

Rule 1.11: Screening Former Government Lawyers

BY ROY SIMON

Two decisions this year have applied Rule 1.11 of the New York Rules of Professional Conduct to former government lawyers now in private practice. In *In re Coleman*, 69 A.D.3d 846 (2d Dept. 2010), the Second Department reversed a disqualification of a law firm that had hired the former government lawyer. But in *Chernick v. Essex Equity USA, LLC*, 2010 WL 2331407 (N.Y. County Supreme Ct., June 10, 2010), the court disqualified a law firm that hired a former government lawyer. This column will focus on the *Chernick* case, but *Coleman* is also worth reading.

Background: The Structure of Rule 1.11

Rule 1.11, entitled “Specific Conflicts of Interest for Former and Current Government Officers and Employees,” covers two topics related to the so-called “revolving door” between government and the private sector. The first topic, addressed in Rule 1.11(a)-(c), concerns lawyers formerly in public service. The second topic, addressed in Rule 1.11(d) and (f), concerns lawyers currently in public service. (Note that Rule 1.11 applies even to lawyers who worked for the government in a nonlegal capacity, such as a policy advisor, agency head, or elected official.)

In addition, Rule 1.11(e), which helps to define the crucial term “matter” for purposes of Rule 1.11, applies both to former government lawyers and to current government lawyers. To understand Rule 1.11(e), we first have to examine the basic definition of “matter” in Rule 1.0(l), which provides:

“Matter” includes any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, arrest, negotiation, arbitration, mediation or any other representation involving a specific party or parties. [Emphasis added.]

Rule 1.11(e) modifies this definition only for purpose of Rule 1.11 by stating:

For purposes of this Rule, the term “matter” as defined in Rule 1.0(l) does not include or apply to agency rulemaking functions.” [Emphasis added.]

Thus, Rule 1.11(e) essentially makes clear that “agency rulemaking functions” are not within the scope of the term “matter” as that term is used in Rule 1.11.

The focus of this article is on lawyers who move from public service to private practice. When a lawyer moves from public service to private practice, the essential provisions for analyzing potential conflicts are paragraphs (a), (b), and (c) of Rule 1.11. With deliberate oversimplification, I will squeeze each of these three important paragraphs down to its essence.

Rule 1.11(a) provides that a lawyer who has formerly served as a public officer or employee of the government “shall not represent a client in connection with a matter in which the lawyer participated

personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation." By implication, informed consent from the appropriate government agency cures the conflict, removing the disqualification and allowing the individual to undertake the representation.

Rule 1.11(c) provides that a lawyer/public servant who acquired "confidential government information" about a person "may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person." Rule 1.11(c) then defines the term "confidential government information" as information (1) "obtained under governmental authority," and (2) "not otherwise available to the public," and (3) either (i) that the government is prohibited from disclosing to the public, or (ii) that the government has a legal privilege not to disclose. Unlike Rule 1.11(a), Rule 1.11 (c) has no consent provision. Thus, government consent will not remove the disqualification from the individual possessing confidential government information.

However, if a lawyer in a firm is personally disqualified under paragraphs (a) or (c), Rule 1.11(b) provides that the rest of the lawyers in the firm may handle the matter if (1) the personally disqualified lawyer is promptly screened from the matter, and (2) no other circumstances in the particular representation create "an appearance of impropriety." This provision overrides the sweeping imputation provisions of Rule 1.10, which governs all matters not involving former government lawyers and does not (unlike ABA Model Rule 1.10 as amended last year) allow screening to cure conflicts of interest when lawyers move laterally from one private firm to another.

With that background in place, I turn to the *Chernick* case.

The Facts in *Chernick v. Essex Equity Holdings*

In March 2007, respondents M. Brian Maher and Basil Maher negotiated the sale of their family business, which specialized in the operation of marine terminals. The proceeds went to their new business, Essex Equity. Over the next few months, Essex Equity wired some \$600 million in proceeds from the sale to Lehman Brothers to invest. This suit began because Essex Equity claimed that Lehman Brothers invested its money in ways that differed radically both from the sample investment portfolio that Lehman had shown the Mahers and from their investment objectives. In particular, Lehman invested millions of dollars in something called "auction rate securities" ("ARS").

The *Chernick* court does not explain the nature of auction rate securities or how Lehman's investment in ARS damaged the Mahers, but the problems were apparently serious because the U.S. Attorney's Office for the Eastern District of New York conducted a criminal investigation of Lehman's sale of auction rate securities to Essex Equity. The investigation was led by a prosecutor named Sean Casey, who was then the Deputy Chief of the Business and Securities Fraud Unit of the U.S. Attorney's Office in the Eastern District of New York. As part of that investigation, subpoenas were issued under Casey's name requiring three Lehman Brothers employees to appear and give testimony before a grand jury.

In addition, in January of 2008, Essex Equity commenced an arbitration proceeding under the auspices of FINRA against Lehman Brothers and various other parties (the "Arbitration") seeking \$286 million in damages. Essex Equity was represented in the Arbitration by the boutique Manhattan law firm of Kobre & Kim. The same ARS transactions that were a subject of the federal government's Investigation were also the subject of the Arbitration brought by Essex Equity.

On September 19, 2008, Lehman Brothers filed for bankruptcy, which automatically stayed the Arbitration as against Lehman. Less than a month later, Kobre & Kim asked FINRA to put the entire Arbitration on “hold” so that Essex Equity could consider whether to pursue claims against the remaining parties to the Arbitration even though the Lehman Brothers claims were stayed. FINRA complied, and the Arbitration went dormant for nearly a year.

At some point during the “hold” period, Sean Casey decided to leave the U.S. Attorney’s Office. Before leaving, Casey met with Peter Norling, the Professional Responsibility Officer for the U.S. Attorney’s Office in the Eastern District. Norling advised Casey that he would be prohibited at any subsequent legal job from working on any matter in which he had worked or had supervisory authority while at the U.S. Attorney’s Office. Shortly after that meeting, Casey joined the New York office of Mayer Brown.

In July of 2009, Casey began seriously considering joining Kobre & Kim. From July through September, Casey also had conversations with the U.S. Attorney and other high ranking people at the U.S. Attorney’s Office regarding what matters Casey could and could not handle if he moved to Kobre & Kim. In light of these conversations, Casey did not seek the U.S. Attorney’s Office’s consent to work on the Essex Equity case.

Simultaneously, Casey was apparently negotiating seriously with Kobre & Kim, and restrictions on Casey’s practice must have come up. Michael Kim, a name partner at Kobre & Kim, knew before hiring Casey that the firm would need to implement certain screening procedures. Ben Leyland, an administrative staff member in charge of risk management, wanted to send around memoranda about the screening issues, but Kim considered that “superfluous” and “not really even appropriate to be talking” to the rest of the firm about screening Sean Casey from the Essex Equity matter because most people at Kobre & Kim had nothing to do with that matter.

After Kobre & Kim offered Casey a job but before Casey started working there, Kobre & Kim’s Chief Administrative Officer, a lawyer named Zoe Erlich, met with Casey to identify the matters from which Casey would have to be screened.

Toward the end of the Arbitration “hold” period, in the summer of 2009, Kobre & Kim’s investigation revealed insurance coverage that made the case against the non-Lehman parties economically viable, and they sought Essex Equity’s approval to re-activate the Arbitration. In September of 2009, Essex Equity gave that approval, and on October 7, 2009, Kobre & Kim informed FINRA that Essex Equity intended to proceed against the remaining parties to the Arbitration. Sometime in October of 2009, Casey moved to Kobre & Kim. (The court could not determine the precise date. Petitioners said it was October 1, 2009, just six days before Kobre & Kim revived the Arbitration, but Kobre & Kim said Casey did not join the firm until October 19, 2009, nearly two weeks after Kobre & Kim had revived the Arbitration.)

During Casey’s first several days working at Kobre & Kim, both Michael Kim and Steven Kobre (the two name partners) had separate formal conversations with Casey about the importance of not being involved in any cases within Kobre & Kim that would “overlap with anything he handled” at the U.S. Attorney’s Office. On December 9, 2009, Kobre & Kim issued a firm-wide memorandum listing all 34 matters from which Casey was screened by their identification number code (which is how matters are referenced within Kobre & Kim). The codes listed in the memorandum referred to all matters being

handled in Kobre & Kim which were investigated or prosecuted by the United States Attorney's Office for the Eastern District of New York, Casey's former employer. The memorandum instructed personnel "not to discuss in front of or consult with Sean Casey regarding any aspect of the above-referenced client matters." The December 9th Memorandum was the first firm-wide written notification regarding Casey.

Finally, on January 27, 2010, almost four months after Casey had begun working at Kobre & Kim, the firm sent formal written notice to the U.S. Attorney's Office that Casey was working at Kobre & Kim and had been screened off from various matters, including the Essex Equity matter.

The Arbitration Defendants Move to Disqualify Kobre & Kim

For about six months after Casey joined Kobre & Kim, the revived Arbitration remained relatively quiet. But then things got hot. By Order to Show Cause dated April 16, 2010, respondents asked the New York County Supreme Court to stay the Arbitration and to disqualify Kobre & Kim from representing Essex Equity in the Arbitration. At a hearing, the court heard two days testimony from Sean Casey and Michael Kim, a senior partner at Kobre & Kim. The hearing resulted in this opinion.

Before starting his analysis, Justice Yates made a threshold observation about the court's jurisdiction:

The issue of disqualification is before the Court rather than the arbitration panel because "matters of attorney discipline are beyond the jurisdiction of arbitrators" ... "Issues of attorney disqualification similarly involve interpretation and application of the Code of Professional Responsibility and Disciplinary Rules, as well as the potential deprivation of counsel of the client's choosing, and cannot be left to the determination of arbitrators selected by the parties themselves for their expertise in the particular industries engaged in" [citations omitted].

The court then embarked on its analysis. Relevant to Rule 1.11(a), Casey did not dispute that he had "participated personally and substantially" in the matter that was the subject of the Arbitration proceeding. Relevant to Rule 1.11(b), Casey did not dispute that he acquired "confidential government information." Accordingly, Casey recognized that he was "personally disqualified from participating in the proceeding because Rule 1.11 is not limited to cases where the Government agency is itself a party." Elaborating on this point, Justice Yates noted that Comment 3 to Rule 1.11 cautions, in part, that:

[T]he disqualification provisions of the rule apply "regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a private client after the lawyer has left government service..."

Despite Casey's personal disqualification based on both his personal and substantial participation and his acquisition of confidential government information during his time at the U.S. Attorney's Office, Kobre & Kim contended that it could ethically continue to represent Essex Equity because it had complied with the screening and notice provisions outlined in Rule 1.11(b), effectively isolating Casey from the matter. Petitioners (the Arbitration defendants) countered by arguing that Kobre & Kim was "presumptively disqualified because Casey is disqualified," and that screening was irrelevant. Thus, the efficacy of screening became the central issue before the court.

Is Screening Effective to Cure Rule 1.11(a) and (c) Conflicts?

To build their case that screening was not effective, petitioners relied on the holding in *Kassis v Teacher's Ins. & Annuity Assoc.*, 93 NY2d 611 (1999). There, the New York Court of Appeals held that screening could not save a law firm from disqualification if an attorney acquired significant and material confidential information about a party at one law firm and then moved laterally to the firm representing the adverse party. Based on *Kassis*, petitioners made the following argument:

[W]here an attorney is disqualified as a result of having acquired confidential information at a prior position, there is a "presumption that the entirety of the attorney's current firm must be disqualified," and to rebut the presumption the law firm must demonstrate that (1) "any information acquired by the disqualified lawyer is unlikely to be significant or material in the litigation," and (2) "an effective screen has been implemented" . . . Only if the law firm satisfies the first requirement need the court proceed to the second step.

Faced with these competing arguments, Justice Yates described the issues before the court as follows: "(1) Does *Kassis* prohibit use of the screening procedure provided by Rule 1.11 in this case and, if not (2) did Respondents [Essex Equity] meet the requirements of Rule 1.11?"

Regarding *Kassis*, Justice Yates noted that *Kassis* had involved an associate with "extensive participation" in a matter on which he had worked in his prior law firm – he had conducted five depositions, attended two court-ordered mediation sessions as sole counsel for the client, appeared as the client's attorney at a physical examination . . . , and conversed with the client on a regular basis." Then the associate switched to another firm that represented the adversary in the same matter. The Court of Appeals, construing DR 5-105(D) (predecessor to current New York Rule 1.10), said:

"[S]ide switching" clearly implicates the policies both of maintaining loyalty to the first client and of protecting that client's confidences. These same principles give rise to the general rule that, where an attorney working in a law firm is disqualified from undertaking a subsequent representation opposing a former client, all the attorneys in that firm are likewise precluded from such representation.

Justice Yates found these facts distinguishable. "The associate in *Kassis* was not a public official who had left government employ," he said. "Instead he had moved from one private firm to another." When *Kassis* was decided, the Code of Professional Responsibility did not allow screening to avoid disqualification when an attorney moved from one private firm to another. Thus, DR 5-105(D) (the Code's imputation provision) "banned continued employment by any attorney in the firm in connection with a matter once the side-switching attorney joined the firm."

Justice Yates noted that the Court in *Solow v W.R. Grace & Co.*, 83 NY2d 303(1994), had rejected a per se rule of disqualification based on imputed confidences, reasoning that a per se rule is "unnecessarily preclusive because it disqualifies all members of a law firm indiscriminately, whether or not they share knowledge of a former client's confidences and secrets." The court in *Kassis* had likewise rejected a per se rule of law firm disqualification, declaring that there was a presumption of shared confidences and that a party seeking to avoid disqualification had to carry the "heavy burden" of proving that any information acquired by the disqualified lawyer was "unlikely to be significant or material in the litigation." If, and

only if, the party opposing disqualification met that burden could the firm continue –and even then, the *Kassis* court said:

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.

Based on *Kassis*, petitioners argued that screening could not save Kobre & Kim from disqualification for three reasons: (1) Casey had not met the “heavy burden” of demonstrating that he is not in possession of “significant and material” confidential information; (2) the facts created an “appearance of impropriety”; and (3) even if screening was an available remedy in these circumstances, the alleged screening at Kobre & Kim was not “timely and effective.” Justice Yates addressed each of these arguments.

First, Justice Yates readily concluded that *Kassis* did not prohibit screening under Rule 1.11. When *Kassis* was decided, the Code of Professional Responsibility did not allow screening to cure conflicts in the case of private attorneys, but DR 9-101(B) specifically authorized screening for public officers and employees even when they had participated personally and substantially in the same matter or held confidential government information about the matter. Moreover, for many years – both before and after *Kassis* – bar association ethics opinions had acknowledged and endorsed screening in the limited context of former prosecutors. The old Code and the current Rules explicitly distinguish treatment of government attorneys and private attorneys for a sound reason:

Governments need and want good young lawyers to devote some time to public service without depriving themselves of the ability to obtain employment thereafter. Recognizing this public purpose, the Rules allow government counsel to do what a lawyer moving from one firm to another cannot do without a client waiver: that is, move from one side to the other, with only notice to the government and parties. [Citation omitted.]

Moreover, in *In re Coleman*, 69 AD3d 846,849 (2d Dept. 2010), the Second Department had recently explained that the disparity between Rule 1.10 and Rule 1.11 “represents a balancing of interests.” The *Coleman* court cited Comment 4 to Rule 1.11, which states, in pertinent part:

[T]he rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards . . . The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent to entering public service.

Beyond this, Justice Yates perceived as a matter of principle “a distinction . . . between the case where an attorney switches sides in private litigation and the situation here, protected by Rule 1.11, where the former employer is not a party to the litigation.” Unlike the situation in *Kassis*, the government here would not be facing a former counsel or his firm in litigation. As long as confidential government information remained protected from disclosure, the nonparty government agency could “stand by unconcerned with the outcome of the litigation.” Regarding that protection, Rule 1.11(b)(1)(iv) provided for written notice to the appropriate government agency to enable it to ascertain compliance with the

screening provisions, and Rule 1.9 directly prohibited use or disclosure of confidential information. Thus, “with adequate and timely notice, the client (the government agency) is in the best position to guard against misuse of their own secrets.”

Appearance of Impropriety?

As for the appearance of impropriety, New York Rule 1.11(b)(2) specifically adds, as a condition for authorizing screening in the case of former government officers, that there must be “no other circumstances in the particular representation that create an appearance of impropriety.” The addition of this language in the New York’s version of Rule 1.11 carries over the same language from its predecessor DR 9-101(B), and “is an apparent nod to the caution in *Kassis* against appearances of impropriety” which acts as “an additional restraint upon screening,” which does not generally enjoy wide acceptance in New York.

Outside the context of Rule 1.11, there is a general recognition that “appearance of impropriety,” without more, is too vague a standard to justify disciplinary measures or disqualification. However, in light of New York’s “cautious approach to the acceptance of screening” and in light of the “specific directive” regarding the appearance of impropriety in Rule 1.11(b)(2), Justice Yates had permitted evidence on the question of the appearance of impropriety at the hearing on petitioners’ Order to Show Cause. I will now discuss that evidence point by point.

First, Petitioners argued that Kobre & Kim had contacted the U.S. Attorney’s Office to urge it to undertake a criminal investigation of Lehman’s ARS sales to Essex Equities. Mr. Kim did not deny that there had been contact between his firm and the U.S. Attorney’s Office, but he testified that the U.S. Attorney’s Office had initiated the contact, not Kobre & Kim. (Mr. Kim admitted that his firm had initiated contacts with the New York State Attorney General and the SEC, however.)

Second, Petitioners argued that Casey himself, while leading the investigation at the U.S. Attorney’s Office, had perhaps personally conducted conversations with lawyers at Kobre & Kim. Mr. Kim did not testify to any direct conversations, but he admitted speaking to a Kobre & Kim partner about contacts between the firm and the U.S. Attorney’s Office, and said there was “an inference” that Casey was involved in those conversations. Kobre & Kim countered that Casey did not leave the U.S. Attorney’s Office to work for Kobre & Kim, but in fact worked for four months at another firm (Mayer Brown) before becoming a partner at Kobre & Kim.

Third, petitioners noted that Kobre & Kim’s website states:

Our trial lawyers include several former federal prosecutors who are experienced at investigating and building complex financial cases. Where appropriate and legitimate, we often leverage the significant collateral benefits to our civil suit that can result from a parallel government investigation.

Kobre & Kim did not dispute this (and while writing this article I confirmed that this statement still appears on the web page cited by the court – go to www.kobrekim.com, hover over “Practice Areas,” click on “Financial Institution Litigation,” and scroll down to the heading “Aggressive Former Prosecutors”).

Fourth, petitioners argued that the arbitration had been “on hold” for almost a year until just six days after Casey joined the firm, at which time Kobre & Kim expressed an interest in going forward. Kobre & Kim countered that the re-activation of the arbitration was a matter of coincidental timing, spurred by the summer 2009 discovery of available insurance coverage, not by Casey’s joining the firm.

Petitioners summed up their arguments regarding the appearance of impropriety by saying: “A law firm should not be permitted to actively assist a Deputy Bureau Chief in the United States Attorney’s Office in conducting a criminal investigation of the same individual the law firm’s clients are suing, hire him as a partner and continue the representation.” Kobre & Kim responded that petitioner’s alleged facts were “speculative, conclusory and unfounded.” The court agreed that the core factual allegations leading to the charge of impropriety were in dispute (and, given the necessary secrecy that surrounds the internal workings of the U.S. Attorney’s Office during the course of a criminal investigation, difficult to assess).

Faced with these unclear facts, Justice Yates turned to a venerable Court of Appeals case, *S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 N.Y.2d 437, 443 (1987), which had noted that disqualification motions present competing concerns:

Balanced against the vital interest in avoiding even the appearance of impropriety is concern for a party’s right to representation by counsel of choice and danger that such motions can become tactical ‘derailment’ weapons for strategic advantage in litigation.

With these considerations in mind, Justice Yates said it is “clear that a movant must offer more to justify disqualification.” Although the court found “some foundation” for petitioners’ suspicions, the court was unwilling, without more, to find that an appearance of impropriety standing alone prevented the remaining lawyers in the firm, if properly screened, from continuing to represent Essex Equity.

The Size of the Firm

Justice Yates next addressed petitioners’ argument that screening is never available to a small firm. Specifically, petitioners argued that the presumption of shared or inadvertently disclosed confidential information cannot be overcome in a law firm where a small number of attorneys necessarily encounter each other and interact. (Kobre & Kim had between 33 and 40 attorneys, in four different locations, with about 20 of the lawyers working in the New York office on the same floor as Casey. Petitioners characterized this as a “small law firm.”) Petitioners cited *Kassis* and various other cases to support their argument, but the court said that none of the cited cases stood for a per se rule against screening in a small firm. Size was a “contributing factor” in decisions to disqualify, Justice Yates said, but the cases granting disqualification had “aggravating factors” as well. He continued:

A per se rule against screening for small firms has not been the law heretofore in New York and would be impractical to adopt. Where would the line be drawn? Would it be inflexible? ...

The better course, and the one the court chose to follow, is the one outlined in Comment 7 to Rule 1.11 which permits screening but cautions: “A small firm may need to exercise special care and vigilance to maintain effective screening but, if appropriate precautions are taken, small firms can satisfy the requirements of [Rule 1.11].” That led the court to a final question: did Kobre & Kim in fact “exercise special care and vigilance to maintain effective screening” as referred to in Comment 7? The court found

that it did not – and this part of the opinion, to which I now turn, is rich with lessons for all law firms that hire former government lawyers.

Was Casey “Timely and Effectively Screened”?

Rule 1.11(c) provides that when a former government lawyer is disqualified because he acquired “confidential government information” while in public services (as Casey did here), then the firm with which the disqualified lawyer is associated may undertake or continue representation in the matter relating to the confidential government information “only if the disqualified lawyer is timely and effectively screened from any participation in the matter” as set out in Rule 1.11(b). Invoking this language, petitioners asserted that Casey was not “timely and effectively screened” and that Kobre & Kim did not act “promptly and reasonably ... to notify ... lawyers ... within the firm ... to implement effective screening procedures ... and [to] give written notice” to the U.S. Attorney’s Office, all of which is required by the Rule 1.11(b).

Justice Yates began his analysis of these arguments by noting that ABA Model Rule 1.11 does not use the term “effective” in describing screening. The fact that New York had added the word “effective” in its version of Rule 1.11 “once again demonstrating New York’s cautious, if not reluctant, approval of screening to avoid imputation,” was significant. With that cautious approach in mind, Justice Yates turned to the specifics of petitioners’ contentions.

First, petitioners argued that Kobre & Kim’s internal notice of Casey’s “isolation” was “belated, unwritten and indirect.” Justice Yates agreed. Rule 1.11 (b) requires a firm to “notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client,” and this notification must be given “reasonably and promptly.” Moreover, the definition of “screening” in New York Rule 1.0(t) requires “timely imposition of procedures within a firm.”

Here, Kobre & Kim knew even before hiring Casey that the firm would need to implement screening procedures, but the firm did not send out a written notice to the entire firm until nearly two months after Casey joined the firm. Justice Yates quoted *Chinese Auto. Distrib. of America LLC v Bricklin*, 2009 WL 47337; 2009 US Dist LEXIS 2647 (SD NY 2009), in which a firm had waited three months before establishing an “ethical wall”. The *Chinese Auto* court said:

The delay was too long. To prevent one lawyer’s conflicts from being imputed to his firm, the firm must immediately, and effectively, screen that lawyer from any contact with any relevant cases, such that there can be “no doubts as to the sufficiency of these preventive measures.” 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 received actual notice of the conflict.” [Citations omitted.]

Along the same lines, Comment 10 to Rule 1.0(t) (defining “screening”) provides: “In order to be effective, screening measures must be implemented as soon as practicable after a lawyer or law firm knows or reasonably should know that there is a need for screening.” (Justice Yates noted Casey’s testimony that “he knew not to discuss the matter with anyone in the firm and that he never did.” The court was willing to credit that statement, but the court also recognized “the distinction between conscious and inadvertent disclosures.”)

Kobre & Kim contended that lawyers in the firm were “effectively notified” about the screen around Casey well before the December 9th firm-wide memorandum because the firm’s usual practice was to create “silos of isolation” that “compartmentalized” the attorneys on different matters so that they could not discuss other matters without permission. Moreover, Casey had been personally advised at an early stage of his employ that he was not to discuss any of the matters upon which he had worked. The firm argued that these procedures, coupled with the advice to Casey, were “the functional equivalent of prompt and reasonable notice to all personnel.”

The court soundly rejected this argument. The court agreed with Kobre & Kim that Rule 1.11 did not explicitly require that the notification of a screen be in writing. Rather, Rule 1.11(b)(1)(i) mandates only prompt notification “as appropriate.” But Justice Yates said:

Although the Rules do not require written notice in every case, given the size of the firm and the interaction with attorneys working on the matter, a rule of reason would demand, at the very least, clear and unequivocal direction to other attorneys in the firm. A writing would have memorialized the terms, timing, scope and form of the notification and given an indication of which personnel received the notification, as well as offering proof that the other lawyers actually had received the notification, all of which would have helped to overcome the claim of impropriety. [Citations omitted.]

To support this statement, Justice Yates quoted Rule 1.0, Comment 9, which interprets Rule 1.11(b)(1) to mean that “other lawyers in the firm who are working on the matter should promptly be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter.” Justice Yates also quoted my commentary on Rule 1.11(b) in the 2009 edition of Simon’s New York Rules of Professional Conduct Annotated, which said: “If the disqualified lawyer works in a small firm...then the notice probably should go to everyone who works in the office, lawyers and non-lawyers alike.” Here, in contrast, the oral notice of the screen around Casey was “vague, untimely and ineffective.”

Second, petitioners argued that Kobre & Kim’s required notice to the agency (the U.S. Attorney’s Office) was likewise belated and unwritten. Justice Yates again agreed. To ensure that confidences are not disclosed or exploited, Rule 1.11(b)(1)(iv) (including the lead-in language) requires the firm to “reasonably and promptly ... give written notice to the appropriate government agency to enable it to ascertain” whether the firm was complying with Rule 1.11(b) to protect the confidential government information. Kobre & Kim did not formally notify the U.S. Attorney’s Office of the screen until almost four months after Casey began work at Kobre & Kim. As the court noted, Kobre & Kim did not even argue that this met the standard of “prompt” notification.

However, Kobre & Kim argued that the series of oral, unrecorded, conversations between Casey and the U.S. Attorney’s Office about what he could and could not handle if he joined Kobre & Kim satisfied the Rule. Justice Yates found that argument flawed in two regards.

One flaw was that there is a significant difference between Casey’s need to personally disqualify himself and the firm’s need to enact procedures to guard against inadvertent disclosures. Merely telling personnel at the U.S. Attorney’s Office that he was going to work for Kobre & Kim and would avoid

conflicts “does not give the Agency sufficient information to ascertain whether the firm is taking measures to protect against inadvertent disclosure or use of confidences.” As Comment 7B to Rule 1.11 advises, the notice to the agency should include “a description of the screened lawyer’s prior representation and of the screening procedures employed.” Casey’s discussions with the U.S. Attorney’s Office occurred before he even joined Kobre & Kim, so it “cannot be said that he gave a description of the screening procedures employed at K&K to the US Attorney or gave sufficient notice of the matters involved for the agency to ensure compliance with the Rules”

The other flaw was that Rule 1.11 expressly required “written” notice. Requiring a writing in the context of notice to an agency was intended “to avoid the very situation which occurred here, oral conversations between co-workers which, many months later, are recalled but unrecorded and undocumented.” Justice Yates continued:

Strict adherence to the writing requirement would seem to be the only plausible way to dispel concerns that “the lawyer’s subsequent private client [has obtained] an unfair advantage because the lawyer has confidential government information about the client’s adversary” (Id. rule 1.11, comment 7A). The requirement of written notice to the agency is not one which can readily be overlooked.

Third, petitioners noted that Casey had interacted with members of the Essex team on other matters, thereby inviting inadvertent disclosures. Justice Yates again agreed. Rule 1.0(t) defines screening as including “isolation” from participation in the related matter. Kobre & Kim had approximately twenty lawyers working on one floor of an office building in New York, and Casey acknowledged that in the seven or so months that he had been at the firm, he had worked on other matters where he had come into occasional contact with at least two lawyers on the Essex Equity team. Under that circumstance, Comment 7 to Rule 1.11 issued a warning: “If a personally disqualified lawyer is working on other matters with lawyers who are participating in a matter requiring screening, it may be impossible to maintain effective screening procedures.” Given the size of the firm, Justice Yates said, “anything less than complete isolation understandably contributes to Petitioners’ skepticism about the effectiveness of the screening procedures in place.” The high degree of both past and present interaction between Casey and the Essex Equity team at Kobre & Kim raised “grave concerns about both the possibility of unintentional breaches of client confidences and about the appearance of impropriety....”

Kobre & Kim asked the court to reject what they characterized as an “absolutist” approach to the rules, and asked the court to forgive or overlook shortcomings in the implementation or timing of the procedures employed and to apply a practical or “common-sense” test. The court agreed that an absolutist or “hyper-technical” approach would be unfair to Kobre & Kim’s client, but the court also said that “condoning anything less than vigilance and careful adherence to the Rules would be unfair to Respondents and Casey’s former client and would invite future applications for ‘practical’ rather than thoughtful compliance.”

Conclusion: “Promptly” Means “Promptly” and “Written” Means “Written”

Like Novak Djokovic in his losing U.S. Open final against Rafael Nadal, Kobre & Kim won a number of important points in *Chernick*. Justice Yates held that (a) Rule 1.11, unlike Rule 1.10, does not per se disqualify a firm based on an imputed conflict of interest; (b) the “appearance of impropriety” that arises

when a firm hires a former federal prosecutor, without more, is insufficient to disqualify the firm; and (c) small firms are not always barred from using screening to protect confidential government information and avoid disqualification. But Justice Yates nevertheless granted the motion to disqualify because Kobre & Kim had not “promptly” circulated written notice within the firm outlining the screen around Casey, and it had not given prompt “written” notice to the U.S. Attorney’s Office regarding the screen. Thus, the simple lesson of *Chernick* is that “promptly” means “promptly” and “written” means “written” in Rule 1.11.

Beyond that, Justice Yates has written a primer on Rule 1.11 that carefully examines the language of the Rule and the rich body of Comments that explain it. For any firm that considers hiring a former government lawyer, the opinion is must reading.

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