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PERSPECTIVE

To tell or not to tell, that is the question

By Diana DiGennaro

Despite the best efforts of your risk management and conflicts team, you hire a paralegal or lateral attorney who, as it turns out, worked on the other side of a litigation matter in which your firm is currently involved. Must you tell the other side about the individual's new employment? Do you need opposing counsel's consent to implement an ethical wall? Or, what if you finally find the perfect expert witness, only to discover that the other side previously spoke with her? Should you call opposing counsel?

In smaller legal markets, unintentional "side-switching" can easily occur when a firm hires a paralegal or lateral attorney who may have had access to confidential information that is material to a matter his or her new firm is handling. The same is true when the expert pool is small; you might find that the expert you are considering previously consulted with the other side. Depending on the circumstances, the law may require you to contact opposing counsel before proceeding. And even if not required, it may be prudent to do so, although often this will be a judgment call based on the particular facts in each case. In some situations, the consequences of failing to provide appropriate notice may include disqualification.

Nonlawyer employees

Paralegals and other nonlawyer employees often handle confidential client information. This can create problems if the employee takes a new job that puts him or her on the other side of a litigation matter they worked on at their prior firm. Does a law firm have an obligation to contact the employee's former employer in this situation? In one often-cited case, *In re Complex Asbestos Litigation*, 232 Cal. App. 3d 572 (1991), the court evaluated whether a law firm should have given notice to opposing counsel when the law firm hired one of opposing counsel's former paralegals in a side-switching scenario. With respect to the notice issue, the court did not hold that the hiring firm was required to give notice to opposing counsel. Instead, the court gave the hiring firm a choice: It must *either* obtain informed written consent from the employee's former employer (opposing counsel) *or*, absent written consent, show that the practical effect of formal screening has been achieved. To demonstrate the latter, the firm hiring the paralegal or other nonlawyer employee must establish that the employee "has not had and will not have any involvement with the litigation, or any communication with attorneys or coemployees concerning the litigation, that would support a reasonable inference that the information has been used or disclosed." At present, it appears that this rule has been applied only to nonlawyer employees, not to attorneys.

Lateral attorneys and ethical walls

Under California law, a law firm generally is not required to provide notice of an ethical wall to opposing counsel in order for the wall to be effective in preventing the firm's disqualification — that is, for the wall to rebut the usual presumption that the knowledge of one lawyer in a firm is imputed to all of the lawyers in the firm. Nor is the affected party's consent to the ethical wall required. But according to one recent case, giving notice can be an important factor in helping a law firm avoid disqualification. "The reasons for providing notice to the former client should be obvious. Notice increases the public perception of the integrity of the bar, by making the interested party aware of the potential threat to its confidential information and the measures taken to prevent the improper use or disclosure of such information. Moreover, notice establishes an enforcement mechanism, in that the interested party will be able to suggest measures to strengthen the wall, and to challenge any apparent breaches." *Kirk v. First American Title Insurance Co.*, 183 Cal. App. 4th 776, 813-14 (2010).

Federal courts, on the other hand, might look to the American Bar Association Model Rules, which do require

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an attorney to provide notice to the former client when an ethical wall is put in place. Model Rule 1.10(a)(2)(ii) provides that written notice must be "promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule." The notice must include, among other things, a description of the screening procedures and "an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures." In one recent case, a federal district court disqualified a law firm and its co-counsel after the court found that an ethical screen purporting to wall off a lateral attorney was ineffective. *Beltran v. Avon Products Inc.,* 867 F. Supp. 2d 1068 (C.D. Cal. 2012). Citing ABA Model Rule 1.10, the court found the law firm's failure to provide the former client with written notice that it was implementing an ethical wall was a factor in making the wall ineffective.

Experts

In certain situations, courts have encouraged lawyers to check with opposing counsel before contacting an expert who previously consulted with opposing counsel on the same matter. In *Shadow Traffic Network v. Superior Court,* 24 Cal. App. 4th 1067 (1994), for example, the court affirmed disqualification of a law firm after it retained an expert with whom the other side had previously spoken. As the court explained, to discharge its professional obligations, the firm should have contacted opposing counsel once it learned that opposing counsel previously had consulted with the expert. The law firm did not take this step, and the court presumed that in hiring the expert, the firm "gained the advantage of learning confidential information disclosed by its adversary." In this case and others, the court has stressed that a phone call to opposing counsel prior to contacting the expert might have avoided the disqualification issue altogether. If, however, you are not contacting the same individual, but rather another expert witness in the same organization, and the organization sets up an ethical wall, a call to opposing counsel may not be necessary.

In sum, while California law may not always require you to provide notice to opposing counsel in these situations, there could be circumstances where it may be helpful to do so. Giving such notice can be a positive factor in persuading a court that an ethical wall was effective, and it could prevent or decrease the risk of disqualification. But that doesn't mean the decision is easy. There are a number of reasons why you might not want to poke a sleeping bear, including the possibility that the affected party will never raise the issue or the belief that the matters are in fact unrelated and there is no conflict or other reason to give notice. One risk of disclosure is that opposing counsel will use the situation — and a disqualification motion — as a tactical weapon. So the question remains: to tell or not to tell? In this, as in many areas of the law, there might not be a clear cut answer.

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