

California Federal Court Allows Screening of Conflicted Lawyer

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Openwave Systems, Inc. v. Myriad France S.A.S., Slip Copy, 2011 WL 1225978 (N.D. Cal. 2011)

Brief Summary

The U.S. District Court for the Northern District of California denied a motion to disqualify because, *inter alia*, the conflicted lawyer had been effectively screened.

Complete Summary

This contract dispute arose out of an asset purchase agreement. The buyer moved to disqualify the seller's firm because a lawyer at the seller's firm had done work for the buyer on the underlying asset purchase agreement.

The Northern District of California denied the buyer's motion because the seller established that the subject lawyer had not shared, and would not share any of the buyer's confidential information with his colleagues who were representing the seller. The court noted that the buyer provided no sworn evidence that the subject attorney had ever revealed confidential information to the lawyers representing the seller. Moreover, the seller's firm had erected an ethical wall by: (1) distributing a memo prohibiting discussion of all confidential information with involved personnel; (2) securing all paper and files; (3) labeling all paper documents with a statement regarding the ethical wall; and (4) limiting access to electronic files to the core group involved in the matter. The firm had also ensured that the subject attorney would not directly receive compensation from the litigation. Although that ethical screen was implemented after the conflict already existed, the court held that it was still timely because the firm implemented it within one day of being put on notice of the conflict.

The court further found that disqualification would be prejudicial to the seller. The court based its finding primarily on the fact that the buyer had, apparently for tactical reasons, delayed bringing its motion to disqualify for a number of months, during which the seller's firm spent substantial time preparing its case.

Significance of Opinion

Until 2010 it was not clear when, if ever, a conflicted lawyer could be screened in California for purposes of avoiding disqualification. See *Kirk v. First American Title Ins. Co.*, 183 Cal. App. 4th 776 (2010) (indicating that a screen could be effectively used by a firm representing a class action defendant where one of the firm's lawyers had, prior to joining the firm, received confidential information from plaintiffs' class counsel). After *Kirk*, California declined to adopt a screening rule in a proposed version of Model Rule 1.10, instead opting to let screening issues be resolved through case law. The present opinion marks perhaps the first extensive foray into the issue of screening by a California federal court since *Kirk*. Although federal courts are not technically bound to apply state law on the issue of disqualification, the Northern District chose to apply *Kirk*. The opinion is also notable because it, unlike *Kirk*, involved a more standard former-client conflict that arose from a lawyer switching firms.

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