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Panel says firms can wall off conflicted lawyers

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Ethical walls within private law firms aren't coming down. In fact, they've just been braced.

Los Angeles' Second District Court of Appeal took a momentous step Wednesday by ruling that an entire law firm need not be automatically disqualified from a case simply because one of its attorneys has a conflict of interest. The firm only needs to prove "by evidence," the court held, that the tainted lawyer's confidential client information wasn't shared with others on the staff who represent an opposing party.

"We do not doubt that vicarious disqualification is the *general* rule," Justice H. Walter Croskey wrote, "and that we should presume knowledge is imputed to all members of a tainted attorney's law firm.

"However," he added, "we conclude that, in the proper circumstances, the presumption is a rebuttable one, which can be refuted by evidence that ethical screening will effectively prevent the sharing of confidences in a particular case."

Justices Joan Klein and Patti Kitching concurred.

Beverly Hills lawyer Bernie Bernheim, who represented the plaintiffs in the case and had fought for disqualification, called the ruling "revolutionary."

"The effect," he added, "will be that law firms will not have to be as careful about avoiding conflicts in the first place."

The Second District recognized its bold move by noting that the California Supreme Court hadn't gone as far in *People ex rel. Department of Corporations v. SpeeDee Oil Change Systems Inc.*, 20 Cal.4th 1135, its 1999 ruling that said the disqualification of an attorney from a case "normally extends vicariously" to the entire firm.


CROSKEY

The high court found it unnecessary in *SpeeDee Oil* to decide whether a firm can rebut a presumption of shared confidences by proving it had effective screening procedures, or so-called ethical walls.

In Wednesday's case, Los Angeles County Superior Court Judge Anthony Mohr last year disqualified 700-lawyer Sonnenschein Nath & Rosenthal from representing First American Title Insurance Co. in four class actions challenging business practices. He decided Sonnenschein attorney Gary Cohen had consulted with the plaintiffs during a 17-minute telephone call in 2007 while he was chief counsel for Fireman's Fund Insurance Co.

Cohen, who left Sonnenschein earlier this year, filed a declaration stating he had complied with the firm's ethical standards, but he forgot the 3.35 hours he had billed on an unrelated matter for First American.

The Second District said there was no dispute that Cohen was disqualified, but felt the Supreme Court had left wiggle room on the broader issue.

Croskey noted that some of the state's appellate courts have strictly applied *SpeeDee Oil*'s vicarious disqualification rule, while others have said it applies in the absence of an effective ethical screen.

He and his fellow justices reached their conclusion, partly, by noting that Cohen and the three Sonnenschein attorneys working on the First American case were in different practices and different cities.

"The instant case illustrates the changing landscape of legal practice," Croskey wrote. "These are not attorneys discussing their cases regularly, passing each other in the hallways or at risk of accidentally sharing client confidences at lunch."

The court also noted that ethical walls have been shown to work in other realms — with government employees, non-attorneys and expert firms, for instance.

The court remanded the case to the superior court with instructions to take evidence to see if Sonnenschein's ethical wall was timely imposed and contained "preventive measures" to ensure confidential information wasn't conveyed.

The court stressed that trial courts should conduct a case-by-case inquiry to determine whether "the tainted attorney has not had and will not have any improper communication with others at the firm concerning the litigation."

David Axelrad, a partner with Encino's Horvitz & Levy and one of the lead defense lawyers on the case, said the ruling should be welcome news for law firms and clients.

"It will help to vindicate the interests of clients in having the attorneys of their choice," he said, "and is very good for lawyers because it recognizes the changing realities of American law firm practice."

The full text of *Kirk v. The First American Title Insurance Co.*, B218956, will appear in Friday's California Daily Opinion Service.

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