Portfolio Media. Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Build The Wall: 4 Ethical Screen Rulings Attys Should Know

By **Andrew Strickler**

Law360 (March 8, 2018, 11:07 PM EST) -- Go in search of guidance around erecting ethical screens — sometimes known as "Chinese walls" — and you won't be disappointed. Courts and bar groups have explored a plethora of scenarios in which lawyers can or cannot be isolated from certain clients or cases to avoid creating a conflict or to prevent the imputation of a conflict to an entire firm.

But the wealth of information doesn't make the task of spotting conflict danger zones and deciding what screening measures are called for any easier, experts say.

Conflict analysis tends to be highly fact-specific, and courts and states vary in how they look at the timeliness of erected screens and how far firms need to go in notifying clients of lateral-generated conflicts, among many other issues.

And while a disqualification challenge is the most immediate risk of a faulty screen or badly handled attorney hire, firms should be more concerned about what comes next, said Jason Fellner of Murphy Pearson Bradley & Feeney PC.

"The liability exposure of a DQ motion is most often very small relative to what a later malpractice claim or a state bar action would bring," he said. "And as firms continue to consolidate and become these behemoths, there is a smaller set of firms handling cases for large corporations, and what's involved in setting up ethical walls is becoming more complicated and costly."

Here are four recent decisions to know about ethics screens:

California Court Frowns on Automatic Disqualification

Going deep on California law on lateral-focused conflict disqualifications and screens, a state appeals court in January said judges must delve into whether there was a real risk to client confidences rather than employ an "automatic" DQ standard.

"Individual assessment of the facts, rather than automatic disqualification, is a modern rule that better reflects the current realities of law firm life in the 21st century," a unanimous Fourth District appeals panel said.

The decision focuses on Nixon Peabody LLP's work for California Self-Insurers' Security Fund and the search for reimbursement of worker comp payments from fund members.

On the other side of the case were a handful of defendants represented by lawyers at Michelman & Robinson LLP, including a one-time health care practice chair, Andrew Selesnick. Selesnick joined Nixon Peabody in February 2017 while the case was still active; the firm was promptly advised of the potential conflict. Selesnick left Nixon Peabody just five weeks later, according to the order.

In their disqualification bid, the defendants argued in part that no ethical wall had been put in place before Selesnick joined Nixon Peabody. A state Superior Court judge agreed that Selesnick's side-switch warranted automatic and mandatory disqualification for the firm that no screen could have cured.

But the appeals panel took issue with that conclusion, saying the trial court failed to account for all the circumstances at play, including Selesnick's brief tenure at Nixon Peabody and the fact that he'd been in a different office than the team handling the fund matter.

"Automatically finding that Selesnick's very short tenure ... is sufficient to impute knowledge to the entire firm, including attorneys working on the matter in a different office, places form over substance," the court said, sending the disqualification determination back to the trial court for another look.

"Disqualification is neither intended to be punitive nor formalistic," the court said.

The fund was represented in its petition by Sean SeLegue, John Throckmorton and Matthew Diton of Arnold & Porter Kaye Scholer LLP.

Defendants are represented Jeffrey Farrow of Michelman & Robinson LLP, Dawn Coulson and Veronica Darling of Epps & Coulson, Nicholas Roxborough, Jaclyn Grossman and Ryan Salsig of Roxborough, Pomerance Nye & Adreani, Shafiel Karim, and Thomas Gehring and Julia Park of Thomas G. Gehring & Associates APC.

The appeal is California Self-Insurers Security Fund v. the Superior Court of Orange County et al., case number G054981, in the Court of Appeal of the State of California, Fourth Appellate District.

'Migrating' Attorney Key to Delaware Screen Rule

Shining a light on the limits of firm conflict screens, a Delaware Superior Court judge last year agreed to disqualify a plaintiff's counsel in a medical malpractice case, saying the screening rule doesn't apply absent a "migrating" attorney.

The decision focuses on a medical negligence suit brought against Dr. Bikash Bose by Bonita Bleacher. Bleacher had been represented by Robert Leoni of personal injury firm Shelsby & Leoni, according to the May 2017 order.

Before discovery commenced, Bose alerted the court that Leoni's partner, Gilbert Shelsby, had previously represented Bose in the defense of another medical malpractice action. That case, filed in 2001 and litigated through trial in 2005, resulted in a $3.6 million verdict against Dr. Bose. Shelsby represented Bose throughout that case.

In refuting the disqualification motion, Leoni relied heavily on a state court decision in a previous case in which a judge said the Delaware conduct rule on imputed disqualification found an exception for when "the personally disqualified lawyer is timely screened from any participation in the matter."

But the judge in the Bleacher case said that decision was off-target because it focused on a Rule 1.10 subsection that was applicable to laterals, which Leoni was not, undercutting Leoni's position that the conflict had not been imputed to him.

"Here, Shelsby and Leoni were partners during the previous representation of Bose and they continue to be partners in this lawsuit against Bose," according to the decision by Judge Charles E. Butler granting the disqualification.

"The remedy of 'screening off' applies only in the case of a migrating attorney under Rule 1.10(c), not in cases of a long standing partnership, which are governed by Rule 1.10(a)," Judge Butler said.

The plaintiff was represented by Robert Leoni of Shelsby & Leoni. Defendants are represented by Dawn Doherty, Norman Brooks, and Brett Norton of Marks O'Neill O'Brien Doherty & Kelly PC and Richard Galperin and Ryan Keating of Morris James LLP.

The case is Bleacher v. Bose et al., case no. N16C-10-178, in the Superior Court for the State of Delaware.

Florida Court: No Take Backs on Imputed Conflicts

Firing a conflicted attorney doesn't "unimpute" the conflict, a Florida state appeals panel said in a January decision.

Backing a lower court call that went against The Ferraro Law Firm, the panel said the mesothelioma firm's decision to fire a lawyer who had previously represented tobacco companies didn't solve the problem of the conflict in the ongoing case.

In a state that does not recognize ethical screens as a way to account for imputed conflicts, the panel nevertheless noted that the Ferraro firm hadn't tried to isolate attorney Paulo Lima from ongoing matters like tobacco defense cases he'd worked on at Hunton & Williams LLP.

"Not only did the Ferraro Firm fail to initiate an inquiry and a screening process when Lima joined the firm in 2015, there is no indication that the firm removed Lima from work on Engle progeny cases for a year after [Philip Morris] detailed the kinds of client confidences Lima's work had included before he switched sides," according to the Dec. 27 opinion.

The order stems from a lawsuit the Ferraro firm filed on behalf of David and Corazon Canta against Philip Morris and R.J. Reynolds in 2007. Some seven years later, the firm hired Lima, who had been a Hunton & Williams associate since 2005 and had worked on Engle cases for Philip Morris.

Philip Morris and R.J. Reynolds began seeking disqualifications of the Ferraro firm from all its pending Engle progeny cases in the state in March 2016, even as Lima continued to work on related matters at his new firm, according to the order.

While acknowledging a lack of previous pertinent case law for "midstream" conflicts, the appeals panel said state law suggests that conflict imputation can be cured as to prospective or new representations through the termination of an individual attorney tainted by their former representations.

But the statute doesn't address the continuation of an attorney-client relationship that already existed when a personally prohibited lawyer joins a firm and is there for an extended period of imputation, the court said.

Plaintiffs are represented by James Ferraro and Juan Bauta of The Ferraro Law Firm. Philip Morris USA is represented by Frances Daphne O'Connor and Geoffrey J. Michael of Arnold & Porter Kaye Scholer LLP.

R.J. Reynolds is represented by Jeffrey Cohen, Benjamine Reid and Douglas Chumbley of Carlton Fields, and Jason Burnette of Jones Day.

The case is David Canta et al. v. Philip Morris USA Inc. et al., case number 3D17-1959, in the Third District Court of Appeal of the State of Florida.

Lack of Screen Supports Appearance of Conflict

Drawing on an "appearance of impropriety" standard, a New York state appeals court in December agreed to remove a plaintiffs lawyer who hired a paralegal who once worked for lawyers representing the estate of an owner of a company being sued by his client.

The Second Department decision rectified differing conclusions in related breach of contract cases in the Bronx and Westchester County on whether attorney Rocco D'Agostino could continue to represent plaintiffs in suits against Sally Sherman Foods, Inc. and Baldwin Endico Realty Associates Inc.

At issue was D'Agostino's hiring of James Monteleon as a paralegal. Monteleon had previously been employed by counsel for the estate of Michael Endico, the late principal of both Sally Sherman Foods and the realty company, according to the order.

While the Bronx County court concluded that Monteleon created a conflict warranting disqualification of D'Agostino, a Westchester judge had denied the defense requests based on the same

circumstances, leading to the appeal.

The panel sided with the defendants, and agreed they had established a "irrebuttable presumption" that Monteleon was subject to disqualification via a conflict imputed to D'Agostino.

The court also noted that D'Agostino had made no effort to erect a "Chinese wall" for his employee — Monteleon became D'Agostino's associate after passing the bar — supporting the position that there was at minimum an appearance of conflicted interests.

"An attorney must avoid not only the fact, but even the appearance, of representing conflicting interests," the unanimous panel said. "An attorney may not place himself or herself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship."

Plaintiffs were represented in the Second Department appeal by Rocco F. D'Agostino. Defendants are represented by Harry Petchesky of LePatner & Associates LLP.

The cases are Joseph N. Moray v UFS Industries Inc. dba Sally Sherman Foods Inc. case number 55645/14, and USA Recycling Inc., v UFS Industries et al., case number 50129/14, in the Supreme Court of the State of New York, Appellate Division, Second Judicial Department.

--Editing by Pamela Wilkinson and Breda Lund.
