

The California Lawyers Association Ethics Committee Provides Guidance on the Elements of Effective Ethical Screens

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California Lawyers Association – Ethics Committee Formal Opinion 2021-1

Brief Summary

On February 11, 2021, the California Lawyers Association Ethics Committee (the Committee) issued [Formal Opinion 2021-1](#), which identified the “Elements of Effective Ethical Screens” that comply with the California Rules of Professional Conduct (“California Rules”). The Committee identified six mandatory elements of effective screens, along with several non-mandatory factors. The Committee noted that its opinion applies to circumstances where the ethical screen is implemented without client consent. Ethical screens implemented with client consent are governed by independent agreement rather than the California Rules.

Complete Summary

Generally, a conflict of interest is imputed from the conflicted individual to all firm lawyers. However, by timely implementing an effective, ethical screen firm lawyers may be able to engage in the representation. On November 1, 2018, the California Rules officially recognized the practice of using ethical screens to resolve certain conflicts.

The Committee identified several rules that expressly provide for the use of an ethical screen. California Rule 1.10 provides ethical screens for lawyers who “did not substantially participate in the same or related matter” while at a previous firm. California Rules 1.11 and 1.12 provide ethical screens of former government employees or former neutrals, respectively, who personally and substantially participated in the prior matter. California Rule 1.18 provides for ethical screens of lawyers who have acquired confidential information from prospective clients.

The Committee emphasized that the effectiveness of any ethical screen in addressing a conflict depends on the context. The screen should protect the confidentiality owed to both the client in the matter that triggered the screen and the client in the screened matter.

The Committee identified the following “universally mandatory elements” of an effective screen:

Imposition of screen in a timely manner

Ethical screens should be implemented as soon as reasonably possible after the conflict is discovered. An ethical screen is untimely if the screened individual provided material information to other individuals involved in the screened matter before the screen was implemented.

No fee sharing on a matter with any prohibited lawyer

Screened lawyers may still receive their “salary or partnership share established by prior independent agreement.” However, they cannot “receive compensation directly related to the [screened] matter.”

Notice to affected clients

The notice should sufficiently communicate the potential threat to the affected clients’ confidential information and the measures taken to protect the confidentiality of such information.

Prohibitions against communications across the screen

Citing *Kirk v. First American Title Ins. Co.* (2010) 183 Cal. App. 4th 776, 811, the Committee noted that this is the “primary goal of any ethical screen.” Firms should notify all screened individuals and all individuals working on the screened matter that they should not communicate with individuals on the other side of the screen about the screened matter.

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

The more steps the firm takes to limit access and consequently disclosure, the more effective the ethical screen.

Limit access of firm lawyers or other personnel to the prohibited person’s documents and information, and vice versa

Limiting individuals on one side of the screen from accessing information of individuals on the other side of the screen prevents the use of confidential information acquired from other matters against that prospective or former client.

The Committee also identified the following non-mandated factors of an effective screen:

Separate all screened individuals from those working on the screened matter

Firms may consider physically, geographically, departmentally, and operationally separating all screened individuals from all individuals working on the screened matter. Increasing the physical proximity and operational separation between individuals decreases the risk of intentional or unintentional disclosure of confidential information.

Provide guidance on ethical screens to firm personnel

Firms may consider providing guidance on ethical screens to firm personnel. California Rules 5.1 and 5.3 provide that supervisory lawyers take reasonable efforts to ensure the firm has measures in place such that all firm personnel conform their conduct to the California Rules and the State Bar Act. In practice, this could include providing information on the conflict of interest rules, when a screen may be used, and the protocol for establishing and monitoring screens.

Implement internal consequences

Firms may consider implementing internal consequences for communications across the screen to deter such behavior.

Monitor ethical screens

Firms may consider monitoring ethical screens to ensure compliance. To do so, firms may consider maintaining records of when ethical screens are erected and dismantled and tracking all erected screens at a given time.

Significance of Opinion

The opinion identifies six elements mandated by the California Rules for ethical screens. It also suggests four additional factors that may increase the efficacy of ethical screens. However, as the opinion noted, even the most effective ethical screen may not be enough to protect a firm from the risk of discipline.

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