measures:

- ***Document Management System, Firm Applications and Databases:*** Restrict the conflicted lawyer's ability to access, search and review relevant electronic files and documents, applications and/or databases by instituting computer security protocols at the client and/or matter level, such as sign-in codes.
- ***Unstructured Data:*** Limit the conflicted lawyer's access to unstructured network file locations (e.g., W-drives) where relevant client files and records are stored and shared among the lawyers and support staff working on the matter.
- ***Electronic Audit:*** When confronted by a disqualification motion, conduct an audit of the firm's document management system to confirm that no prohibited documents have been accessed by the conflicted lawyer. This requires a document management system that retains access information.
- ***Monitoring System:*** In accordance with the electronic audit measure, track the conflicted lawyer's access to relevant electronic files to verify whether the conflicted lawyer accessed relevant electronic files.
- ***Email:*** Exclude the conflicted lawyer's email account from the firm's email distribution list to preclude him/her from the firm's email groups, or set up special email distribution groups for conflicted matters restricted to the lawyers working on those matters. Obviously, more sophisticated and narrower filters, if available, could be used.
- ***Time Entry System:*** Exclude the conflicted lawyer from personally entering time on all client matter numbers in the firm's time and billing system unless he/she is provided access on an as need basis or unless that system does not permit one lawyer to look at the time recorded by other lawyers.

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Endnotes:

¹ ABA Model Rule of Professional Conduct 1.10(a); N.Y. Rule of Professional Conduct (22 NYCRR 1200.0) rule 1.10(a).

² N.Y. Rule of Professional Conduct (22 NYCRR 1200.0) rule 1.0(t).

³ 93 N.Y.2d 611, 717 N.E.2d 674 (1999).

⁴ 2009 N.Y. Misc. (Sup. Ct. N.Y. Co. 2009).

⁵ 409 F.3d 127 (2d Cir. 2005).

⁶ S.D.N.Y. 2009.

⁷ 158 F.R.D. 270 (S.D.N.Y. 1994).

⁸ E.D.N.Y. 2008.

⁹ 722 F. Supp.2d 295 (E.D.N.Y. 2010).

¹⁰ 631 F.2d 1052 (2d Cir. 1980).

¹¹ See *Decora Inc. v. DW Wallcovering Inc.*, 899 F. Supp. 132 (S.D.N.Y. 1995); *Yaretsky v. Blum*, 525 F. Supp. 24 (S.D.N.Y. 1981); and *Crudele v. N.Y. City Police Dep't*, (S.D.N.Y. 2001).

¹² See *Papyrus Tech. Corp. v. N.Y. Stock Exch. Inc.*, 325 F.Supp.2d 270 (S.D.N.Y. 2004); *In re Del-Val Fin. Corp. Sec. Litig.*, 158 F.R.D. 270; and *Arista Records LLC v. Lime Group LLC* (S.D.N.Y. 2011).

¹³ 325 F.Supp.2d 270 (S.D.N.Y. 2004).

¹⁴ S.D.N.Y. 2011.

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