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# THE DUTY OF CONFIDENTIALITY AND THE DUTY TO COMMUNICATE

## ISSUES

1. Whether a prospective client's disclosure of confidential information that affects an existing client's case, either positively or negatively, may be disclosed to the existing client under any circumstance where the prospective client does not consent to such disclosure.
2. The extent to which such disclosure may be used by the Attorney's law firm.
3. Whether such disclosure may require the Attorney or his/her firm to withdraw from representing the prospective client or the existing client in pending litigation.
4. The extent to which an ethical screen may preserve the attorney-client relationship with the existing client.

## DIGEST

[TO BE INSERTED]

**AUTHORITIES INTERPRETED:** Rules 1.4 [Communication with Client]; 1.6 [Confidential information of Client]; 1.7 [Conflicts of Interest]; 1.8.2 [Use of Current Client's Information]; 1.9 [Duties to Former Clients], 1.10 Imputation of Conflicts of Interest 1.16 [Declining or terminating representation] and 1.18 [Duties to Prospective Clients]; of the State Bar Rules of Professional Conduct

Business and Professions Code section 6068(e) (1)

## STATEMENT OF FACTS

### 1. Scenarios :

#### a. First Scenario

A public interest law firm commenced a lawsuit on behalf of many investors who assert a publicly traded company committed securities fraud by falsely ascribing attributes of the company's recently developed battery technology that it promotes as the "next big technological breakthrough" in battery driven vehicles. The attorney's firm claims the battery technology is not sufficiently proven to warrant the representations the Company asserts the product is reputed to have. Recent industry reports have suggested the battery's effective life is far shorter than anticipated with a steep decline in power after two to three years which will likely result in the batteries being recalled within a few years. These reports of this potential problem has caused the company's stock to plummet and its investors to sue.

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A partner at the firm is assigned the task of interviewing potential additional clients. During these interviews, he advises each prospective client that while he has not agreed to represent them the information they discuss will remain confidential between them.

During an interview of one such potential client (“Prospective Client”) who is an investor in the Company and one of the principal researchers who worked on the development of the battery, the Prospective Client discloses that he too purchased substantial stock in the company believing at the time in the market success of this battery. However, he later learned that management was provided a report by his research team leader that discussed the potential risk of premature battery failure. The Prospective Client secured a copy of the report and was later instructed by senior management to destroy it, which he did, keeping a copy in case he ever needed it. This previously unknown internal report would be extremely useful information to aid in the prosecution of the case for the Attorney’s existing clients (“Existing Clients”). In addition, the Prospective Client knows what specific test criteria were used to reach the result the manufacturer now seeks to hide. However, the Prospective Client advises that if this information came out, he fears he would be terminated from his job and face potential other reputational issues in his scientific field.

### Second Scenario:

During the interview described in scenario No. 1, the Prospective Client reveals that out of anger and frustration with the company he leaked to a consumer watch dog agency the report of premature battery failure which was understood by the Prospective Client to be false. The Prospective Client felt it important to get this information off his chest and feels remorseful about his actions, but does not want this information disclosed. The basis for the reports of premature battery failure is critical to the Attorney’s firm’s case against the manufacturer.

[Consider POTENTIAL ADDITIONAL SCENARIOS altering the fact pattern as to the position of the Attorney (Associate/Of Counsel etc. and the efforts to create an ethical screen?]

## DISCUSSION

### Issues:

1. Should Attorney decline to represent the Prospective Client?
2. Can Attorney disclose to his Existing Clients any of the information shared by the Prospective Client?
3. Can Attorney use the information provided by the Prospective Client in any way?
4. Can Attorney’s law firm continue to represent their Existing Clients?
5. Are there steps Attorney could have taken to avoid the conflict created by the disclosure of such “confidential” information?

Analysis

*Duties To The Prospective Client*

Where, as here, there is not an express agreement between the parties that there is in fact an attorney-client relationship, an implied in fact attorney-client relationship may exist when the attorney volunteered his services to a prospective client (*Miller v. Metzinger* (1979) 91 Cal app 3<sup>rd</sup> 31, 39).<sup>1</sup> As a result, the fiduciary relationship existing between the lawyer and a client extends to preliminary consultations by a prospective client with a view to retention of the lawyer, although actual employment may not result. (*People Ex Rel. Department Of Corporations V. Speedee Oil, Inc.* (1999) 20 Cal 4<sup>th</sup> 1135, 1147-48) see also Cal. State Bar Formal Opinion No. 1984-84). This principle has been recently been codified in Rule 1.18 which provides in pertinent part:

1.18 [Duties to Prospective Clients]:

(b) Even when no lawyer-client relationship ensues, a lawyer who has communicated with a prospective client shall not use or reveal information protected by Business and Professions Code section 6068 (E) and Rule 1.6 that the lawyer learned as result of the consultation, except as Rule 1.9 would permit with respect to information of a former client.<sup>2</sup>

This opinion assumes that the information imparted to the Attorney by the Prospective Client was imparted as confidential information within the meaning of Rules 1.6 (a)<sup>3</sup> and 1.18.

Rule 1.6(a) provides that a lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068(e)(1) absent the client giving informed consent or the disclosure is permitted by paragraph (b) of the rule. Business and Professions code section 6068(e)(1)) requires an attorney "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."<sup>4</sup> A lawyer's duty to preserve

<sup>1</sup> For an extensive list of the factors that may be considered in determining whether an implied in fact attorney-client relationship exists, see Formal Opinion No. 2003-161

<sup>2</sup> Rule 1.9 provides that a former client may give informed written consent

<sup>3</sup> Rule 1.6 (a) provides: "A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e) (1) unless the client gives informed consent, or the disclosure is permitted by paragraph (b) of this rule."

<sup>4</sup> Rule 1.6 [Confidential information of Client]

(a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068(e)(1) unless the client gives informed consent, or the disclosure is permitted by paragraph (b) of this Rule.

(b) A lawyer may, but is not required to, reveal information protected by Business and Professions Code section 6068(e)(1) to the extent that the lawyer

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96 confidentiality of client information involves public policies of paramount importance. (*In re*  
97 *Jordan* (1974) 12 Cal 3<sup>rd</sup> 575, 580); see also *Commercial Standard Title Co. v. Superior Court*  
98 (1979) 92 Cal app 3<sup>rd</sup> 934, 945 (see Comment 1, Rule 1.6). It is recognized that a lawyer's duty to  
99 preserve the confidences of a client promotes trust which is the hallmark of the attorney-client  
100 relationship. (Comment 1, Rule 1.6)

101 The principle of lawyer-client confidentiality applies to information an attorney acquired  
102 by virtue of the representation, whatever its source, and encompasses matters communicated in  
103 confidence by the client, and therefore protected by the lawyer-client privilege, matters protected  
104 by the work product doctrine, and matters protected under ethical standards of confidentiality.  
105 (See Comment 2, Rule 1.6) The duty of confidentiality is broader than the lawyer-client privilege  
106 and protects virtually everything the lawyer knows about the client's matter regardless of the  
107 source of the information. *Elijah W v. Superior Court* (2013) 216 Cal app 4<sup>th</sup> 140, 151) Not only  
108 may the attorney not disclose the confidential information absent one of the exceptions, the

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reasonably believes the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death, or substantial bodily harm to, an individual, as provided in paragraph (c).

(c) Before revealing information protected by Business and Professions Code section 6068(e)(1) to prevent a criminal act as provided in paragraph (B), a lawyer shall, if reasonable under the circumstances:

(1) make a good faith effort to persuade the client (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and

(2) informed the client, at an appropriate time, of the lawyer's ability or decision to reveal information protected by Business and Professions Code section 6068(e)(1) as provided in paragraph (b).

(d) In revealing information protected by Business and Professions Code section 6068(e)(1), as provided in paragraph (b), the lawyer's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the lawyer at the time of the disclosure.

(e) A lawyer who does not reveal information permitted by paragraph (b) does not violate this rule.

Attorney may not use that information to assist him or his law firm in the lawsuit. Rule 1.8.2.<sup>5</sup> The only exception to the duty to maintain such information confidential is set forth in Rule 1.6(b) which is not here applicable since, among other things, there is no indication of a likelihood of death or substantial bodily harm should the information not be disclosed.

#### *Disclosure To Existing Client*

In issue here, however, is whether the duty of confidentiality to the Prospective Client precludes the disclosure of the Prospective Client's confidential information to the Existing Clients notwithstanding Attorney's duty to communicate (Rule 1.4)<sup>6</sup> and the inherent duty of loyalty to the Existing Clients.

The tension between the duty of confidentiality and the duty of loyalty of Attorney and his firm to the Existing Clients presents an ethical dilemma. *Flatt v. Superior Court*, *supra*, 9 Cal 4<sup>th</sup> 280-283. The duty of loyalty implicates the biblical injunction against "serving two masters (Matthew 6:24)." (*Flatt v. Superior Court*, *supra*, 9 Cal 4<sup>th</sup> at 286). The duty of loyalty has been found to be sufficiently important that a mandatory rule of disqualification in cases of dual representation involving unrelated matters is firmly entrenched in California law. *Flatt v. Superior Court*, *supra*, 9 Cal 4<sup>th</sup> 286. Moreover the duty of loyalty may arise without potential breaches of confidentiality. (*id*) It has been said that the duty of loyalty to any existing client cannot be cured by withdrawing from the relationship that caused the conflict. *Flatt v. Superior Court*, *supra*, 9 Cal 4<sup>th</sup> 275, 2 880, citing *Truck Ins. Exchange Co. V. Fireman's Fund Ins. Co.*, *supra*, 6 Cal app 4<sup>th</sup> 1050.

In *Flatt v. Superior Court* (1994) 9 Cal. 4<sup>th</sup> 275, the California Supreme Court held that an attorney's duty of loyalty to any existing client not only precluded the attorney from representing a prospective client against the existing client but also insulated the attorney from liability in failing to advise the prospective client of the potential statute of limitations of any

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<sup>5</sup> Rule 1.8.2 provides: "A lawyer shall not use a client's information protected by Business and Professions Code section 6068, subdivision (e) (1) to the disadvantage of the client unless the client gives informed consent, except as permitted by these rules of the State Bar Act."

<sup>6</sup> 1.4 [Communication with Client]

(a) (3) a lawyer shall "Keep the client reasonably informed about significant developments relating to the representation including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed."

Comment [1]: "a lawyer will not be subject to discipline under paragraph (a) (3) of this rule for failing to communicate insignificant or irrelevant information. (See Business & Professions Code Section 6068 (m).) Whether a particular development is significant will generally depend on the surrounding facts and circumstances

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claim the prospective client may have against the attorneys existing client. The court in *Flatt*, however, did not address the obligation, if any, of the attorney to disclose to the existing client the information the prospective client provided to the attorney. However, Rule 1.6 and Business and Professions Code section 6068(e)(1) contains no exception that would authorize such disclosure. Further, case law and several opinions from this Committee and state bar committees from other jurisdictions demonstrate that in such a context the duty of confidentiality remains paramount so that disclosure is not permitted.

In Opinion No. 2003-163, this Committee opined that when an outside lawyer represents a corporation and also simultaneously represents a corporate constituent (the Chief Financial Officer) in an unrelated matter, the duty of confidentiality precluded the attorney from disclosing the confidences of the CFO to the corporation without the CFO's consent despite the duty to communicate and the duty of loyalty owed to the corporation.

In LA County 528 (2017), LA County 528, an attorney is engaged by an insurance carrier to defend the interests of an insured and obtains information that could provide a basis for the insurance carrier to deny coverage, the attorney is prohibited from disclosing that information to the insurance carrier.<sup>7</sup>

In LA 506 (2001), a law firm learned in an interview with a prospective client that the client was considering filing bankruptcy. The prospective client was a defendant in a separate action brought by an existing client of the firm but by a different law firm. LA County 506 concluded that the firm had a duty of confidentiality to the prospective client and that the confidential information could be significant to the existing client, but concluded that no conflict arose between the duty of confidentiality and the duty to communicate, because the law firm was not representing the existing client in the other matter to which the information was relevant. Such a distinction does not address the full impact of the duty of confidentiality.

In *A v. B*, 158 A. J. 51(1999) a law firm was representing a husband and wife jointly in planning their estates. Through an error in the firm's conflict checking system, the firm started to represent a woman in a paternity action against the husband. When the firm realized the error, it withdrew from the representation against the husband and asked the husband for consent to disclose the existence of the illegitimate child to the wife, but the husband refused. The New Jersey Supreme Court held that the information was confidential, but the broad New Jersey exception for fraud prevention permitted the firm to disclose to the wife. California has not recognized such a broad fraud exception to the duty of confidentiality.

Apart from the forgoing bar opinions and the New Jersey decision, California has a rich history of decisions in which the Courts have through motions to disqualify protected the confidences of previous clients from new or prospective clients.<sup>8</sup> In these cases the Courts have

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<sup>7</sup> In LA 508, the committee opined the attorney must withdraw from representation. This discussion of the opinion does not endorse this conclusion.

<sup>8</sup> *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal 4th 811, 821-823; *People Ex Rel. Department Of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal 4th 1135, 1148;

consistently found that even when there is only a risk of disclosure to an existing client, an order to disqualify is warranted. Inherent in the logic of these decisions is the implicit recognition that the duty of confidentiality is paramount to the attorney's subsequent duty of loyalty and to communicate to his or her other client. (Comment 1, Rule 1.6, citing *In Re Jordan* (1974) 12 Cal 3<sup>rd</sup> 575, 580) The Committee is unaware of any authority that would suggest the rule should be otherwise with respect to disclosures made by a prospective client as opposed to a previous client. Likewise, nothing in the case law would suggest an existing client can expect an attorney's duty of loyalty to him or her to prevail over the attorney's duty of confidentiality to another client, whether existing or prospective.

As to the facts presented by the two hypothetical scenarios, the Committee concludes that the Attorney has a duty to retain in confidence the information imparted by the Prospective Client absent application of Rule 1.6 (b). Moreover, the confidential information provided to Attorney is imputed to the members of his firm. (Rule 1.8.11). Neither the Attorney nor his law firm may use the confidential information provided to Attorney under the circumstances presented.(Rule 1.8.2)

#### *Representation Of Prospective Client*

Under the circumstances described, can Attorney or his law firm represent the Prospective Client. Rule 1.7 (b) strongly suggests not without an informed written consent. Rule 1.7 (b) provides that a lawyer shall not without informed written consent represent a client "if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyers' responsibilities to or relationship with another client, a former client or third person, or by the lawyer's own interest."

Here, under both scenario 1 and scenario 2, Attorney should decline to represent the Prospective Client, because the interests of the Prospective Client and Attorney's Existing Clients conflict as to their respective interests in disclosing this information to Existing Client. In this respect, it would be important to the Attorney and his Existing Clients to be aware of and use the confidential information imparted by the Prospective Client either to aid in the prosecution of the case under scenario 1 or to reevaluate the prosecution of the case under scenario 2, but the Prospective Client does not want such disclosure. The objectives and interests of the Prospective Client conflict with that of Attorney's Existing Clients.

#### *Continued Representation Of Existing Client*

Under these scenarios can Attorney's law firm continue to represent their Existing Clients against the manufacturer now charged with the information the Prospective Client imparted or must the Attorney's firm withdraw as required by Rule 1.16?

Under scenario 1, the information imparted would be very helpful to Attorney's Existing Clients, but if it cannot be disclosed. Here, Attorney knows that there is powerful evidence to support Existing Clients' claims against the manufacturer that he and his law firm cannot use.

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*Flatt v. Superior Court*, *supra*, 9 Cal 4th at 283; *Wutchumna Water Co. v. Bailey* (1932) 216 Cal 564, 571; *Marriage Of Zimmerman* (1993) 16 Cal app 4th 556, 564-565[cite check]

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Attorney may very well believe that he has now been imparted with information that provides him a direction for discovery that could be very helpful to his Existing Clients, but may, on the other hand, reveal the actions of the Prospective Client which the Prospective Client shared in confidence. Attorney's firms representation of the Existing Clients would appear to be compromised by the Prospective Client's desire to keep the information about the destroyed report confidential. Because of Prospective Client's desire to keep this information confidential, an informed waiver of the conflict under Rule 1.7(b) would not be a viable option. Attorney knows of this confidential information that represents critical evidence and as a consequence Attorney's efforts to pursue the case against the manufacturer will be burdened by the concern that the possibility of later securing such evidence, no matter how innocently, may cause the Prospective Client to believe Attorney has used this information in violation of Rule 1.8.2. Such inhibition potentially compromises Attorney's representation of his Existing Clients and should require withdrawal under Rule 1.16(a)(2) and Rule 1.7 (b) (2)<sup>9</sup> . Such circumstances certainly may warrant permissive withdrawal under Rule 1.16 (b)(4)(9) or (10).<sup>10</sup>

Under scenario 2, if the Attorney concludes that the helpful, doctored report prepared by the Prospective Client was the critical evidence supporting the manufacturer's liability and the attorney knows that it is no longer trustworthy evidence, the attorney must determine whether pursuit of the litigation by the Attorney and his firm would implicate rule 1.16 (a) (1) which proscribes a lawyer continuing to represent a client if "the lawyer knows or reasonably should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal without probable cause and for the purpose of harassing or maliciously injuring any person." This scenario implicates the issue of probable cause to pursue the case without that evidence. The facts addressed are insufficient to reach a conclusion in this regard. In

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<sup>9</sup> Rule 1.16 (a) (2) provides that a lawyer shall not represent a client if P.. "The lawyer knows or reasonably should know that the representation will result in violation of these rules or of the State Bar Act..." Rule 1.7 (b) provides "a lawyer shall not, without informed written consent from each affected client and compliance with paragraph (D), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited to the lawyer's responsibilities to or relationship with another client, a former client or 1/3 person, or by the lawyer's own interest.

<sup>10</sup> Rule 1.16 (b) provides for permissive withdrawal under certain circumstances including:

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"(4) the client by other conduct renders it unreasonably difficult for the lawyer to carry out the representation effectively;

oOo

(9) a continuation of the representation is likely to result in a violation of these rules or the State Bar Act; or

(10) the lawyer believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other cause for withdrawal."



addition, based on the facts presented, there is no evidence that the Existing Clients are aware this evidence may be untrustworthy so their lack of bona fides is not suggested, although Attorney's good faith in pursuing the case in light of this information might be called into question. Accordingly, Attorney's representation of Existing Clients does not come with the express terms of Rule 1.16(a)(1). However, the attorney's representation of the Existing Clients may nevertheless be compromised because the attorney is not in a position to adequately advise his Existing Clients that the potentially key evidence in their case is founded on unreliable evidence without violating the duty of confidentiality to the Prospective Client. Likewise, as in scenario No. 1, Attorney's discovery efforts may be compromised by concerns that his firm's efforts could reveal the existence of Prospective Client's actions which the Attorney was charged with keeping confidential. Correspondingly, the Prospective Client may fear the disclosure of this evidence by Attorney and demand Attorney and his firm withdraw from their representation of Existing Clients. Under such a circumstance, the decisions discussing the duty of confidentiality in the context of successive representation involving substantially the same matter create the presumption of shared confidences. *Flatt v. Superior Court*, *supra*, 9 Cal 4<sup>th</sup> at 283; *Zador Corp. v. Kwan* (1995) 31 Cal app 4<sup>th</sup> 1285, 1294 [joint clients involving the same matter creates an inherent substantial relationship] Again, such Attorney's representation of Existing Clients would be problematic under the circumstances.

#### *Ethical Screen*

An attorney may avoid acquiring information from a prospective client that would prohibit representation as provided in Rule 1.18 (c) by limiting the initial interview to only such information as reasonably appears necessary for that purpose. However, under the scenarios presented the initial interview went beyond the typical client adversary identification process necessary for a conflicts analysis. Instead, the Attorney was exposed to potentially disqualifying information. As such, the issue becomes whether the Attorney's firm can preserve its representation of Existing Clients in light of Rule 1.18(d)(2).

First, Rule 1.18 provides that when an attorney has received material, confidential information from a Prospective Client, representation of a client with interests materially adverse to the prospective client is not permissible unless the lawyer who received the information undertook measures to avoid exposure to more information than was reasonably necessary to determine whether to represent the prospective client. Reconciling Rules 1.18(c) and 1.18(d)(2) suggests an ethical screen can only be considered if Attorney received material information to the matter only after taking reasonable steps to avoid exposure to such information. The failure to take such measures should be fatal to Attorney's and his firm's continued representation of Existing Clients. (See: *SkyBell Technologies Inc. v. Ring* 2018 WL 601-6156 [there must be some type of preceding or concurrent affirmative act that is carried out by the attorney to limit the disclosure and the attorney should advise prospective client to withhold any information deemed quote confidential"].

Here both scenario 1 and scenario 2 demonstrate the Attorney obtained material information at the outset of the consultation and for the reasons above stated, that information impacts the attorney's representation of Existing Clients. Assuming Attorney took reasonable steps to avoid exposure to such information (steps discussed below) but was exposed in any

event, then under Rule 1.18(d) an ethical screen may under certain circumstances preserve the attorney-client relationship with Existing Clients.

Pertinent to this opinion are the provisions of rule 1.18 (d) (2)<sup>11</sup> which provides:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more information than was reasonably necessary to determine whether to represent the prospective client and

(i) the prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom<sup>12</sup>; and

(ii) written notice is promptly given to the prospective client to enable the prospective client to ascertain compliance with the provisions of this rule.(Emphasis added)

*The Attributes of an effective Ethical Screen*

The elements of an effective ethical screen will vary from case to case, but the two most critical elements are: (1) the screen must be timely in place and (2) imposition of actual preventive measures to guarantee that the information will not be conveyed. (*Kirk v. First American Title Ins. Co.* (2010) 183 Cal. App. 4<sup>th</sup> 776, 810, citing *Speedee Oil, supra*, 20 Cal. 4<sup>th</sup> at pp. 1142,1151-1152 & fn. 5) The typical elements of an effective ethical wall are:

1. Physical, geographic, and departmental separation of attorneys;
2. Prohibitions against and sanctions for discussing confidential matters;
3. Established rules and procedures preventing access to confidential information and files;
4. Procedures preventing a disqualified attorney from sharing in the profits from the representation<sup>13</sup>; and

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<sup>11</sup> Rule 1.10 likewise recognizes the potential efficacy of an ethical screen in circumstances of successive representation in order to avoid imputation of knowledge from a “prohibited lawyer” and the resulting vicarious disqualification. Rule 1.10 requires that the prohibited lawyer did not substantially participate in the same or substantially related matter; was timely screened from participation in the matter, and written notice is given to the affected client to enable the former client to ascertain compliance with the provision of the rule, including a description of the screening procedures employed an agreement by the firm to respond promptly to any written inquiries or objections by the former client.

<sup>12</sup> Paragraph (d)(2) does not prohibit the screened lawyer from receiving a salary or partnership share established by independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is prohibited.

5. Continuing education in professional responsibility.

(*Kirk v. First American Title Ins. Co.*, *supra*, 183 Cal. App. 4<sup>th</sup> at. P. 810-811)

Mechanical adherence to these factors is not conclusive. As the Court in *Kirk* cautioned: "...the inquiry before a trial court considering the efficacy of any particular ethical wall is not to determine whether all of the prescribed list of elements (beyond timeliness and imposition of prophylactic measures) have been established; it is, instead, a case-by- case inquiry focusing on whether the court is satisfied that the tainted attorney has not had and will not have any improper communication with others at the firm concerning the litigation. This inquiry raises practical issues. For example, in other jurisdictions where ethical screens have been recognized, the relatively small size of a firm is a factor in determining the efficacy of the screening procedures. (*Dworkin v. General Motors Cor.* 906 F. Supp. 273 (1995) 279:See e.g. *Van Jackson v. Check 'n Go of Ill., Inc.* F. Supp. 2d 731 (N.D.Ill. 2000 [Found relative small size of firm undermined efficacy of the ethical screen). In a Canadian Court, for example, the fact that the Attorney in charge of the screen supervised the prohibited lateral attorney caused the screen to fail. (*Budget Car Rentals Toronto Ltd.*) 2008 CanLII 54295 (Ont. S. Ct. Octo.9, 2008), leave to appeal denied, 2008 CanII 65753 (Ont. S. Ct. Nov. 28. 2008). Faced with the fundamental issue- whether the tainted attorney has exposed others within the firm to confidential information- the efficacy of an ethical screen in a particular context cannot be certain.

**CONCLUSION**

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<sup>13</sup> By their terms, Rules 1.10 and 1.18 apply to attorneys. As Comment 2 to Rule 1.10 states subsection (a) of Rule 1.10 does not prohibit representation by others in the law firm where the individual prohibited from the matter is a non-lawyer such as a secretary or paralegal.