

# AVOIDING DISQUALIFICATION WITH EFFECTIVE ETHICAL SCREENING

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**Y**our firm wants to hire a lawyer with experience in your practice areas. Since lawyers switching firms can bring conflicts of interest that “infect” their new firms, and lead to disqualification, you run her previous clients through your conflicts software. You discover she worked briefly for a client in a case in which your firm is representing the adverse party.

The intention of ethical screens (or “walls”) is to prevent lawyers from sharing past client confidences that are material to matters at their new firms. In California, the use of ethical screens has not yet been sanctioned to avoid disqualification in all situations. They can, however, help encourage clients to give informed written consent to your representation. The key for any ethical screen is that it be timely and effective.

## Ethical Screening In California

Under the imputed disqualification doctrine, if one lawyer is disqualified from representing a client in a matter, the entire firm is disqualified. Before ethical screening, only the informed written consent of the former client could prevent imputed disqualification, based on an irrebuttable presumption that confidential information from the prior representation was shared with the new firm.

Ethical screening in California has, until recently, been limited to non-lawyers (such as legal assistants) switching firms, or to attorneys and judicial officers moving between the public and private sectors. However, in *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776, one court expanded the possible use of ethical screening to the situation where an attorney had been provided

confidential information by plaintiffs’ counsel about serving as a consultant. He was not retained as a consultant, and later joined the firm defending the case. The California Supreme Court has not addressed whether expanded ethical screening is now permitted. The scope of *Kirk’s* application remains uncertain.

## Best Practices

These steps will, nevertheless, create an ethical screen that may rebut the presumption of shared confidences—and disqualification—where permitted:

- Erect the screen as soon as possible and before the conflict arises—before the “tainted” attorney joins the firm, or before work begins on the new matter.
- Give written notice to all screened persons and the entire firm—particularly those working on the matter—that the screen is in ef-



fect and what it entails, including follow-up reminders.

- Prohibit any communication about the matter between the screened person and those working on it (lawyers and staff), and prohibit any access to files or other information about it.
- Create as much physical separation as possible between those working on the matter and the screened person.
- Use the best technology available to limit access to physical and electronic files for the matter (including document management software to limit electronic access); segregate and label physical files to prohibit access by the

screened person.

- Notify the affected former client of the steps taken, in writing; maintain a copy of that notice.
- Train all personnel on conflicts and screening procedures, including the penalties for breaching an ethical screen.
- Have a trained person in charge of the creation and maintenance of all screens.
- Maintain and preserve detailed records establishing all steps taken and when.
- Preclude screened attorneys from sharing profits from the representation, other than salaries and

regular partnership shares.

- Require that screened attorneys do not supervise attorneys handling the matter, and vice versa.

By taking these steps in a timely manner, you can reduce your firm's risk of disqualification. Explaining to affected former clients that you have taken these steps may also increase the chance they will, based on those assurances, provide informed written consent to your firm's representation.

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