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Conflicts of Interest

California Court Recognizes Ethics Screens As Method of Avoiding Firms' Disqualification

A law firm's use of effective screening measures may in some circumstances enable the firm to avoid vicarious disqualification based on an incoming lawyer's knowledge of client confidences acquired at another private firm, the California Court of Appeal, Second District, ruled April 7 (*Kirk v. First American Title Insurance Co.*, Cal. Ct. App. 2d Dist., No. B218956, 4/7/10).

In an opinion that some observers consider groundbreaking—and others find disappointing—the court decided that a law firm is not automatically disqualified from continuing to represent the defendants in several related class actions even though a lawyer who had recently joined the firm had previously learned key confidences of the plaintiffs in a brief conversation with their counsel about serving as a consultant in the litigation.

The court concluded that ''*automatic* vicarious disqualification is not required, and that, instead, there is a *rebuttable* presumption that the attorney's knowledge of client confidences is imputed to the firm, which can be refuted by evidence that the law firm adequately screened the attorney from the others at the firm representing the adverse party.''

The court stated, however, that if the tainted lawyer was actually involved in the former client's representation and ''switches sides'' in the same case, the presumption of shared information is conclusive and cannot be rebutted, even by the most thorough screening measures.

In his lengthy opinion announcing these conclusions, Justice H. Walter Croskey traced the development of California case law on imputed disqualification, reviewed the use of screening in contexts other than lawyers moving between law firms, discussed public policy considerations, canvassed screening rules adopted by other jurisdictions, and set out criteria for effective screening.

Croskey also took into account the work of the California State Bar Commission for the Revision of the Rules of Professional Conduct, which is in the process of overhauling the state's lawyer conduct rules. During that process, the subjects of imputed disqualification and screening for lawyers moving between firms have been especially controversial—and so far remain unresolved. California's existing professional conduct rules do not include any version of ABA Model Rule 1.10, which addresses the subject of imputed disqualification and, as of February 2009, allows use of ethics screens to avoid imputation of conflicts when lawyers change private firms.

'State-of-the-Art Analysis.' In comments to BNA, several lawyers not involved in the *Kirk* case characterized the decision as especially significant. ''It is perhaps the most important case in the past year in the field of professional responsibility, certainly the most important in California,'' according to Paul Vapnek, who practices with Townsend & Townsend & Crew in San Francisco and serves as a vice-chair of the rules revision commission.

This is the very first California case to state directly that vicarious disqualification is not automatic and that screening can be used in proper cases for lawyers moving between firms, Vapnek said. He is a co-author of *California Practice Guide: Professional Responsibility*, published by the Rutter Group, which was cited in the court's opinion.

''[W]hen a tainted attorney moves from one private law firm to another, the law gives rise to a rebuttable presumption of imputed knowledge to the law firm, which may be rebutted by evidence of effective ethical screening.''

JUSTICE H. WALTER CROSKEY

Lucian T. Pera of Adams and Reese in Memphis, Tenn., who served on the ABA Ethics 2000 Commission, characterized the opinion as a ''state-of-the-art analysis'' of the contemporary law on screening in the context of lawyers' lateral movements between firms. ''This opinion is a must-read for every court considering this question, and for every bar committee or court committee looking at a possible rule revision on this subject,'' Pera told BNA.

Dominique M. Snyder, who practices in La Canada, Cal., referred to the opinion in superlative terms, including ''extraordinary,'' ''thoughtful,'' ''comprehen-

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sive,'' and ''incredibly important.'' The opinion ''avoids a one-size-fits-all, simplistic conclusion about vicarious disqualification,'' she said. Snyder is a member of the state bar's rules revision commission but, like the other lawyers who provided comment about the *Kirk* case, made clear that she was expressing her personal views.

Not all observers are pleased with what the court said. ''The opinion addresses at length the duty of confidentiality, but it overlooks the trust element of the lawyer-client relationship,'' according to Robert L. Kehr of Kehr, Schiff & Crane, Los Angeles.

''Clients will be less likely to trust lawyers, and to fully expose themselves to their lawyers as is needed to obtain full and reliable legal advice, if they lack confidence about how lawyers will handle confidential information,'' he told BNA.

Kehr said the case before the court involved one of the ''rare situations'' in which a conflict cannot be identified by reasonable procedures. The firm whose disqualification was sought could not be expected to know, he explained, that one of its lawyers had pertinent confidential information as a result of a matter in which he was not retained. The court's decision would be understandable if it had been limited to this exceptional situation, Kehr said.

Instead, he remarked, the court ''went out of its way to make a broad and ill-defined point about the utility and reliability of ethics screening.'' The opinion ''will leave lawyers and courts at sea,'' Kehr said, adding: ''One of the inevitable consequences of a post hoc screening remedy is that lawyers will be less motivated to check for conflicts.''

''This opinion is a must-read for every court considering this question [of lateral screening], and for every bar committee or court committee looking at a possible rule revision on this subject.''

LUCIAN T. PERA
ADAMS AND REESE

''Very disappointing'' is how Stanley W. Lamport, of Cox Castle & Nicholson, Los Angeles, described the decision. A strict rule of imputation is essential to preserve the trust that makes clients and prospective clients willing to confide in lawyers, he said in remarks to BNA. Like Snyder and Kehr, Lamport is a member of the state bar's rules revision commission.

Lamport also emphasized the practical difficulty of proving violations of an ethics screen. ''I am suspicious of reports claiming that screens have been successful because of the absence of any means to prove a violation,'' he said.

Lamport added that the decision seems to reflect a ''disturbing'' cost-benefit analysis in which a client's right to confidentiality is weighed against the money that the adversary has invested in its counsel. ''In my mind, a lawyer's duty of confidentiality is not for sale,'' Lamport stated. ''A cost benefit analysis is antithetical to the function the duty of confidentiality exists to assure—affording client communications with a lawyer without ever having to worry the information will be revealed or used against the now former client.''

Many Friends. Indicating the perceived importance of the *Kirk* case, two dozen large law firms took part in the appeal as amici curiae in support of the defendants and Sonnenschein Nath & Rosenthal, the firm that was disqualified by the trial court. The availability of screening for the former-client conflicts of lateral hires is critically important for large firms, which tend to grow by acquiring lawyers from other firm and through mergers, all of which can create conflicts with ongoing representations if an incoming lawyer's former-client conflicts are automatically imputed to the new firm.

In contrast, 25 ''small law firms'' having fewer than 15 lawyers filed an amicus brief in support of the plaintiffs, who wanted the disqualification ruling to be upheld on appeal.

In their brief, the small law firm amici argued that ''allowing screening in this case would be 'bad law,' not workable for the overwhelming majority of California law firms, and detrimental to the interests of clients.'' The brief was authored by Ronald E. Mallen and Kara Farmer of Hinshaw & Culbertson in San Francisco.

Policy Considerations. Several lawyers who discussed the case with BNA emphasized the court's discussion of policy considerations as a particularly valuable aspect of the opinion. ''The court's policy analysis is spot-on,'' Pera said.

In his opinion for the court, Croskey stressed that an automatic rule of vicarious disqualification without any leeway for screening results in real harm to clients in that they are deprived of counsel of choice. He quoted extensively on this point from the ABA ethics committee's analysis in its February 2009 report on the proposed screening amendment to Model Rule 1.10. That aspect of the report in turn drew heavily on an article by Robert A. Creamer of Evanston, Ill. See *Screening Plays in Peoria*, 10 Prof'l Law. (no. 4) 1 (Summer 1999).

In an interview with BNA, Creamer said that the *Kirk* case is the first to focus on the harm that befalls clients who lose their counsel when firms are forbidden to use lateral screening. The opinion recognizes, he noted, that there are additional policy considerations that must be balanced, along with public trust in the administration of justice and the integrity of the bar, in weighing a motion for disqualification.

In some cases, Croskey wrote, ''the public trust in the scrupulous administration of justice is not advanced (and, in fact, may be undermined) by an order disqualifying 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.''

Like Creamer, Snyder praised the court's recognition of the impact on clients when their counsel is disqualified if firms are unable to use screens. ''It can be a tremendous burden to replace counsel,'' and counsel sometimes has nearly irreplaceable expertise, Snyder said. ''Lawyers are not widgets.''

Vapnek too lauded the court's focus on the adverse impact upon clients of an absolute rule of vicarious disqualification. ''That's a real problem—not a theoretical one,'' he said.

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Changing Realities, Changing Rules. Several of those who spoke with BNA, including Snyder and Creamer, described the court's view of law practice as ''realistic,'' and applauded its willingness to look at how other jurisdictions are adapting to the changes in the legal profession. The decision draws from ''the real world, not theoretical fretting,'' Creamer said.

Croskey found a recognition in several California decisions that the changing realities of law practice—especially increased lawyer mobility and firm mergers—are undermining the rationale for an automatic rule of vicarious disqualification, which reflects an assumption that lawyers within a firm routinely share information with each other. The present case illustrates the need for a fresh look, Croskey said, in that the tainted attorney who joined Sonnenschein Nath worked in a different geographical office and a different practice group from the attorneys working on this litigation.

Other states are recognizing and adapting to the changing realities of law practice, Croskey said, noting that jurisdictions outside California are ''very nearly split evenly as to whether to permit ethical screening of attorneys moving from one private law firm to another.''

Twelve states have adopted professional conduct rules that permit screening with no limitations based on the scope of the disqualified attorney's prior involvement in the representation, and 12 others have adopted rules permitting screening when the disqualified attorney's involvement in the prior representation was limited.

''That nearly half of the states have chosen to permit some level of ethical screening in the non-governmental attorney context demonstrates a growing understanding that law is often practiced in firms in which effective screening is possible,'' Croskey wrote.

In a footnote, Croskey pointed out that 36 states and the District of Columbia permit screening when the confidential information was conveyed by a former prospective client, as does Model Rule 1.18(d). These screening rules generally apply only when the attorney took reasonable measures to avoid obtaining more information than was reasonably necessary to determine whether to accept the representation—''a circumstance which arguably did not occur in the instant case,'' he noted.

Screening Allowed in Other Contexts. Several of the lawyers interviewed by BNA emphasized the court's discussion of the use of screening in contexts other than lateral hires.

Croskey pointed out that under California case law, screening is permitted to rebut the presumption of imputed knowledge in situations involving former government lawyers, nonlawyer employees, experts who are not retained, and within expert firms. The use of a rebuttable presumption is accepted in these situations, he said, because it is believed that ethics screening can work. ''There is no legitimate reason to believe that the same screening could not work in the context of private attorneys at a private firm,'' he declared. ''The effectiveness of the screening process depends on the policies implemented by the law firm, not on the former employment of the screened attorney,'' Croskey stated.

Emphasizing this aspect of the court's analysis, Snyder expressed the view that screening can work equally well for lawyers in private firms. ''Government lawyers are no more or less ethical than private lawyers,'' said Snyder, a former government lawyer herself.

Creamer pointed out that in the case before the court, the tainted lawyer was in fact a government lawyer before he changed jobs and became privy to the confidences of the plaintiffs that led to the disqualification motion. The court itself noted this fact, Creamer said, referencing a footnote in which Croskey said that ''[t]he

Opinion Mulls Elements of Effective Screening to Deal With Lateral Conflicts

In *Kirk v. First American Title Insurance Co.*, Justice H. Walter Croskey discussed at length the elements the court believes are needed for an effective ethics screen if a law firm hopes to rebut the presumption that a lateral hire will share a former client's confidences with others in the firm.

While observing that the specifics of an effective screen will vary from case to case, the court made clear that two elements are critical:

First, the screen must be timely—that is, imposed when the conflict first arises.

Second, preventive measures must be imposed to guarantee that information will not be conveyed. It is not sufficient for a firm simply to produce declarations stating that confidential information was not conveyed or that the disqualified attorney did not work on the case, Croskey said.

Drawing on previous California court decisions, Croskey identified six factors that can help make a screen effective:

- isolation of the tainted attorney through physical, geographic, and departmental separation;
- prohibitions against the discussion of confidential information;
- establishment of rules and procedures preventing access to confidential information and files;
- use of procedures to prevent a disqualified attorney from sharing in the profits from the representation;
- the absence of any supervisory relationship between the tainted attorney and the lawyers involved in the current matter; and
- notice to the former client.

Croskey emphasized, however, that the trial court's inquiry in evaluating the effectiveness of a screen does not boil down to checking off a prescribed list of elements, beyond timeliness and the imposition of prophylactic measures.

''[I]t is, instead, 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,'' the opinion states.

law cannot possibly be'' that Sonnenschein could effectively screen the lawyer if he was tainted with information obtained while he was with the government, but could not effectively screen him from information obtained while he was working for a private company.

The Conversation. The disqualification dispute in *Kirk* arose from a conversation between Gary Cohen, who was then chief counsel with Fireman's Fund Insurance Co., and counsel for the plaintiffs in four class actions brought against First American Title Insurance Co. and First American entities.

The trial court found that during a 17-minute conversation with Cohen in autumn 2007, the plaintiffs' counsel divulged material confidential information to Cohen. Upon learning that Fireman's Fund might have provided coverage to a First American entity, Cohen ultimately declined to work with plaintiffs' counsel.

Cohen joined Sonnenschein Nath in January 2009 and, not long afterward, three attorneys representing First American in the class actions moved to Sonnenschein from Bryan Cave. The day after First American filed substitutions of counsel in the class actions, reflecting that Sonnenschein was now handling its defense, the plaintiffs objected to the representation due to their prior consultation with Cohen.

Up until that point, the First American team had been unaware of Cohen's prior contacts with plaintiffs' counsel. Upon learning of the problem, Sonnenschein's general counsel issued a screening memorandum to isolate Cohen from the class actions and prevent those working on the class actions from acquiring any confidential information from him.

The trial court granted the plaintiffs' motion to disqualify Sonnenschein, concluding that when an attorney possesses disqualifying confidential client information, vicarious disqualification of the lawyer's entire firm is automatic, regardless of the creation of any form of ethics screening wall.

Rebuttable Presumption. Croskey described the appellate court's conclusion in this fashion:

> when a tainted attorney moves from one private law firm to another, the law gives rise to a rebuttable presumption of imputed knowledge to the law firm, which may be rebutted by evidence of effective ethical screening. However, if the tainted attorney was actually involved in the representation of the first client, and switches sides in the same case, no amount of screening will be sufficient, and the presumption of imputed knowledge is conclusive.

En route to this conclusion, the court traced the historical development of the law regarding imputed disqualification in California, beginning with a 1981 California Supreme Court case. California courts did not apply an absolute rule of vicarious disqualification, Croskey said, until *Henriksen v. Great Am. Savs. & Loan*, 14 Cal. Rptr.2d 184 (Cal. Ct. App. 1992), which found that an entire firm must be disqualified from representing a litigant after it hired a lawyer who had been actively representing the opponents before joining the firm, even though the firm had erected a screen to prevent disclosure of the opponent's confidences.

Croskey said that although the California Supreme Court appeared to adopt and extend *Henriksen* to all cases of vicarious disqualification in *Flatt v. Superior Court*, 36 Cal. Rptr.2d 537 (Cal. 1994), that language was merely nonbinding dicta because the issue of vicarious disqualification was not presented in *Flatt*.

The supreme court subsequently indicated in *State ex rel. Corps. Dep't v. SpeeDee Oil Change Sys. Inc.*, 980 P.2d 371, 15 Law. Man. Prof. Conduct 356 (Cal. 1999), that whether vicarious disqualification is always absolute was still an open question, Croskey said.

According to Croskey, recent California decisions are inconsistent as to whether the presumption of imputed disqualification can be rebutted, and the supreme court has never directly addressed the issue on the merits. Croskey summarized the court's interpretation of the state of the law as requiring ''(1) a case-by-case analysis based on the circumstances present in, and policy interests implicated by, the case; (2) tempered by the *Henriksen* rule that vicarious disqualification should be automatic in cases of a tainted attorney possessing actual confidential information from a representation, who switches sides in the same case.''

Issue of Trust. In his comments to BNA, Lamport faulted the *Kirk* court for ignoring why imputation is required. It is needed, he said, to preserve the trust of former clients and prospective clients who would never have confided in the lawyer if they thought their confidential information could be harbored in a law firm representing an adversary whose interests could be advanced by using or revealing the information—particularly when the former client or prospective client cannot verify whether the screen is violated.

The court "went out of its way to make a broad and ill-defined point about the utility and reliability of ethics screening."

ROBERT L. KEHR
KEHR, SCHIFF & CRANE

For example, Lamport noted that the *Kirk* court did not discuss *Cho v. Superior Court*, 45 Cal. Rptr.2d 863 (Cal. Ct. App. 1995), which stated: ''No amount of assurances or screening procedures, no 'cone of silence,' could ever convince the opposing party that confidences would not be used to its disadvantage. . . . No one could have confidence in the integrity of a legal process in which this is permitted to occur without the parties' consent.''

Lamport also noted that the court did not discuss California Ethics Op. 1998-152, which concluded that ''the absence of an effective means of oversight combined with the law firm's interest as an advocate for the current client in the adverse representation are factors that tend to undermine a former client's trust, and in turn, the public's trust in a legal system that would permit such a situation to exist without the former client's consent.''

Lamport pointed out that although both of these statements were quoted in *Adams v. Aerojet Gen. Corp.*, 104 Cal. Rptr.2d 116, 17 Law. Man. Prof. Conduct 88 (Cal. Ct. App. 2001), the *Kirk* court cited *Adams* without addressing these concerns.

But Pera told BNA that his experience from being ''in the trenches'' on the lateral screening issue for more than a decade is that the decisions of most courts—and

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the views of most lawyers—on the policy issue come down to one question: ''Do you trust lawyers?''

''Judge Croskey and the California Court of Appeal clearly and explicitly decided that they could trust lawyers to abide by screens,'' Pera said. ''I trust lawyers, too.''

Criteria for Effective Screening. In Mallen's view, the importance of the case nationwide can be found primarily in the opinion's extensive guidelines for screening (*see box*), which he said he considers the most thorough announced in any case. ''These guidelines should be functional in all jurisdictions,'' he said.

Similarly, Snyder characterized the court's discussion of the elements of an effective screen as the most important facet of the opinion.

Mallen's brief for the small firm amici addressed the elements of an effective screen at length, emphasizing the importance of features such as timeliness and notice to clients. The brief argued that the screen implemented by Sonnenschein Nath was inadequate in several ways.

While the court discussed standards for effective screens in general, it did not rule on the adequacy of Sonnenschein's screening measures. Croskey said that under normal circumstances, it would remand for the trial court to consider whether the provisions of Sonnenschein's ethics screen were adequate to rebut the presumption of imputed disqualification.

The court decided, however, that because Cohen is no longer employed by Sonnenschein, the trial court on remand should not consider the risk of transmitting confidential information, but instead should look at whether before his departure Cohen actually conveyed confidential information to anyone who may have worked on the class actions.

Even if it finds that the screen was effective, the trial court still should consider whether the policy considerations implicated in these circumstances favor allowing the firm to remain as counsel, or whether they mandate disqualification of the entire firm, Croskey instructed.

Porous Barriers. In an interview with BNA, Lawrence J. Fox, who has long opposed screening for lawyers moving between firms, said that ''the case demonstrates how screens can be breached inadvertently, which has been my argument all along.'' Fox practices with Drinker Biddle & Reath in Philadelphia.

The opinion in *Kirk* relates that after the screen was put in place at Sonnenschein Nath, Cohen worked on a different matter with the lawyers who were representing First American in the class actions. Specifically, Cohen worked for several hours with the lawyers in the ''*Lyons* matter'' to draft a letter to the state department of insurance regarding the issue of exhaustion of remedies. That issue was also present in the four class actions in which the plaintiffs objected to the firm's participation, and the trial court found that Cohen's work on the *Lyons* matter breached the screen that the Sonnenschein firm had put in place.

The appellate court pointed out, however, that Cohen's work on the *Lyons* matter was not used against the plaintiffs who were seeking Sonnenschein's disqualification. Without deciding whether Cohen's work on the *Lyons* matter was or was not disqualifying for the law firm, the appeals court said that the safest approach would have been for Sonnenschein to screen Cohen completely from the First American team and all First American cases.

Fox said that under these circumstances he found it stunning and ''disturbing'' for the court to endorse the viability of screening. ''When you have hundreds of screens and hundreds of matters, lawyers can forget about a screen,'' he noted.

Fox also criticized the idea that ''screening is necessary because law firms have gotten big.'' On that rationale, he said, ''pretty soon we'll all be one big firm.''

Beyond those problems, Fox said that the court's holding on screening was really of minimal concern if the case was actually a ''Rule 1.18'' situation. Model Rule 1.18 envisions screening to prevent a firm's imputed disqualification in some circumstances based on a lawyer's discussions with a prospective client, he pointed out. Screening under Rule 1.18 is ''much more benign'' than the screening provision that the ABA approved for Model Rule 1.10, which permits law firms to use screening measures even for a ''side-switching'' lawyer, he said.

Difficulty of Line-Drawing. At several points in the opinion, the court of appeal emphasized that the presumption of imputed knowledge remains conclusive in some situations. For example, in footnote 29, the opinion states: ''We reiterate . . . that the presumption is not rebuttable in those cases that fall within the *Henriksen* and *Meza* exception.'' Croskey described *Meza v. H. Muehlstein & Co.*, 98 Cal. Rptr.3d 422, 25 Law. Man. Prof. Conduct 460 (Cal. Ct. App. 2009), as ''involving a tainted attorney possessing confidential information who switched sides in the same lawsuit.''

''[T]he case demonstrates how screens can be breached inadvertently, which has been my argument all along.''

LAWRENCE J. FOX
DRINKER, BIDDLE & REATH

And in footnote 20, Croskey said that while *Henriksen* considered the circumstances of an attorney who obtained numerous client confidences while fully participating in the representation of the client, and then joined a firm opposing a client in the same case, ''we need not determine if that is the *only* scenario in which the presumption should be conclusive.''

In that same footnote, the court went on to say that it disagreed with *Pound v. DeMera DeMera Cameron*, 36 Cal. Rptr.3d 922 (Cal. Ct. App. 2005), ''to the extent it sees no qualitative distinction between an attorney who had a brief preliminary meeting with counsel for the first client and an attorney who was actively involved with the first client's representation.''

As noted above, Croskey also stated in the opinion, citing *Henriksen* and *Meza*, that ''if the tainted attorney was actually involved in the representation of the first client, and switches sides in the same case, no amount of screening will be sufficient, and the presumption of imputed knowledge is conclusive.''

In an interview with BNA, ethics consultant William Freivogel of Chicago said that this sentence in the opin-

ion raises the question whether screening may be used if the tainted attorney worked on the case to a very limited extent, or if the tainted attorney learned some confidential information in a casual setting about the case while working at the former firm that was handling the case. In the facts before the court in *Kirk*, he noted, the ''tainted'' attorney acquired confidential information without any actual association with the firms who were representing the plaintiffs.

The most generous ''pro law firm'' interpretation, Freivogel said, is that the court would permit screening except where the lawyer had substantial involvement. A ''more confining'' interpretation, he said, would be that screening is disallowed unless the lawyer had no involvement in the prior representation but somehow became privy to the movant's confidences.

Freivogel said he wondered whether the court really meant ''switches firms'' when it said ''switches sides.'' He maintains a website on lawyers' conflicts (http://www.freivogelonconflicts.com).

Mark L. Tuft of Cooper, White & Cooper in San Francisco told BNA that an issue remains as to where *Kirk* draws the line on permissible screening. Tackling some hypothetical situations posed by Freivogel, Tuft suggested that a screen probably would not be allowed under *Kirk* if a lawyer worked at the firm representing the former client and attended a lunch at which the lawyers on the case described their strategy.

And if a lawyer did minor work on a peripheral issue, the permissibility of a screen would probably depend on a case-by-case analysis of whether the lawyer acquired confidential information on a material matter, Tuft said.

Snyder cautioned against an overbroad reading of the *Kirk* decision. The general rule is a presumption of imputed disqualification, but the presumption is rebuttable in some circumstances outlined by the court, she noted.

Rules Revision Project. California's current professional conduct rules do not include any version of Model Rule 1.10, which addresses the subject of imputed disqualification and, as of February 2009, allows use of ethics screens to avoid imputation of an individual lawyer's conflict to an entire firm.

In September 2009, the California State Bar's Commission for Revision of the Rules of Professional Conduct released for public comment a proposed version of Rule 1.10 that did not include a screening provision.

Against the backdrop of that proposal, Mallen argued in the small law firms' amici brief that it would make no sense for the appellate court to adopt screening contrary to the commission's then-pending recommendation. The incongruous result would be that California lawyers and firms could use screens to avoid imputed disqualification, but by doing so would be subject to discipline for violating an ethics rule to the contrary, Mallen contended in the brief.

The commission later decided to recommend a version of Rule 1.10 that included a narrow screening provision. In early March, however, a committee of the bar's board of governors rejected the proposed rule in its entirety, and the board of governors itself did not override that action at a meeting two days later. See 26 Law. Man. Prof. Conduct 166.

The court in *Kirk* took note of these developments, saying it agreed with the board that the question whether attorney screening can overcome vicarious disqualification in the context of lawyers' movement between private law firms is not settled in California. But the court said it found significant that a majority of the commission believed screening should be ethically permissible in limited circumstances.

At a meeting in late March, the commission once again considered the subject of imputed disqualification, according to Tuft, who is a vice-chair of the commission. This time around, he said, the commission voted to recommend bringing the subject of imputed disqualification back before the board of governors with a version of Rule 1.10 that does not include a screening provision.

Tuft expressed disappointment that in other action at the meeting in late March, the commission voted not to recommend adoption of Model Rule 1.18, which addresses conflicts of interest resulting from discussions with prospective clients that do not result in a lawyer-client relationship. At present, California has no ethics rule on conflicts arising from contact with a prospective client.

Ruling by Supreme Court? Lawyers who discussed the case with BNA expressed differing views about whether the court of appeal's decision will be reviewed by the California Supreme Court.

Vapnek said he doubts that the high court will grant review; Mallen said that although the decision to review is discretionary, he expects the supreme court to take the case. Tuft also said he believes that if a petition for review is filed, the court is likely to accept it. ''The court is inviting review,'' he said.

David M. Axelrad and Lisa J. Perrochet of Horvitz & Levy in Encino, Cal., and Peter Q. Ezzell and Nancy E. Lucas of Haight Brown & Bonesteel, Los Angeles, represented First American and Sonnenschein Nath & Rosenthal.

The plaintiffs were represented by Bernie Bernheim of the Bernheim Law Firm in Beverly Hills, Cal., Nazo S. Semerdjian of the Bernheim Law Firm, Encino, Cal., and Wilson K. Park, Studio City, Cal., and by Taras Kick, Matthew Hess, and Thomas Segal of the Kick Law Firm in Los Angeles.

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