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ETHICAL WALLS FIND ACCEPTANCE IN NINTH CIRCUIT

By Sean M. SeLegue

In the past, most lawyers spent their entire careers at one firm, often servicing a relatively stable group of clients. Now, attorneys change jobs freely, and clients come and go almost as frequently.

In addition, many firms have branch offices which physically separate the attorneys (and their files), and firms have so many lawyers they often cannot identify each other by sight. In short, the concept of a close-knit, everyone-knows-everything firm is now more often the exception rather than the rule.

The courts have not kept up with these important changes in the profession, and some courts still allow litigants to bring and win motions to disqualify counsel based on a mechanistic imputation doctrine under which every lawyer at a firm is deemed to "know" everything that is known by other attorneys in the same firm. This unstinting reliance on imputation has encouraged litigants (and their attorneys) to use disqualification motions for strategic reasons, rather than to really protect confidences. Many courts have seemed content to tolerate this costly and unfair situation.

The Ninth Circuit, however, is adapting to the times. The Circuit

has held that California law firms may employ an ethical wall to prevent one lawyer's conflict of interest from being imputed to every other lawyer at the firm. *County of Los Angeles v. United States District Court*, 223 F.3d 990 (2000). And in doing so, the Ninth Circuit predicted that the California Supreme Court would do likewise.

Facts in *County of Los Angeles* decision

The Ninth Circuit's decision involved a federal magistrate judge who retired and joined a small firm that specializes in civil rights actions. That firm filed a police brutality case against Los Angeles County. The defendants moved to disqualify the firm on the ground that the magistrate judge had presided over settlement talks in an earlier police brutality case involving a different plaintiff but the same deputy sheriff. The court assumed that the magistrate judge himself was disqualified, but noted that the firm had "walled off" the former judge from the pending case. Thus, the key question before the Ninth Circuit was whether California law would impute the former judge's conflict to his new firm despite the ethical wall.

The Ninth Circuit's Reasoning

At the outset, the Ninth Circuit considered whether to analyze the judge's prior work as a settlement judge under the usual disqualification rules that apply to lawyers or, instead, under the more lenient disqualification standards typically applied to former judges. The court noted that the scope of disqualification arising from a lawyer's prior work as a judge is narrow, because a judge is not usually exposed to confidential information. Judicial proceedings are, after all, open to public view.

When a judge presides over settlement talks, however, the situation is different: the judge "becomes a confidant of the parties, on a par with the parties' own lawyers." As a result, a court evaluating a disqualification motion will treat a former settlement judge "just as if he were a lawyer for one of the parties."

Federal courts interpreting state law are supposed to predict how the state's highest court will rule on an issue. The Ninth Circuit acknowledged some earlier California Court of Appeal decisions which had expressed skepticism about the effectiveness

of ethical walls. The Ninth Circuit, however, held that the California Supreme Court's decision in *People ex rel. Department of Corporations v. Speedee Oil Change Systems*, 20 Cal. 4th 1135 (1999), signaled that the state's high court "may well adopt a more flexible approach to vicarious disqualification." In doing so, the Ninth Circuit gave great weight to a particular passage in *Speedee Oil* as indicating that the California Supreme Court might be open in the future to approving ethical walls.

The Speedee Oil Decision

Some California state courts have conclusively presumed that lawyers in a firm share confidential information with one another, resulting in the automatic imputation of most conflicts. This is, of course, often a preposterous assumption, given the size of many law firms, the fact separate branch offices are often scattered across the nation (and even in foreign countries), and the hectic pace of today's practice. In *Speedee Oil*, however, the state Supreme Court left the door open to holding that the presumption of shared confidences is rebuttable.

In the passage highlighted by the Ninth Circuit, the state Supreme Court declined to actually decide whether an ethical wall would have cured the conflict present there. The court stated that it "need not consider whether an attorney can rebut a presumption of shared confidences, and avoid disqualification, by establishing that the firm imposed effective screening measures," because the firm in *Speedee Oil* had not even attempted to implement a formal screening procedure.

But quite significantly, the state Supreme Court acknowledged the possibility that "an ethical screen . . . could serve the same prophylactic purpose as disqualification."

California's Rule Revision Commission Should Follow the Ninth Circuit's Lead

The Ninth Circuit saw this language in *Speedee Oil* as a good sign, and so do we. Both the *Speedee Oil* case and the Ninth Circuit's opinion in *County of Los Angeles* signal that California courts may be ready to acknowledge the necessity of recognizing ethical walls in today's practice environment, in which lawyers so often move between firms and disqualification motions are more and more used merely for tactical advantage.

California lawyers and trial judges should follow the Ninth Circuit's lead and no longer assume that an ethical wall cannot constitute a valid defense to disqualification motion in appropriate circumstances. Other courts have, long ago, adopted this more functional and modern analysis. See, e.g., *Nemours Foundation v. Gilbane*, 632 F. Supp. 418 (D.Del. 1986).

California judges should now consider the equities of granting a disqualification motion based on all the relevant facts and circumstances, giving weight not just to the interests of the party seeking disqualification, but also to those of the party whose choice of counsel will be impeded by granting a disqualification motion based solely on an imputed conflict.

Express Your Opinion

California's Rule Revision Commission is currently examining all of our Rules of Professional Conduct to update them in light of changes in law and society. We believe that the Commission should follow the Ninth Circuit's lead by adopting a rule permitting law firms to use ethical screens in appropriate circumstances.

If you agree, please let us know or send your comments directly to:

Audrey M. Hollins, Esq.
Office of Professional
Competence, Planning and
Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-
1639
Telephone: 415.538.2167
Facsimile: 415.538.2171
Website: www.calbar.org

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ROGERS JOSEPH O'DONNELL & PHILLIPS

RJOP's Professional Liability Practice Group specializes in representing lawyers and law firms throughout California.

Pamela Phillips (Chair)
J. Michael Matthews
Suzanne M. Mellard
Merri A. Baldwin
Sean M. SeLegue
Phyllis A. Jaudes
Richard A. Jackson
S. Amber Lee
Tara-Nicholle B. Nelson
Constance J. Yu

311 California Street, 10th Floor
San Francisco, CA 94104
Telephone: 415.956.2828
Facsimile: 415.956.6457
E-mail: rjop@rjop.com