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October 9, 2019

The Honorable Cantil-Sakauye, Chief Justice
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-3600

RE: DEATH PENALTY CASE
People v. James M. Fayed
California Supreme Court Case No. S198132

To the Honorable Cantil-Sakauye, Chief Justice, and Associate Justices:

On September 25, 2019, this Court requested a letter brief detailing counsels' compliance with "any and all Rules of Professional Conduct and related provisions,"¹ noting Code of Civil Procedure, section 128,² rules 1.7 and 1.11 of the Rules of Professional Conduct, and Business and Professions Code section 6131. Specifically, the Court requested information concerning what steps Werksman Jackson & Quinn

¹ Rules 1.7 and 1.11 of the Rules of Professional Conduct became effective three years after Mr. Jackson joined the Firm. Previously, rule 3-310 of the Rules of Professional Conduct governed conflicts of interests, and there was no equivalent to rule 1.11 of the Rules of Professional Conduct.

² This provision gives "every court" the power to conduct certain functions, including "[t]o enforce order in the proceedings before it, or before a person or persons empowered to conduct a judicial investigation under its authority," and "to provide for the orderly conduct of proceedings before it, or its officers." (Code Civ. Proc., § 128, subs. (a)(2) & (a)(3).)

(“the Firm”) took to ensure compliance with those rules when it hired the former prosecutor in the Fayed case, Alan Jackson.

The Firm understands that anytime government counsel joins a private firm (or vice versa), ethical considerations must be evaluated. Given the complex issues presented in Mr. Fayed’s case, *before* hiring Mr. Jackson, the Firm consulted with an attorney specializing in legal ethics, who is also certified by the State Bar Board of Legal Specialization in Legal Malpractice, to ensure complete compliance with all legal and ethical requirements.

As set forth herein, as a result of consultation with ethics counsel, *before* Mr. Jackson joined the Firm, numerous strict procedures were undertaken to wholly and completely screen Mr. Jackson not only from direct involvement in the instant case, but also from the ability to access the file (in person and on the Firm’s server). Measures were also taken to restrict his access to other Firm personnel who worked on the Fayed case. Mr. Jackson was precluded from having any direct supervisory authority over any partner or staff working on the case, and from discussing the case with any of the Firm’s attorneys or staff. Further, *before* Mr. Jackson joined the firm, Mr. Fayed was informed that the Firm was considering hiring Mr. Jackson. Mr. Fayed was advised of the possible conflict issues and informed that if Mr. Jackson joined the Firm, he would be completely isolated from Mr. Fayed’s case. Following receipt of the written disclosure and identification of the conflict of interest issue, Mr. Fayed signed a written consent agreement detailing the potential adverse effects of hiring Mr. Jackson. Further, all monies from Mr. Fayed’s case were received three years *before* Mr. Jackson joined the Firm. No fees have been received and no fees have been charged since Mr. Jackson joined the Firm. Thus, as required, Mr. Jackson has never received any monies from Mr. Fayed’s case.

CALIFORNIA RULES OF PROFESSIONAL RESPONSIBILITY, RULE 1.7

Pursuant to rule 1.7(b) of the Rules of Professional Conduct, “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 by the lawyer’s responsibilities to or relationships with another client, a former client or a third person, or by the lawyer’s own interests.” (Rules Prof. Conduct, rule 1.7(b), emphasis added.) “Informed written consent” requires written disclosure of the potential adverse consequences of the client consenting to a conflicted representation.³ Moreover, “[e]ven when a significant risk

³ https://www.calbar.ca.gov/Portals/0/documents/rules/Rule_1.7-Exec_Summary-Redline.pdf

requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client *without written disclosure* of the relationship to the client and compliance with paragraph (d) where: (1) the lawyer has, or knows that another lawyer in the lawyer's firm has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or (2) the lawyer knows or reasonably should know that another party's lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is a client of the lawyer or another lawyer in the lawyer's firm, or has an intimate personal relationship with the lawyer." (Rules Prof. Conduct, rule 1.7(c), emphasis added.)

Here, although the specific requirements of rule 1.7 of the Rules of Professional Conduct were not in effect at the time Mr. Jackson joined the Firm, counsel recognized and ensured that the Firm obtained written consent from Mr. Fayed before Mr. Jackson was hired. On November 21, 2014, *before* formalizing the agreement to hire Mr. Jackson, Mr. Werksman corresponded with and, on December 11, 2014, personally visited Mr. Fayed to discuss this issue. Mr. Werksman informed Mr. Fayed of his rights, of the steps the Firm would take to separate his case from Mr. Jackson, and of potential concerns from the representation. After this discussion, Mr. Fayed provided written consent for the Firm to continue to represent him on appeal. Thus, regardless of whether the heightened informed consent standard set forth in rule 1.7(b) or the lesser disclosure standard set forth in rule 1.7(c) of the Rules of Professional Conduct controls, the Firm complied in good faith with its ethical duties to obtain written disclosure and informed written consent *before* hiring Mr. Jackson.

Additionally, the Firm has also complied with rule 1.7(d) of the Rules of Professional Conduct. Under paragraph (d), the rules further require that: (1) the lawyer reasonably believes that he will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; and (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding. (Rules Prof. Conduct, rule 1.7(d).) As set forth below, Mr. Jackson was completely screened from the instant case and was prevented from having any communications, access to documents, or any other contact or involvement in Mr. Fayed's case. Thus, the representation is not prohibited by law, and the Firm has continued to provide effective, competent, diligent, and zealous representation for Mr. Fayed.

CALIFORNIA RULES OF PROFESSIONAL RESPONSIBILITY 1.11 AND BUSINESS AND PROFESSIONS CODE SECTION 6131

Under rule 1.11(a) of the Rules of Professional Conduct, a lawyer who has formerly served as an employee of the government: (1) is subject to rule 1.9(c); and (2)

shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public employee, unless the appropriate government agency gives its informed written consent to the representation. Thus, Mr. Jackson is certainly prohibited from personally representing Mr. Fayed under rule 1.11(a).

Although rule 1.11 of the Rules of Professional Conduct prohibits the conflicting representation, it does not prohibit the former counsel from joining the criminal defendant's new law firm. Rule 1.11(b) governs the duties of a firm that is associated with a lawyer, such as Mr. Jackson, who is prohibited from working on a particular matter. Under this rule, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless: (1) the personally prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.⁴

Comment (10) to rule 1.11 of the Rules of Professional Conduct restates rules and authorities which have long governed the actions of current and former district attorneys, including Business and Professions Code, section 6131. Under these provisions, a former prosecutor may not directly or indirectly advise or take any part in the defense of an action he prosecuted, nor is he or she permitted to take or receive any valuable consideration from or on behalf of a defendant. (Bus. & Prof. Code, § 6131, subs. (a) & (b); see also Cal. Com. on Prof. Resp. & Conduct, opn. No. 1993-128 (1993).) In Opinion No. 1993-128, the State Bar considered the specific question of whether a firm may undertake representation of a criminal client where a member of the firm assisted in the prosecution of that client. The opinion specifically noted that Business and Professions Code section 6131 prohibits that prosecutor from personally taking part in the defense, but does not, *with adequate screening*, prohibit the Firm from representing the defendant. (*Id.* at p. 4.) As set forth herein, Mr. Jackson completely screened from Mr. Fayed's defense.

"Screening" is primarily a function of case law. Long before the concept of screening was applied to lawyers in the private setting, governmental lawyers were permitted to address conflicts of interest and avoid disqualification through the use of

⁴ Neither rule 1.11 of the Rules of Professional Conduct, requiring that a law firm or a lawyer who had previously been a criminal prosecutor provide written notice to the appropriate governmental agency of the lawyer's affiliation, nor any other equivalent rule existed in 2014.

ethical screens (also known as ethical walls). (See *People v. Gamache* (2010) 48 Cal.4th 347, 364–365 [disqualification not required where district attorney’s office was able to set up effective ethical screens]; *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17, 27 [no disqualification required where attorney was in a nonsupervisory position, was timely and effectively screened from case creating the conflict, could not communicate to other employees about the case, and was not allowed access to the case files]; *People v. Lopez* (1984) 155 Cal.App.3d 813, 827 [no disqualification required because, “[n]otwithstanding the probable intimacy of the 10-person DA’s office, there was no suggestion of evidence that any leak in the wall of silence between Smith and his colleagues had occurred or would occur”].) In doing so, courts have been mindful of placing strict limitations on employees who want to leave or join government service. (*Chambers v. Superior Court* (1981) 121 Cal.App.3d 893, 899 [discussing an ABA ethics opinion that “expressed concern for important policy considerations such as interference with the right to counsel of one’s choice; a restrictive impact upon the disqualified attorney’s future employment prospects; and potential harm to the ability of government to attract talented young attorneys, due to reduction of subsequent job opportunities”]; *City of Santa Barbara*, at p. 24 [“Private sector law firms may hesitate to hire a lawyer from a public law office, to avoid being disqualified in future matters involving that office. Individual lawyers may hesitate to accept public sector jobs, to avoid limiting their future opportunities in the private sector.”].)

Courts have noted that, while “specific elements of an effective screen will vary from case to case, there are two necessary elements: (1) the screen must be timely imposed”; and (2) “the ethical wall must impose preventative measures to guarantee that information will not be conveyed.” (*National Grange of Order of Patrons of Husbandry v. California Guild et al.* (2019) 38 Cal.App.5th 706, 715.) The typical elements of an ethical wall include: (1) “physical, geographic, and departmental separation of attorneys”; and (2) “established rules and procedures preventing access to confidential information and files.” (*Ibid.*, internal quotation marks omitted.) “[T]he inquiry before a trial court considering the efficacy of any particular ethical wall is *not* to determine whether all of a prescribed list of elements (beyond timeliness and the 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.” (*Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776, 811.)

Here, the Firm took all possible steps to ensure it followed every screening requirement *before* Mr. Jackson joined the Firm. First, the Firm considered how to properly screen the computer system so that Mr. Jackson could not access any information associated with Mr. Fayed’s case. Thus, *prior* to Mr. Jackson joining the

firm, the Firm hired an IT vendor to come into the office and partition Mr. Fayed's electronic file into a separate drive to which Mr. Jackson has no access rights. That drive is only accessible to persons working on Mr. Fayed's case.

The Firm then considered how to best do a physical, in person screening of information related to Mr. Fayed's case. *Prior* to Mr. Jackson's arrival, the Firm converted an entire attorney office into a locked storage room for all documents related to Mr. Fayed's case. That room contains all the physical files related to this matter and remains locked at all times. Only one assistant (not supervised by Mr. Jackson) and the office administrator hold keys to that room. In order to ensure that the room would always be secure, the Firm does not allow even the cleaning staff to have access to that room.

The Firm further assured that Mr. Jackson would have no supervisory authority over persons working on the matter. All the written work on this case was drafted by partner Kelly C. Quinn. Other than the final Reply Brief filed in this matter, all the legal work was completed *before* Mr. Jackson joined the firm. At no time during the period in which Ms. Quinn was drafting, finalizing, and filing the Reply Brief, did Mr. Jackson have any contact with the Fayed matter. Moreover, because Mr. Jackson is a partner in the trial department of the Firm, he has never had any supervisory authority over Ms. Quinn's work. Likewise, because Ms. Quinn is a partner in the appeals department of the Firm, she has never had any supervisory authority over Mr. Jackson's work. Additionally, during the time Ms. Quinn was drafting the Reply Brief, the Firm hired a law clerk, Elizabeth Little, to assist in the preparation of the brief. To avoid even the appearance of impropriety, the Firm took steps to guarantee that Mr. Jackson had no supervisory authority over Ms. Little in connection with any matter. Thus, while working on the instant case, Ms. Little was not permitted to work on *any cases* for or with Mr. Jackson.

CONCLUSION

As set forth above, the Firm took serious and deliberate measures to ensure that Mr. Jackson had no physical or online access to Mr. Fayed's file; did not have any involvement in the case; did not communicate with anyone regarding the Fayed case; did not supervise anyone on the case; did not work with or supervise the law clerk working on the Fayed case, even in matters wholly unrelated to the Fayed case; and did not receive any funds from the case.

Furthermore, the briefing in this case shows that Mr. Jackson's affiliation with the Firm did not affect or influence the legal services provided to Mr. Fayed in any way. The Appellant's Opening Brief was filed on January 22, 2014, more than a year

before Mr. Jackson joined the Firm. After Mr. Jackson joined the Firm, Appellant's Reply Brief was filed on October 30, 2015. The arguments in the brief after Mr. Jackson joined the firm remained exactly the same as those set forth in the Opening Brief before Mr. Jackson joined the firm.

Finally, the right of a criminal defendant to counsel of choice and to present a defense are among the most sacred and sensitive of constitutional rights. (U.S. Const., 6th Amend.; Cal. Const., art. I, §§ 1, 14 & 15; *Magee v. Superior Court* (1973) 8 Cal.3d 949, 954.) Given the seriousness of the instant case, and undersigned counsels' long-standing relationship with Mr. Fayed, these interests are all the more significant and worthy of careful consideration.

Respectfully submitted,
WERKSMAN JACKSON & QUINN, LLP



Mark J. Werksman
Attorney for Defendant/Appellant
James M. Fayed

Respectfully submitted,
WERKSMAN JACKSON & QUINN, LLP




Kelly C. Quinn
Attorney for Defendant/Appellant
James M. Fayed

CERTIFICATE OF COUNSEL

Pursuant to the Court's order, this brief complies with the requirements of California Rule of Court 8.520 subdivision (d). The undersigned certifies that this letter brief contains 2,628 words, according to the Microsoft Word word-count program. The word count includes footnotes but excludes the Firm letterhead, address information and signatures.

By:



Kelly C. Quinn
Werksman Jackson & Quinn
Attorney for Defendant/Appellant
James M. Fayed

DECLARATION OF SERVICE
Re: **People v. James Michael Fayed**
Case No.: **S198132**


I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 888 West Sixth Street, Suite 400, Los Angeles, California 90017.

On October 9, 2019, I served the foregoing document, described as **LETTER BRIEF** on all interested parties listed below by transmitting to all interested parties a true copy thereof as follows:

Head Deputy Major Crimes Division Los Angeles District Attorney's Office 211 West Temple Street Eleventh Floor Los Angeles, CA 90012 <i>Via U.S. Mail</i>	James Michael Fayed CDC No. AK-3340 CSP-San Quentin 3-EB-71 San Quentin, CA 94974 <i>Via U.S. Mail</i>
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 9, 2019 in Los Angeles, California



Martha Rodriguez

STATE OF CALIFORNIA

PROOF OF SERVICE

STATE OF CALIFORNIA

Case Name: **PEOPLE v. FAYED (JAMES
MICHAEL)**

Case Number: **S198132**

Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **kquinn@werksmanjackson.com**
3. I served by email a copy of the following document(s) indicated below:

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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date

/s/Kelly Quinn

Signature

Quinn, Kelly (197697)

Last Name, First Name (PNum)

Werksman Jackson Hathaway & Quinn

