

Can Screens Cure Conflicts in New York?

BY ROY SIMON

It's almost summertime, and summertime is the time for screens - window screens, sunscreens, conflicts screens. Can screens cure conflicts of interest in New York that would otherwise disqualify an entire law firm under New York's imputed disqualification rule, DR 5-105(D)? The answer is: maybe. This article examines New York law on ethics screens and highlights two recent New York cases that discuss screens.

Our analysis begins with DR 5-105(D), which provides:

While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so under DR 5-101(A), DR 5 105(A) or (B), DR 5-108(A) or (B), or DR 9-101(B) except as otherwise provided therein.

In other words, when any lawyer in a law firm is disqualified due to a personal conflict (DR 5-101), a conflict with another current client (DR 5-105), a conflict with a former client (DR 5-108), or certain conflicts arising from former governmental service (DR 9-101(B)), then the entire law firm is disqualified unless a specific exception applies. Are screens an exception?

In theory, a properly built screen fully and effectively isolates the disqualified lawyer - and thus prevents the spread of that lawyer's conflict to the rest of the firm - by prohibiting the disqualified lawyer from communicating about the disqualifying matter with anyone else at the firm or from gaining any access to files, witnesses, or parties in the conflicting matter. Some states - Illinois, Pennsylvania, Oregon, and various others - formally recognize screens as a way to overcome a client's or former client's objection to a conflict of interest. The New York Code of Professional Responsibility does not expressly recognize screens except when the conflict arises from a lawyer's former government service - see DR 9-101(B)(1)(a) & (B)(2) - but New York courts have implied that screens may be effective in some circumstances.

The Court of Appeals approach to screens

The New York Court of Appeals addressed screens in *Kassis v. Teacher's Insurance and Annuity Association*, 93 N.Y.2d 611 (1999). Henry Kassis retained Weg & Myers to represent him and his company in a property damage case. Charles Arnold, a first year Weg & Meyers associate, played an important role in the case. He took depositions, attended mediation sessions, reviewed documents, and often spoke to the client. In the middle of the litigation, however, Mr. Arnold was hired by Thurm & Heller, a twenty-six lawyer firm representing the opposing side, TIAA. Alarmed, Weg & Myers asked Thurm & Heller partner Roula Theofanis to "detail the precautionary measures that the firm planned to take in order to prevent Arnold's inadvertent disclosure of confidential information he had obtained while at Weg & Myers." Ms. Theofanis responded with an impressive list of precautionary steps:

- "1. The entire file... will be kept in my office in lieu of our general filing area.
- "2. Mr. Arnold's office will be at a substantial distance from my office.
- "3. Mr. Arnold upon commencement of his employment with the firm on March 3, 1997 will be instructed not to touch the Kassis file nor to discuss the Kassis matter with any partner, associate or staff member of the firm.
- "4. There will be no meetings, conferences or discussions in the presence of Mr. Arnold concerning the Kassis litigation.
- "5. All future associates who may work on the Kassis matter with me in preparation for trial will be instructed not to discuss this file with Mr. Arnold."

Despite these measures, Kassis moved to disqualify Thurm & Heller. The Supreme Court denied the disqualification motion and the First Department narrowly affirmed, holding that (a) the safeguards employed by Thurm & Heller "eliminated the danger of Arnold inadvertently transmitting information he might have gained from his previous employment at Weg & Myers," and (b) given the strong "Chinese Wall," disqualifying Thurm & Heller would give Kassis "an undue advantage."

The Court of Appeals in *Kassis* reversed. The Court rejected a per se rule of disqualification whenever a lawyer switches to an opposing firm. But disqualification was warranted in *Kassis*, and the Chinese Wall was of no avail, because:

Given Arnold's extensive participation in the *Kassis* litigation and Thurm & Heller 's representation of the adversary in the same matter, defendants' burden in rebutting the presumption that Arnold acquired material confidences is especially heavy. Defendants' conclusory averments that Arnold did not acquire such confidences during the prior representation failed to rebut that presumption as a matter of law. *The erection of a "Chinese Wall" in this case, therefore, was inconsequential.* Thus, we hold, as a matter of law, that disqualification is required. [Emphasis added.]

However, *Kassis* did not reject all use of screens. On the contrary: "Because even the appearance of impropriety must be eliminated, it follows that even where it is demonstrated that the disqualified attorney possesses no material confidential information, a firm must nonetheless erect adequate screening measures to separate the disqualified lawyer and eliminate any involvement by that lawyer in the representation." Thus, the *Kassis* Court simultaneously rejected screens when the lateral attorney acquired material confidential information at the old firm, and mandated screens when the lateral attorney has not acquired any protected information at the old firm.

Kassis not the last word

The *Kassis* opinion, however, was not the last word. Shortly after *Kassis*, the First Department decided *Cummin v. Cummin*, 1999 WL 744252 (1st Dep't 1999). Around 1993, Mr. Arch Cummin consulted with Robert Cohen, a prominent divorce lawyer at Morrison, Cohen, Singer & Weinstein. During a one or two hour meeting, Mr. Cummin and Mr. Cohen discussed Cummin's real estate and security holdings, his

separate property claims, and issues of custody and support. Mr. Cummin paid \$400 for a one-hour consultation, but did not hire Cohen or his firm.

Six years later, Mrs. Cummin contacted Steven Ruchefsky, another divorce lawyer at Morrison Cohen. During his routine conflict check, Ruchefsky discovered that his partner (Robert Cohen) had previously been consulted by Mr. Cummin. The firm immediately set up a Chinese Wall. Nevertheless, Mr. Cummin moved to disqualify Morrison Cohen, and the Supreme Court granted the motion based on an "appearance of impropriety."

The First Department reversed, stating:

In *Kassis v Teacher's Ins. & Annuity Assn.*, a law firm was disqualified from representing a litigant because one of its newly hired attorneys had... represented an adversary in the same litigation. What distinguished that case was the attorney's lead and active role in the case at the prior firm, his regular contact with the client, and his familiarity with all the details of the former client's confidences. None of these factors is present here. Indeed, the Court of Appeals implied that the presumption could be rebutted where confidential information previously acquired by a large firm, but never shared among its associates, could be physically isolated, such as with the erection of a "Chinese wall."

The court noted that Morrison Cohen had not kept any notes or memoranda of the 1992 consultation, and nothing indicated that Cohen had shared any information with any of his colleagues at the time. "Furthermore," the court said, "the screening mechanism implemented by the Morrison Cohen firm to protect any confidences that may have been divulged by defendant six years earlier constituted an adequate safeguard against even the appearance of impropriety." Accordingly, the First Department held that the presumption of shared confidences had been rebutted and reversed Morrison Cohen's disqualification.

Was *Cummin v. Cummin* an aberration? There has been no other case like it, so perhaps it is an aberration. But two recent New York cases - one state, one federal - suggest that courts may recognize Chinese Walls in some circumstances.

A scholarly opinion from S.D.N.Y.

This March, Judge Pauley of the Southern District of New York issued a scholarly opinion in *Mitchell v. Metropolitan Life Insurance Co.*, 2002 WL 441194 (S.D.N.Y. 2002). A lawyer named Wendy R. Fleishman had worked as counsel in the products liability department at Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden") for more than seven years. From late 1998 through early 2001, Ms. Fleishman devoted "a substantial portion" of her time to defending MetLife. In 1999, Ms. Fleishman spent over 1,800 client billable hours representing MetLife in almost fifty matters. In 2000, she accrued over 1,540 client billable hours representing MetLife in almost forty matters. In many of those matters, Fleishman had "primary day-to-day responsibilities as lead outside counsel."

In January of 2001, Ms. Fleishman left Skadden to join the twelve-lawyer New York office of San Francisco-based Lief Cabraser, which was soon retained as counsel for plaintiffs in a class action accusing MetLife of gender discrimination. MetLife soon moved to disqualify Lief Cabraser because of

Fleishman's presence at the firm. Lief Cabraser argued that it had taken "screening measures" to protect against any misuse of MetLife's confidential information, but the court granted the motion to disqualify.

The Mitchell court spent most of its time analyzing the relationship between Fleishman's work at Skadden and the case now being handled by Lief Cabraser.

Although none of her work at Skadden was "directly related to employment discrimination," the court concluded that the current class action was "substantially related" to the MetLife matters Fleishman had worked on at Skadden. "Perhaps dispositive," the court said, was that Fleishman "personally interviewed managers who had decision-making authority over certain named plaintiffs and... potential witnesses. Fleishman would be privy to confidential information that could serve to challenge credibility, to prepare cross-examinations, and to otherwise contest their proffered justifications for the adverse employment decisions challenged by plaintiffs."

Given the substantial relationship, Lief Cabraser's only remaining hope of avoiding disqualification was the screen around Ms. Fleishman. The court examined the screen at length. The Second Circuit, Judge Pauley noted, "has expressed consistent skepticism about screening as a remedy for conflicts of interest and declared that such procedures ultimately must be rejected if they are subject to doubt." Courts had approved screening procedures only in "the limited circumstances where a conflicted attorney possesses information unlikely to be material to the current action and has no contact with the department conducting the current litigation, which typically occurs only in the context of a large firm." In addition, to rebut the presumption of shared confidences, "the screening measures must have been established from the first moment the conflicted attorney transferred to the firm or, at a minimum, when the firm first received actual notice of the conflict." Lief Cabraser had not met either test. The court said:

In this case, the screening measures put in place by Lief Cabraser do not suffice to avoid disqualification...Although Fleishman personally is not involved in prosecuting this action, she works in the 12-lawyer New York office of a relatively small firm. Two of the attorneys in the New York office are assigned to this case, and Fleishman is working directly with one of them on another significant class action suit. Given that Fleishman works in close proximity to attorneys responsible for this action, and regularly interacts with at least one of them, there exists a continuing danger that Fleishman may inadvertently transmit information gained through her prior representations of MetLife.

Timing was also against Lief Cabraser. "The record shows that the firm did not formally implement the screen until March 9, 2001, almost two months after Fleishman joined the firm and well after the time the firm had actual notice of the conflict," the court said. "A screening device implemented only after a disqualified lawyer has joined the firm, in an instance where the firm knew of the problem at the time of her arrival, further diminishes the possibility that screening remedies the conflict..." Because "the potential of inadvertent disclosure would lurk constantly in the background," the only remedy was disqualification.

Speculative opinion from the Third Department

A variation on screens involving side-switching within a law firm (as opposed to a lateral-hire situation) reached the Third Department in April of this year in *R.M. Buck Construction Corp. v. Village of Sherburne*,

740 N.Y.S.2d 154 (3d Dep't 2002). (See, NYPRR, May 2002, p. 8.) In early April of 1999, the Village of Sherburne had retained the services of Roger Bradley, a partner with the law firm of Melvin & Melvin LLP, to represent the Village's interests in a dispute with R.M. Buck ("Buck"), a construction contractor, relating to bids for proposed improvements to a wastewater treatment plant. Basically, Buck no longer wanted to do the work for the amount of its bid and was seeking more money from the Village for certain "dewatering" work. The Village refused and awarded Buck the contract at the price Buck had bid. Bradley's services for the Village lasted less than two weeks; he completed his assignment and did not perform any legal services for the Village after April 14, 1999.

A little over a year later, in May of 2000, another attorney with Melvin & Melvin named Edward Sheats Jr. served the Village with a notice of claim on Buck's behalf, seeking money for "additional dewatering and additional work, labor and materials for the construction of the dewatering system for the project..." In October of 2000, Melvin & Melvin sued the Village on Buck's behalf alleging breach of contract and unjust enrichment. The Village moved to disqualify the law firm from representing Buck based on Roger Bradley's prior representation of the Village. The Supreme Court denied the Village's motion, but the Third Department reversed and ordered Melvin & Melvin's disqualification. The Third Department noted, however, that "not all situations involving imputed disqualification mandate that other members of the firm be barred from representation. A court must examine the circumstances of the particular case and, if it is not clear as a matter of law that disqualification of the entire firm is required, the firm should be given an opportunity to rebut the presumption" that a former client's confidences (here, the Village's confidences) have been shared with lawyers now opposing the former client. Even if the presumption of shared confidences is rebutted, however, "a firm must nonetheless erect adequate screening measures to separate the disqualified lawyer and eliminate any involvement by that lawyer in the representation [i.e., erect a 'Chinese Wall']."

The court readily concluded that Roger Bradley, the attorney who had represented the Village in its dispute with Buck over the wastewater project, would be personally disqualified from representing Buck in the subsequent breach of contract action regarding "the exact same project." Then, citing *Kassis*, the court addressed the issue of screens:

[I]t is not clear on this record whether the entire firm should be disqualified outright as a matter of law. Under these circumstances, the law firm is given the opportunity to rebut the presumption of disqualification by ...presenting "facts establishing [that] the firm's remaining attorneys possess no confidences or secrets of the former client." Additionally, consideration must also be given to other factors, including the size of the law firm, the size of office space, the accessibility of files and the relative informality of office interaction. [Citations omitted.]

Here, Melvin & Melvin had failed to rebut the presumption of imputed disqualification. Furthermore, the court said, even if the presumption had been rebutted, "we note that there was also insufficient proof that the law firm erected adequate screening measures." Accordingly, the court concluded that Melvin & Melvin should have been disqualified.

Conclusion: Timing is (almost) everything

The lesson I draw from *Mitchell and R.M. Buck* is that when it comes to screens, timing is almost everything. Once a former client establishes that the new matter is substantially related to the old matter,

the only remaining line of defense is a solid Chinese Wall. Most firms know how to build a Chinese Wall, but if the wall isn't in place starting the moment the former client's confidences and secrets come into the law firm, building it later probably won't help. When a law firm hires laterally, therefore, the law firm must establish an airtight screen from day one. When a law firm switches sides as it did in *Buck*, the timing test will seldom be met. The rare case is illustrated by *Cummin v. Cummin*, where six years had passed since the firm did two hours of work, and no one in the firm had any memory or written record of the substance of that work. But in the usual case, when the lawyer who worked on the former client's matter is still with the firm and limited time has passed since the representation, disqualification will nearly always be in order.

In sum, the best advice I can give is: 1) when you hire laterally, get the screen in place before the lateral arrives; and 2) when a client asks your firm to oppose a former client in a substantially related matter, reject the case unless you can obtain the former client's informed consent - otherwise, you'll spend most of your time fighting a motion to disqualify, and nine times out of ten, you'll lose.

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