

# Court Of Appeals Disqualifies Firm Despite Chinese Wall

BY ROY SIMON

In *Kassis v. Teacher's Insurance and Annuity Association*, 243 AD2d 191 (1st Dep't 1998), the First Dept. surprised a lot of people by denying the plaintiff's motion to disqualify the defendant's counsel, Thurm & Heller, after it hired an associate who had handled much of the plaintiff's work in ongoing litigation. The basis of the decision was that the firm had set up an elaborate Chinese Wall to prevent the plaintiff's former lawyer from sharing any of the plaintiff's confidences or secrets with the Thurm & Heller defense team.

This newsletter criticized *Kassis*, saying, a "Chinese Wall should not overcome the well grounded objection by a client whose trusted lawyer has jumped ship to the opposing law firm in mid-case." It urged the Court of Appeals to hear the *Kassis* case and "reverse it before any more damage is done to clients and to attorney-client relationships in New York." See, Roy Simon, *Chinese Wall Fends Off Disqualification in First Department*, NYPRR, Sept. 1998, at 6-7.

## Court Of Appeals Agrees

The Court was apparently listening. In *Kassis v. Teacher's Insurance and Annuity Association*, 1 No. 86 (N.Y. 1999), a unanimous Court reversed and disqualified Thurm & Heller. This was the correct decision. Without question, the associate who moved to Thurm & Heller was personally disqualified from the defense side in the pending litigation because he had been intensely involved in representing the plaintiff. He had taken five depositions, reviewed documents, talked regularly with the client, attended an inspection of the building in dispute, and represented plaintiff at two mediation sessions. Under NY's imputed disqualification rule, DR 5-105(D), all of the lawyers Thurm & Heller were disqualified from representing the defendant in the litigation.

The Court went beyond the facts of the *Kassis* case. Drawing on *Solow v. W.R. Grace & Co.*, 83 NY2d 303 (1994), it reiterated that "imputed disqualification is not an irrebuttable presumption" and told how to defeat a motion to disqualify:

[N]o presumption of disqualification will arise if either the moving party fails to make any showing of a risk that the attorney changing firms acquired any client confidences in the prior employment or the nonmoving party disproves that the attorney had any opportunity to acquire confidential information in the former employment. In either case, it would not have been established that the side-switching attorney actually "represented the former client in a matter" and neither the attorney nor the firm would need to be disqualified. [Citations omitted.]

When a rebuttable presumption of disqualification does arise — *i.e.*, when the party seeking disqualification demonstrates a risk that the lateral hire acquired confidential information at his old firm,

or when the firm opposing disqualification can't prove the lateral hire's lack of access to confidential information at his old firm — then:

[T]he party seeking to avoid disqualification must prove that any information acquired by the disqualified lawyer is unlikely to be significant or material in the litigation. *In that factual scenario, with the presumption rebutted, a 'Chinese Wall' around the disqualified lawyer would be sufficient to avoid firm disqualification.* [Emphasis added; citations omitted.]

The Court is essentially mandating Chinese Walls whenever a lateral hire arrives with any information about pending litigation (and presumably any transaction) in which the hiring firm is opposing -the-lateral's old firm. This will have — — the greatest impact on large firms. Suppose Cravath and Proskauer represent opposing sides in an antitrust suit. If Proskauer hires a Cravath lawyer, and Cravath moves to disqualify Proskauer in the antitrust suit, then Proskauer can avoid disqualification only by showing either that the former Cravath lawyer had no access to confidential information about the antitrust suit while at Cravath, or the former Cravath lawyer did acquire some confidential information about the antitrust suit but (a) the information is “unlikely to be significant or material” and (b) Proskauer promptly set up an airtight Chinese Wall around the former Cravath lawyer.

The difficult questions are: did the lateral hire have access to the opposing party's confidences while at his old firm and is the data likely to be “material or significant” in any pending matters against the lateral's old firm. The smart way to avoid these difficult questions is to routinely set up a Chinese Wall around every lateral hire before she sets foot in the new firm. As your mother always said: “Better safe than sorry”