New York State Bar Association

Committee on Professional Ethics

Opinion 793 – 3/17/06

Overrules: N.Y. State 262 (in part)

Topic: Conflicts of interest relating to of counsel attorneys

Digest: Except for personal conflicts under DR 5-101(A), conflicts imputed to an attorney under DR 5-105(D) will also be imputed to all lawyers in any firm with which the attorney has an of counsel relationship; where two firms share an of counsel relationship, conflicts of one firm will be imputed to the other.

Code: DR 2-102(A)(4), DR 4-101, DR 5-101(A), DR 5-105(A), (D), (E), DR 5-108

FACTS

1. Attorney L has an of counsel relationship with both the XYZ law firm and the ABC law firm. The DEF law firm has an of counsel relationship with the MNO law firm.

QUESTIONS

2. Are conflicts of interest that arise out of Attorney L's relationship with the XYZ Firm imputed to the attorneys associated with the ABC Firm and vice versa?

3. Are conflicts attributable to the DEF Firm imputed to the MNO Firm and vice versa?

OPINION

1. DR 2-102(A)(4) of the Lawyer's Code of Professional Responsibility provides that "[a] lawyer or law firm may be designated 'Of Counsel' on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate." We have interpreted an of counsel relationship to mean that the of counsel lawyer is "available to the firm for consultation and advice on a regular and continuing basis."

N.Y. State 262 (1972); *see also* ABA 90-357 (characterizing the of counsel relationship as "close, regular [and] personal"); N.Y. City 1996-8 (same).[1]

5. DR 5-105(D) prohibits a lawyer from representing a client in many circumstances where another lawyer in the firm would be prohibited from doing so:

> While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so under DR 5-101(A), DR 5-105(A) or (B), DR 5-108(A) or (B) or DR 9-101(B) except as otherwise provided therein.

2. Imputation of conflicts from one lawyer in the firm to another lawyer in the firm applies to partners and associates, as well as attorneys who have an of counsel relationship to the firm. In N.Y. State 773 (2004), we concluded that a lawyer who has an of counsel relationship is "associated" with a firm for purposes of imputation of conflicts of interest. *See* ABA 90-357; N.Y. City 1995-8; *see also Nemet v. Nemet*, 112 A.D.2d 359 (of counsel relationship leads to imputed disqualification), *appeal dismissed*, 66 N.Y.2d 602 (1985).[2] We agreed with these authorities and stated that "if a lawyer acting alone would be disqualified from a particular representation based on any of the rules enumerated in DR 5-105(D), then that disqualification is imputed to a law firm with which that lawyer has an 'of counsel' relationship." N.Y. State 773.

3. Thus, any representation that lawyer L could not undertake personally based on the rules enumerated under DR 5-105(D) could not be undertaken by any other lawyer associated with the XYZ Firm and vice versa. Similarly, any representation that lawyer L could not undertake personally could not be undertaken by any other lawyer associated with the ABC Firm and vice versa.

. *Imputation of Conflicts Among Firms that Have a Common Of Counsel Attorney*

8. In this inquiry we now turn to the question whether conflicts imputed to L by virtue of his or counsel relationship with the XYZ Firm will be imputed to lawyers associated with the ABC Firm. For example, if attorney X, a partner with the XYZ Firm, is disqualified from a particular representation under DR 5-105(A), all lawyers associated

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[1] In N.Y. State 262 (1972) we opined that a law firm could not be designated as "of counsel" to another law firm. DR 2-102(A)(4) was amended in June, 1999 to permit such a relationship. To the extent N.Y. State 262 holds otherwise, it is overruled. We also opined that a lawyer could not be designated as "of counsel" to more than one law firm. We no longer hold to that view. We note, however, that there is a practical limitation on the number of such arrangements that a lawyer may enter into because of the requirement that an of counsel attorney have a significant relationship with the firm. *See* N.Y. State 773 (2004); ABA 351 (1984) (of counsel designation requires a relationship that is "close and regular, continuing and semi-permanent"); N.Y. City 2000-4 (adopting the same standard).

[2] In *Hempstead. Video, Inc. v. Incorporated Village of Valley Stream,* 409 F.3d 127 (2d Cir. 2005), the court refused to disqualify a lawyer and his firm because of imputation of conflicts from another attorney who was of counsel to the firm. Despite the title "of counsel," the attorney did not have a significant continuing relationship with the firm and had no access to confidences and secrets of the firm's clients.

with the firm XYZ, including L, who has only an of counsel relationship, also are precluded from undertaking the representation. DR 5-105(D). Does that disqualification extend as well to all the lawyers with whom L is associated in the ABC Firm? We conclude that generally it does.

9. DR 5-105(D) might be read literally to hold that while X's conflicts are imputed to L, they could not be re-imputed to anyone outside of the XYZ Firm. DR 5-105(D) provides for imputation when a lawyer practicing alone "would be prohibited from [undertaking the representation] under DR 5-101(A), DR 5-105(A) or (B), DR 5-108(A) or (B), or DR 9-101(B)." L's conflict derives from DR 5-105(D), not from one of the enumerated provisions and thus arguably there is no basis to impute that conflict to lawyers associated with the ABC Firm. In N.Y. State 670 (1994), however, this Committee opined: "In cases where the primary disqualification does not fall within the parameters of one of the enumerated Disciplinary Rules, vicarious disqualification is dependent on the facts and circumstances of the individual case."

10. Turning to the facts and circumstances of the inquiry, we believe that in most cases the reasons for the imputation to L of the conflicts of lawyers associated with XYZ apply equally to the imputation to the lawyers associated with ABC. As noted in the *Restatement of the Law Governing Lawyers*:

> A lawyer who is of counsel to a firm often has more limited access to confidential client information than firm partners and associates and usually a smaller financial stake in the firm. Nonetheless, the incentive to misuse confidential information, the difficulty of determining when it has been misused, the ostensible professional relationship, as well as the administrative ease of a definite rule, justify extending imputation to lawyers having an of-counsel status.

Restatement Third, *The Law Governing Lawyers* § 123 cmt. c(ii) (1998).

4. We previously opined that a lawyer with an of counsel relationship is associated with a law firm for purposes of the imputation of conflicts. N.Y. State 773. By holding oneself out as having an of counsel relationship with a firm, a lawyer conveys to the public that the lawyer has a continuing relationship with a firm that is close and regular. There is a presumption that a lawyer with an of counsel relationship has access to confidences and secrets of the firm's clients. Thus, the of counsel lawyer has a duty of confidentiality, as well as a duty of loyalty, to the clients of both firms with which the lawyer has an of counsel relationship. We believe that this duty of confidentiality must extend to the other lawyers in the firm.[3]

12. Suppose, for example, that lawyer X, a partner in the XYZ Firm, has agreed to represent Client 1 in litigation against Client 2. Client 2 approaches lawyer Y, also a partner in the XYZ Firm, and asks lawyer Y to represent Client 2 in this litigation.

[3] This rule would apply as well where one lawyer was a partner or associate in two firms. *See Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976).

Lawyer Y must decline, as must every lawyer associated with the firm, including L. DR 5-105(A). This disqualification is required in part because all of the lawyers are presumed to have access to confidential information about Client 1 that might be used to Client 1's disadvantage in the representation of Client 2.[4] This imputation should apply as well to all lawyers associated with L in Firm ABC. Because the relationship between L and ABC must be a close, continuing relationship,[5] the presumption arising from L's access to the confidences of Client 1 should be imputed to the lawyers in Firm ABC so as to preclude representation of Client 2 in litigation against Client 1.[6]

13. Another reason for the imputation of conflicts is to protect the principle of loyalty to a client. *See* Model Rules of Professional Conduct R. 1.10 cmt 2 ("The rule of imputed disqualification . . . gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm."). A client of the XYZ Firm is entitled to loyalty from all lawyers associated with XYZ regardless of other arrangements they have made to practice law. Similarly, the client is entitled to the lawyer's continued loyalty when he simultaneously practices at another firm, as well as the loyalty of the lawyers at that second firm.

14. Similarly, the lawyers in two firms that share an of counsel lawyer owe duties of confidentiality to former clients of both firms. Just as the duty of confidentiality bars the lawyers in a firm from appearing adverse to former clients of the firm in matters substantially related to the prior representation, DR 5-108(B); *see* N.Y. State 723 (1999), lawyers in a firm that share an of counsel lawyer with that first firm are subject to the same prohibition.

15. This position is in substantial accord with that taken by the New York City Bar, which treated the of counsel attorney and the firms as one unit where the attorney was of counsel to more than one firm. The committee stated:

> If the law firm reaches the conclusion that an "of counsel" designation is appropriate, it should bear in mind that for purposes of analyzing conflicts of interest, "of counsel" relationships are treated as if the "counsel" and the firm are one unit. N.Y. City 1995-8. The implication of the "of

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4 The lawyer does not need to actually convey confidences and secrets to the lawyers at ABC, which of course would be a violation of DR 4-101. It is the mere access to confidences and secrets that triggers the obligation. *Emle Indus. Inc. v. Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973) (disqualification analysis hinges on whether attorney could have acquired information, not whether it was actually acquired). *Cf. Solow v. W.R. Grace*, 83 N.Y.2d 303, 306; 632 N.E.2d 437, 438; 610 N.Y.S.2d 128 (1994) (disqualification may be avoided by demonstrating that confidential information was not communicated); N.Y. State 723 (1999) ("In some circumstances, the moving lawyer will not be presumed to have acquired confidences and secrets").

5 *See* note 1.

6 *Cf.* N.Y. State 715 (1999) (contract lawyer could not work for two firms representing adverse clients if he is deemed to be associated with both firms even if contract lawyer does not work on the matter); N.Y. State 672 (1995) (implying that conflicts arising under one of the enumerated rules in DR 5-105(D) that would be imputed from one partner to a second partner who was a part-time prosecutor would also be imputed to the DA's office).

> counsel" relationship will be even more far reaching if the per diem attorney is considered "of counsel" to one or more other law firms; conflicts of interest applicable individually to any of the firms or attorneys would be imputed to all of them.

N.Y. City 1996-8.

It is also in substantial accord with the position of the ABA, which imputed all conflicts of two firms due to a common of counsel lawyer.

> In consequence there is attribution to the lawyer who is of counsel of all of the disqualifications of each firm, and, correspondingly, attribution from the of counsel lawyer to each firm, of each of those disqualifications . . . . [T]he effect of two or more firms sharing an of counsel lawyer is to make them all effectively a single firm, for purposes of attribution of disqualifications.

ABA 90-357.[7]

5. We conclude that the result will often be different where the conflict arises not from a conflicting representation of a client by another lawyer in one of the firms but from a personal interest of such a lawyer. DR 5-101(A) prohibits representation where an attorney's financial, business, personal or property interests might affect the exercise of the attorney's professional judgment. While the Code requires disqualification of the of counsel attorney, as well as all other attorneys in the firm, when one of the firm's lawyers is disqualified because of a personal conflict under DR 5-101(A), *see* DR 5-105(D), we do not believe that this circumstance automatically requires the disqualification of the attorneys in the other firm with which the common lawyer has an of counsel relationship. For example, suppose that lawyer A is unable to undertake representation of T Co. in litigation against D Co. because A's father is the treasurer of D Co. and A believes that might affect A's ability to represent T Co. While none of the other 1,000 lawyers in the ABC firm who knew of the relationship, including the of counsel lawyer, could represent T Co. (absent consent), we see no reason why a lawyer in the XYZ Firm, other than the of counsel lawyer, could not represent D Co. On the other hand, there may be circumstances where such cross-imputation would be warranted. For example, suppose the of counsel lawyer was one of only three lawyers in each firm and was a major public figure. In that case, where the of counsel lawyer

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[7] In ABA 90-357, the committee reconsidered its former view that a lawyer could not be of counsel to more than two firms, and concluded that the Model Rules contained no such restriction. The opinion makes clear that the cost and consequence of multiple relationships was conflict imputation. *See also* California Op. 1993-129 (where lawyer is of counsel to two firms, the firms are treated as one for conflicts purposes); Massachusetts Op. 01-1 (same); Maine Op. 175 (2001) (same); Ohio Op. 97-2 (1997) (same); Vermont Op. 99-5 (same); Wisconsin Op. E-93-1 (adopting ABA 90-357). ABA 90-357 rests on Model Rule 1.10, which provides for imputation of conflicts arising from enumerated rules that are similar to the rules listed in DR 5-105(D), except that Model Rule 1.10 exempts personal interest conflicts from firm-wide imputation if the conflicts do "not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." Model Rule 1.10(a).

may be prominently associated with both firms in the minds of the firms' clients and where the relationship among the lawyers of the firms is likely to be particularly close, all lawyers in both firms might be disqualified.

6. We emphasize that imputation of conflicts would not occur where a lawyer's relationship with the firm is more attenuated than that of an of counsel relationship. For example, where a lawyer from Firm A performs legal work on a contract basis with Firm B, or appears as local counsel in a litigated matter principally handled by Firm B, or consults with Firm B on a one-off basis, the lawyer is not deemed "associated" with Firm B. The relationship would not be close, regular, or personal, and the lawyer would not have general access to confidences and secrets of Firm B. Thus none of the lawyer's conflicts from Firm A would be imputed to Firm B.[8] Conversely, even where there is no formal of counsel relationship, imputation may be required in specific cases where the lawyer from Firm A has participated in a matter against a Firm B client and had access to confidences and secrets.[9]

. *Imputation Where One Firm is Of Counsel to Another Firm*

7. A similar question arises when the DEF Firm enters into an of counsel relationship with the MNO Firm. For example, if any lawyer from the DEF Firm is precluded from undertaking a representation, is that disqualification imputed to all lawyers associated with the MNO Firm? Although the Code is silent as to imputed disqualification with respect to *law firms* sharing an of counsel relationship, we do not believe it makes any difference whether the shared relationship is with one lawyer or an entire firm. In order to create an of counsel designation with another firm, the two firms must have a continuing relationship that, for example, would entail access to confidences and secrets of the other firm's clients.[10] Such access should preclude the MNO Firm from representing any client that the DEF Firm could not represent under the enumerated provisions of DR 5-105(D). Were we to conclude otherwise, a law firm could avoid the imputation required by multiple of counsel relationships by designating the entire firm, rather than a single attorney or multiple attorneys as of counsel.[11]

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8 *See, e.g., Bison Plumbing City, Inc. v. Benderson*, 281 A.D.2d 955, 722 N.Y.S.2d 660, 661 (4th Dept. 2001) (law firm's disqualification not imputed to "special counsel" to law firm); *Shelton v. Shelton*, 151 A.D.2d 659, 542 N.Y.S.2d 719 (2d Dep't 1989) (mere rental of office space does not create an association where conflicts are imputed); *Gray v. Memorial Medical Center, Inc.*, 855 F. Supp. 377 (S.D. Ga. 1994) (although lawyer had an of counsel title, court found that he was actually a part-time independent contractor and refused to impute conflicts).

9 *See, e.g., Fund of Funds Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1977) (entire law firm disqualified where one of its lawyers worked extensively as a co-counsel with another firm that could not undertake the representation).

10 As a practical matter, such a relationship is much like that of two branch offices of a single law firm. For example, DR 5-105(D) prohibits an associate working in the New York office of a law firm from representing a client that could not be represented by an associate in the Seattle office of the firm.

11 *See also* Mississippi Op. 180 (1990) (requiring reciprocal attribution of disqualification where two law firms are of counsel); Wisconsin Op. E-93-1 (same).

. *Conflicts Checks*

19. One implication of the possibility of one lawyer having multiple of counsel relationships or of firms having a reciprocal of counsel relationship that imputes disqualifications between the firms is the necessity to do a more extensive conflicts check. DR 5-105(E) provides:

> A law firm shall keep records of prior engagements, which records shall be made at or near the time of such engagements and shall have a policy implementing a system by which proposed engagements are checked against current and previous engagements, so as to render effective assistance to lawyers within the firm in complying with DR 5-105(D). Failure to keep records or to have a policy which complies with this subdivision, whether or not a violation of DR 5-105(D) occurs, shall be a violation by the firm. In cases in which a violation of this subdivision by the firm is a substantial factor in causing a violation of DR 5-105(D) by a lawyer, the firm, as well as the individual lawyer, shall also be responsible for the violation of DR 5-105(D).

8. In N.Y. State 720 (1999), we opined that "the intent of the provision can only be effected if a firm adds to its system information about the representations of lawyers who join the firm." This would be true whether the lawyer joining the firm is a partner or associate or has an of counsel relationship. Thus, when lawyer L establishes an of counsel relationship with ABC, the firm has an obligation not only to make inquiries about L's own representations but also the representations of the XYZ Firm so that the ABC lawyers have sufficient information to avoid a violation of DR 5-105(D).[12] Conversely, when L establishes an of counsel relationship with XYZ, that firm has an obligation to make inquiries about the representations of the ABC Firm. This would include past representations because both firms would be precluded from undertaking a current representation of a client whose interests were adverse to a former client of either firm, where the matters were substantially related. DR 5-108; DR 5-105(D) (imputing DR 5-108 conflicts). This is also an ongoing obligation because L and each firm will undertake new representations that may present conflicts for the other firm.[13]

21. Similar obligations arise when the DEF Firm forms an of counsel relationship with the MNO Firm. Because these two firms are essentially treated as one firm, one conflict checking system would cover both firms and all their attorneys.

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[12] For the possibility that this information may be a confidence or secret or may be considered proprietary information, see N.Y. State 720 (1999). Note that DR 5-105(E) does not require the firm to keep records of personal conflicts under DR 5-101(A). As noted above, in most circumstances there would be no cross-imputation of such conflicts.

[13] *See* Massachusetts Op. 01-1 (on taking on a new matter, conflicts databases of both firms where lawyer is of counsel must be checked); Vermont Opinion 99-5 (two firms sharing one lawyer on an of counsel basis must develop a procedure to screen for conflicts).

CONCLUSION

22. For the reasons explained above, both questions are answered in the affirmative.

(26-05)