

California Lawyers Association
Ethics Committee
Formal Opinion No. 2021-1
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Elements of Effective Ethical Screens

This opinion addresses the elements of ethical screens that effectively comply with the Rules of Professional Conduct. California Rules of Professional Conduct, rule 1.0.1(k) provides a definition of a screen that, while helpful, does not provide a detailed roadmap for a law firm instituting an ethical screen.¹ Whether a screen is effective at meeting these standards must be determined on a case-by-case basis. But four required elements are (1) timely imposition of the screen, (2) prohibitions of communications across the screen, (3) no fee-sharing with prohibited² persons, and (4) notice to affected clients. Other factors that may be considered when evaluating the efficacy of a screen include the physical and operational separation of those on each side of the screen, limitation of prohibited individuals' access to the screened matter's file, the communication employed within the firm regarding its terms, negative internal consequences for violations of the terms, and the monitoring of the screen. This opinion does not consider the circumstances under which conflicts may be addressed through an ethical screen where a waiver is obtained.³

¹ The rule defines "screened" as the isolation of a lawyer from any participation in a matter, including the timely imposition of procedures within a law firm that are adequate under the circumstances (i) to protect information that the isolated lawyer is obligated to protect under these rules or other law; and (ii) to protect against other law firm lawyers and nonlawyer personnel communicating with the lawyer with respect to the matter.

² This opinion uses the term "prohibited," rather than the term "disqualified," to describe persons who are precluded by the Rules of Professional Conduct from representing a client because that is the term used in the Rules, which are intended primarily as disciplinary rules. (See Rules of Prof. Conduct, rule 1.0(a) & Comment [1].) This opinion also addresses what would be an effective ethical screen within the meaning of the Rules, rather than what elements may be appropriate or necessary to avoid disqualification. Although courts may typically take the conflict rules into consideration when addressing a disqualification motions, the rules are not intended to be conclusive in a particular matter. (See, e.g., *Kirk v. First American Title Ins. Co.* (2010) 183 Cal. App. 4th 776, 792.)

³ Lawyers and clients may sometimes resolve concerns regarding loyalty and/or confidentiality by agreeing to an ethical screen as a condition of the clients providing informed written consent in situations where the lawyers have a waivable conflict of interest. The elements of such screens are determined by independent agreement, rather than the Rules of Professional Conduct.

I. Introduction

On November 1, 2018, amended California Rules of Professional Conduct became effective. Those rules recognized for the first time the use of an ethical screen to resolve certain conflicts. Previously, case law in the context of disqualification motions had recognized the possible use of an ethical screen to prevent imputation of a conflict in certain situations.

Generally, a conflict of interest is imputed from a prohibited person, the one who has the conflict, to everyone else at the prohibited person's firm. In such situations, a conflict of interest that prohibits any one person from representing a client would, by default, prevent any other person at a firm from taking on the representation. But in circumstances where an effective ethical screen is permitted and implemented, prohibition of an entire firm need not happen.

An ethical screen is intended to prevent the sharing of confidences between the lawyers who possess confidential client information and others in the firm who are currently representing a different client. Functionally, ethical screens are generally employed when lawyers or nonlawyers have a conflict of interest that prohibits them from working on a matter. They safeguard the disclosure of confidential information when conflicts are imputed. This is achieved by implementing institutional mechanisms to effectively insulate against any flow of confidential information between the prohibited person and any other person in the firm. The adequacy of the measures taken must be determined on a case-by-case basis.

II. Analysis

A. Rules of Professional Conduct providing for ethical screens

Several Rules of Professional Conduct expressly provide for implementation of a screen without client consent to rebut the presumption of shared confidences. Comment [5] to Rule 1.0.1 identifies that protection should extend to the information of clients, former clients, and prospective clients. The Rules generally apply to lawyers and the aforementioned rules regarding screening by their terms refer to the screening of individual lawyers to prevent communications between the prohibited lawyer and other lawyers and nonlawyers in the firm who are working on the screened matter. Nevertheless, the Rules also recognize that under certain circumstances it will be necessary to screen a nonlawyer, such as a secretary or paralegal, to address a conflict. (See California Rules of Professional Conduct, rule 1.10, Comment [2].)

1. Former clients⁴

Several rules permit law firms to address conflicts under particular, limited circumstances without a former client's consent by erecting an ethical screen . Two rules, 1.11 and 1.12, provide for the circumstances that ethical screens may address conflicts without client consent in the context of former government officials or employees or former neutrals who participated personally and substantially in the former matter. California case law has long recognized the feasibility of screens in that context.⁵ Rule 1.10 provides for the circumstances that ethical screens may address conflicts without client consent in the private firm context where "the prohibited lawyer did not substantially participate in the same or related manner" while at a prior firm.

2. Prospective clients

Rule 1.18(a) defines "prospective client" as a "person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from the lawyer in the lawyer's professional capacity." Rule 1.18(b) prohibits a lawyer who has acquired confidential information from a prospective client as a result of the consultation from using or disclosing that information, even if no lawyer-client relationship resulted from the consultation. Rule 1.18(c) imputes that prohibition to the consulting lawyer's firm unless the prohibited lawyer is screened in accordance with rule 1.18(d).

B. Specific elements of an effective ethical screen

Whether an ethical screen adequately satisfies the requirements of the Rules of Professional Conduct in addressing a conflict depends on the facts unique to the circumstances. Although reviewing in the context of disqualification rather than through compliance with the Rules of Professional Conduct,⁶ courts have addressed screening issues by, among other things, considering the obligation to protect the client's confidential information and the prerogative of a party to select counsel of its choice. Accordingly, the absence of one or more of the non-mandated elements discussed below does not necessarily mean the screen is ineffective. And addressing each of the elements will not necessarily be sufficient to address a conflict. Context matters.

⁴ The Rules do not expressly provide for the use of ethical screens as a means to address concurrent conflicts.

⁵ See California Rules of Professional Conduct, rule 1.11, Comment [10].

⁶ Given the relatively recent vintage of California Rules of Professional Conduct permitting screens in particular situations without client consent, there is relatively little direction from State Bar decisions addressing the issue. Accordingly, we look to existing case law in discussing the efficacy of screens in other contexts. These determinations may not be binding on disciplinary determinations.

The screen should be designed to protect the confidentiality owed to the clients in both the prohibited matter—the matter that requires the prohibited lawyer be screened from working on the firm’s current matter—and the screened matter—the current matter that the firm is working on. In California, lawyers’ duty of confidentiality is set forth in Business & Professions Code section 6068, subdivision (e)(1), which provides that a lawyer must “maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.”⁷

1. Universally mandatory elements

Notwithstanding the importance of context in designing an adequate screen, there are several elements that are mandatory for an effective ethical screen. Each of the California Rules of Professional Conduct that permit screens requires the first three enumerated elements below. As a practical matter, we believe the fourth through sixth are also necessary.

a. Imposition of screen in timely manner

In those instances where the Rules of Professional Conduct require an ethical screen to permit others in the firm to provide legal service, the ethical screen must be timely. (See Cal. Rules of Prof. Conduct, rule 1.10(a)(2)(ii); 1.11(b)(1); 1.12(c)(2); and 1.18(d)(2)(i).) Acknowledging this, the Court of Appeal noted that, although the specific requirements for elements of an effective screen may vary from case to case, two are necessary. One is that there are preventative measures to prevent information from being conveyed, a topic discussed in more detail below. The other is timely imposition of those measures. (*National Grange of Order of Patrons of Husbandry v. Cal. Guild* (2019) 38 Cal.App.5th 706, 715.)

In practice, this means instituting the screen as soon as reasonably possible following discovery of the conflict by any individual in the firm. Factors that could potentially affect a determination of whether the screen had been set up timely would be (i) whether the prohibited individual provided any confidential information to any other person in the firm, (ii) how much time passed since the firm undertook the affected representation that the prohibited individual was to be screened from, (iii) how much work the firm had done before the screen was instituted, and (iv) whether the conflict was identifiable at any earlier time, or instead was the result of some trigger, such as the unanticipated joinder of a party or the discovery of a new witness. We note that, to the extent the prohibited individual provided material information to people

⁷ Section 6068, subdivision (e)(2), provides the single exception. The single exception is that lawyers may reveal a client’s confidential information where the lawyer reasonably believes such disclosure is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual. (Bus. & Prof. Code, § 6068, subd. (e)(2).)

working on the affected representation before a screen is implemented, it would necessarily be untimely.

b. No fee sharing on matter with any prohibited lawyer

The same paragraphs of the rules requiring that screens be timely also provide that the prohibited lawyer must be apportioned no part of the fee therefrom. Of note, comments for these rules also provide that this provision does not prohibit screened lawyers “from receiving a salary or partnership share established by prior independent agreement.” But screened lawyers “may not receive compensation directly related to the matter in which the lawyer is prohibited.” So, a prohibited person may receive a bonus based upon profitability of the entire firm, so long as that profitability – or the receipt of any particular funds – is not directly linked to the screened matter. By precluding a financial incentive for the prohibited attorney to assist, this provision offers further protection from confidential information being shared across the ethical screen. (*Kirk v. First American Title Ins. Co.* (2010) 183 Cal. App. 4th 776, 812.)

c. Notice to affected clients

Where the Rules of Professional Conduct require an ethical screen to permit others in the firm to provide legal service, the law firm must give notice to affected clients. (See Cal. Rules of Prof. Conduct, rules 1.10(a)(2)(iii); 1.11(b)(2); 1.12(c)(3)⁸; and 1.18(d)(2)(ii).) In situations where a conflict is imputed based on duties to a former client arising out of the prohibited person’s association in a previous firm, this notice must include a description of the screening procedures employed and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures. (Cal. Rules of Prof. Conduct, rule 1.10(a)(2)(iii).)

Notice should be sufficient to make the interested party aware of the potential threat to its confidential information and the measures taken to prevent the improper use or disclosure of such information. Although consent is not required, the interested party should have sufficient information to be able to suggest measures to strengthen the screen, and to challenge any apparent breaches. (*Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776, 813-814.)

⁸ Rule 1.12 addresses duties of former judges, arbitrators, mediators, or other third-party neutrals and requires notice to “parties and any appropriate tribunal” rather than to clients.

The screen is intended to provide the clients assurance that their confidential information will be protected from those with adverse interests.⁹

d. Prohibitions against communications across the screen

A prohibition of communication across a screen is the primary goal of any ethical screen. (*Kirk v. First American Title Ins. Co.* (2010) 183 Cal. App. 4th 776, 811.) In all but the most unusual case, it would be necessary for a law firm to establish express prohibitions against the discussion of confidential information as part of an ethical screen. After all, the purpose of an ethical screen is to prevent the sharing of client confidences which is otherwise assumed when attorneys are practicing together. (*Id.* at p. 812.) An express prohibition against discussing the information which must not be discussed should be a first step toward establishing this goal. (See Rules of Prof. Conduct, rule 1.0.1, Comment [5] [“To implement, reinforce and remind all affected law firm personnel of the presence of the screening, it may be appropriate for the law firm to undertake such procedures as . . . written notice and instructions to all other law firm personnel forbidding any communication with the personally prohibited lawyer relating to the matter.”].)

All persons on each side of the screen – that is, all prohibited persons and all persons working on the screened matter,¹⁰ including both lawyers and support staff – should be notified that they should not communicate regarding the screened matter with persons on the other side of the screen. They should also be directed not to access files or share any other information across the screen.

e. Limitation of prohibited person’s access to screened matter’s file

Limiting access to the screened matter prevents prohibited individuals from assisting in a matter with information that may be useful to the firm’s client. There are many ways to do this. Files may be stored in a locked cabinet, or in a separate location to which the prohibited attorney has no access. Warnings can be posted on file room doors. Files may be protected by lock and key. Electronic documents can be coded with restrictions on access and document

⁹ California authorities do not directly discuss whether lawyers who become aware that confidential information of affected clients was shared or accessed notwithstanding imposition of a screen, owe an obligation to communicate that fact to affected clients. We believe that similar obligations would be imposed as those that occur in other contexts where confidential information becomes accessible to those who are not supposed to have access. (See, e.g., ABA Formal Opn. 483.)

¹⁰ With ethical screens, there are two matters that are being screened. The first is the matter that the prohibited lawyer potentially had some information related to. The second is the matter that the law firm is presently undertaking. Throughout this opinion, “screened matter” refers to the latter.

management software can be used to block access to the prohibited lawyer. As with the other factors, there is no one particular method of preventing access to confidential information and files that is necessary. A directive not to access the information may be sufficient. But the more steps a firm has taken to prevent any disclosure, the more likely it is that the ethical screen to be adequate. (See *Kirk v. First American Title Ins. Co.* (2010) 183 Cal. App. 4th 776, 812.)

f. Limitation of access of firm lawyers or other personnel to the prohibited person's documents and information

The converse of this third element is also necessary. The reason to screen lawyers and nonlawyers is to prevent confidential information they acquired from the prohibiting matter from being used against that prospective or former client. That protects the confidentiality that is mandated under the Rules of Professional Conduct. Ways to achieve this may include precluding any information from the prohibited lawyer's former matters to be stored within the firm or the firm's storage systems, whether physical or electronic. For screens arising out of information obtained from prospective clients, there may be reasons why the firm would still want the information preserved, such as to respond to a later claim being made against the firm. In such instances, the information may be segregated from others, particularly those working on the screened matter. This could potentially mean employing one of the procedures discussed under the third element, but with the goal of precluding information flow from the opposite direction.

2. Other elements that may be required

An effective ethical screen must comply with the express requirements provided in the Rules of Professional Conduct. In short, a screen must isolate the individual lawyer or law firm employee who has a conflict from any participation in the matter. But whether the objectives are met so that the screen is adequate may depend on factors outside of the above universally-mandated elements. Whether these additional considerations will apply to the situation—whether involving a transaction, litigation, or other matter—may turn on a number of factors, including the size and structural divisions of the law firm involved, the likelihood of contact between the prohibited person and the screened attorneys and other firm employees who are responsible for the screened representation, and the existence of other conditions that prevent the prohibited person from accessing relevant files or other information pertaining to the present screened representation. Authorities and practice have suggested that the following elements may be considered as part of constructing an ethical screen. Whether, and to what extent they are required, will be situationally dependent.

Accordingly, the absence of one or more elements discussed below does not necessarily mean the screen is ineffective. And addressing each of them will not necessarily be sufficient to address a conflict.

a. Physical, geographic, departmental, and operational separation of personnel

Physical, geographic, departmental, and operational separation of lawyers sometimes facilitate the efficacy of a screen. Each supports the concept of “isolation” that is identified in the Rules’ definition of screening and may help prevent the accidental disclosure of confidential information. Such separation addresses the “everyday reality that attorneys, working together and practicing law in a professional association, share each other’s, and their clients’, confidential information.” (See *People ex re. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1153–1154.) Close proximity of attorneys “increases the actual risk of intentional or unintentional disclosure of [client] confidential information.” (*Hitachi, Ltd. v. Tatung Co.* (N.D. Cal. 2006) 419 F.Supp.2d 1158 1165.) So, in a small practice group or small firm, separating a lawyer with a conflict from the case alone might not be sufficient; separation from the lawyers handling the case may be necessary to safeguard against inadvertent disclosure.

In addition to physical separation, the efficacy of a screen may be enhanced where a prohibited attorney has no supervisory powers over the attorneys involved in the litigation, and vice versa. (See, e.g., *City of Santa Barbara v. Super. Ct.* (2004) 122 Cal.App.4th 17, 27.) The rationale is similar to that of precluding a prohibited attorney from receiving compensation from the matter. If the lawyers handling the matter are supervising the prohibited person, the prohibited person may feel obliged to assist. Likewise, if a prohibited lawyer is supervising others involved in the screened matter, there could be concerns that the prohibited lawyer sets policies that might affect subordinates’ handling of the particular matter or that the subordinates could feel pressure to provide information to the prohibited lawyer. (*Kirk v. First American Title Ins. Co.* (2010) 183 Cal. App. 4th 776, 813; see also *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839 [prohibition of entire government office appropriate despite screening effort where the office head had a conflict of interest].)

So, firms may consider, to the extent it is practical, employing physical and operational separation of prohibited persons from the screened matter. This may include having the matter handled by personnel who are in different offices or portions of an office (such as on different floors), or in a separate practice groups. To this end, firms may attempt to minimize the amount of communication and collaboration that occurs between persons on each side of the ethical screen. Such measures might include prohibiting personnel working on the affected matter

from working with the prohibited lawyer on other matters—even if the other matters are unrelated—or prohibiting shared support personnel from assisting lawyers (or others) on both sides of the screen.

b. Providing information on ethical screens generally to law firm personnel

Rules of Professional Conduct 5.1 and 5.3 provide that managerial and supervisory lawyers shall take reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers and nonlawyers in the firm will conform their conduct to the Rules of Professional Conduct and the State Bar Act. Education may be a component of such an effort. So, even before firms erect an ethical screen for a particular conflict, they may provide guidance on ethical screens to those employed by the firm. This may entail providing an understanding regarding the conflict of interest rules and when a screen may be used as well as a protocol for establishing and monitoring ethical screens. Often, this can be accomplished through conducting a training session or circulating memoranda that employees affirmatively confirm they have read and understand.

c. Negative internal consequences for communications across the screen

Negative internal consequences for communication across the screen may be a consideration to provide some reassurance to the affected former or prospective client that a deterrent will accompany the mandatory element, the preclusion of communications across the screens. Although not required, the potential for negative internal consequences may, as a practical matter, assist those persons at the firm who are responsible for enforcing the ethical screen to do so. Such consequences may take on many forms, including a focus on employment status, such as the potential for termination of employment.

d. Monitoring of ethical screen

To provide further assurance that ethical screens are complied with following their erection, firms may consider maintaining records of when it erects and dismantles ethical screens, and tracking all of the screens it is using at any given time. If someone in the firm is designated to monitor screens, they can periodically check whether the files—physical and electronic—are being stored appropriately. The firm’s information technology staff or provider may also be able to audit and identify who attempts to access the screened files from the moment of the creation of the screen onwards. And any notices and reminders, as well as monitoring information may be preserved as long as the matter continues, in case the firm is later required

to demonstrate the adequacy of its screen. To the extent that monitoring is employed, firms may want to consider the regularity with which screens are monitored, perhaps at quarterly intervals.

III. Conclusion

While even the most effective ethical screen does not insulate firms from all risk of discipline because of the existence of a conflict of interest, the timely erection of an effective ethical screen—in the limited circumstances where the Rules of Professional Conduct permit the use of such screens—may be an effective means to avoid prohibition of the entire firm from working on a conflicted matter. The above are the “typical elements” of a screen. Some of these elements are mandated by the rules, while others need not necessarily be present for an ethical screen to be sufficient to rebut the presumption of imputed knowledge. Any ethical screen must ultimately be judged by whether it is sufficient to meet its purpose, to satisfy concerns that a prohibited attorney has not and will not have any involvement with, or communication concerning, the screened matter that would support a reasonable inference that confidential information was or will be disclosed.

Caveat: In accordance with California Rules of Professional Conduct, rule 1.0, Comment [4], opinions of ethics committees in California are not binding, but should be consulted for guidance on proper professional conduct.