

New York State Bar Association

Committee on Professional Ethics

Opinion 794 – 3/17/06

Topic: Conflicts among various projects of a law school legal clinic, temporary or contract lawyers.

Digest: If the various divisions of a law school legal clinic share common office space and file space, the conflicts of the entire clinic are imputed to the firms of lawyers who supervise only one clinic division or project, and the conflicts of the law firms are imputed to the clinic.

Code: DR 2-103(D); DR 2-110; DR 5-105; DR 5-108; DR 5-110; DR 9-101; EC 2-25; EC 5-21; EC 5-23.

QUESTION

1. A law school's legal clinic assigns different personnel to different "projects" (representations grouped by practice area such as a civil rights project or low-income tax project). If lawyers supervise one of the clinic's projects, are all of the clinic's conflicts imputed to the lawyers' respective firms, and *vice versa*? Can any steps be taken to prevent such imputation?

OPINION

2. So long as the clinic's students work in a common space and have shared access to physical files, the entire legal clinic, including the project in question, is a law firm within the meaning of the Code so that the clinic's entire set of conflicts are imputed to the lawyers' firms, and *vice versa*.

Background

3. A New York lawyer is director of the legal clinic at a law school located in New York State. The legal clinic provides *pro bono* legal services in which law students,

supervised by faculty members admitted to the New York bar, represent mostly low-income persons in matters ranging from civil rights actions to domestic violence complaints. Recently, the clinic has established a new project, which will engage the clinic in representing persons allegedly harmed by improper commercial practices. To facilitate this endeavor, this “Consumer Project” has enlisted the aid of one faculty member who is also “of counsel” to a private law firm, as well as another private practitioner who is a partner in a law firm and will be a clinical instructor. The regular faculty member will direct the Project and also “consult” on individual cases. The clinical instructor will supervise the cases and work with the students to represent the Project’s clients.

4. The clinic’s director wishes to clarify whether the lawyers’ participation in the Consumer Project will result in the imputation of conflicts from the entire clinic to the lawyers’ firms and *vice versa*. The director is concerned that, in view of the extent of the clinic’s other projects, the exercise of clearing conflicts with respect to those other projects may be so burdensome as to discourage the participation of the private law firms in the Consumer Project.

5. In particular, the clinic inquires whether the following segregation measures are sufficient to prevent imputation of conflicts of the other projects to the law firms:

First, the offices of the supervising lawyers will not be part of the clinic’s common space, though students assigned to the Consumer Project will continue to work side-by-side with students assigned to other projects.¹

Second, a separate client information database for storing documents electronically will be established to which only Consumer Project personnel will have access. The other projects will share a separate information database, which will be inaccessible to those involved in the Consumer Project. Client files will likewise be separated, but physically located in the common clinic space.

Third, new matters for the Consumer Project will be cleared for conflicts against the legal clinic’s conflict checking system and the conflict checking systems of the two law firms whose lawyers will be participating in the Consumer Project. New matters for the clinic’s other projects will likewise continue to be cleared for conflicts against the clinic’s conflict checking system, but will *not* be cleared against the systems of the law firms.

Fourth, the legal personnel and administrative assistant involved in the Consumer Project will not have access to the information database of, or responsibility for, any other non-Consumer Project matter.

¹ The inquirer does not so state, but we assume for purposes of this opinion that the students could not participate in two projects at once, and could not move from one project to another, at least without additional conflict checking.

Finally, the clinic intends to use separate letterhead for the Consumer Project, and to conduct confidentiality training for the students participating in its work.

6. The inquirer asks whether the proposed measures are sufficient to prevent imputation of (i) the clinic's non-Consumer Project representations to the law firms and (ii) the law firms' representations to the other projects of the legal clinic.

7. We conclude that the proposed measures are not sufficient to prevent cross-imputation of conflicts, because of the sharing of work space and physical file space.

Analysis

8. With limited exceptions, the Code of Professional Responsibility treats a law clinic as a law firm. The Code defines a "law firm" to include a "qualified legal assistance organization."² A "qualified legal assistance organization" means an "office or organization of one of the four types listed in DR 2-103(D)(1) through (4),"³ which includes a legal aid office operated or sponsored by a law school.⁴ Thus, unless the Code otherwise provides, the rules governing law firms are equally applicable to the law school's legal clinic.⁵

9. These rules include the vicarious disqualification rules of DR 5-105(D). DR 5-105(D) says that, "[w]hile 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 (conflicts involving a lawyer's personal or business interests); DR 5-105(A) or (B) (conflicts involving differing client interests); DR 5-108(A) or (B) (conflicts involving former clients); or DR 9-101(B) (conflicts involving prior government service).

10. The Code provides an exception to the rules of imputation for legal clinics. DR 5-110(A) states:

A lawyer may serve as a director, officer or member of a not-for-profit legal services organization, apart from the law firm in which the lawyer participates, notwithstanding that the organization serves persons having interests that differ from those of a client of the lawyer or the lawyer's firm, provided that the lawyer shall not knowingly participate in a decision or action of the organization:

1. If participating in the decision or action would be incompatible with the lawyer's duty of loyalty to a client under DR 5-101 through DR 5-111; or

² Code, Definitions ¶ 2.

³ *Id.* ¶ 8.

⁴ DR 2-103(D)(1)(a).

⁵ See N.Y. State 688 (1997) (applying DR 5-101 to legal clinic).

2. Where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests differ from those of a client of the lawyer or the lawyer's firm.

11. A law school legal clinic is a not-for-profit legal services organization within the meaning of this rule.⁶ The public policy underlying DR 5-110 is to encourage lawyers to contribute *pro bono* legal services and to assist in making legal counsel available to clients with limited means.⁷ The rule, however, applies only to lawyers serving as a "director, officer, or member" of such an organization, and does not apply to a lawyer representing clients through the organization.⁸ In other words, DR 5-110 distinguishes between lawyers who, on the one hand, administer the organization, make policy, or teach, and on the other hand, the lawyers who represent clients as part of the organization's rendition of legal services. Accordingly, DR 5-105(D) applies in full force to lawyers engaged in the representation of clients through the legal clinic.

12. Whether a lawyer participating in a legal clinic is engaged in the representation of a client is a fact-intensive inquiry. In the circumstances before us, we understand that the full-time faculty member's principal role will be to teach the legal subjects of relevance to the Project, with occasional "consultation" on specific matters. Whether these consultations give rise to the formation of an attorney-client relationship between the teacher and the clinic's client in particular matters depends on all the circumstances. Such a relationship is most likely to exist when the instructor is in receipt of a particular client's confidences and secrets and actively engaged in providing legal services to the client. On the other hand, we do not think that a teacher's commentary on abstract facts gives rise to an attorney-client relationship.

13. In this situation, the clinic presumes that the nature of the services provided by both of the supervising instructors consists, at least in part, of attorney-client relationships between the instructors and the clinic's clients. In trying to accommodate this fact to the clinic's ethical obligations as a law firm, the clinic likens the faculty members' situation to that of temporary or contract lawyers. The clinic argues that the safeguards it proposes to implement are akin to those deemed sufficient to relieve temporary or contract lawyers hired for particular matters from DR 5-105(D)'s imputation rule. We disagree.

14. This Committee and others have outlined the circumstances in which contract or temporary lawyers may be treated as "associated" in a firm for imputing conflicts.⁹ The common and predominant theme of these opinions is the protection of client confidences and secrets. As we said in Opinion 715, whether a lawyer "should be regarded as being associated with a firm while working on a matter for the firm depends on the nature of the relationship, and especially whether [the lawyer] has access to

⁶ See N.Y. State 688 (1997).

⁷ EC 2-25.

⁸ See N.Y. State 688 (1997). See also N.Y. State 643 (1993) (legal service organization's board member may represent client against organization's client whether board member's client is paying or *pro bono*).

⁹ N.Y. State 715 (1999); ABA 88-356; N.Y. City 1995-8; Restatement, Third, The Law Governing Lawyers §123(3) (2000).

information relating to the representation of firm clients other than the clients for which [the lawyer] is working directly.” We wrote:

Whether a Contract Lawyer who works in the offices of the employing firm should be deemed to have access to the confidences and secrets of all clients of the firm depends upon the circumstances, including whether the firm has a system for restricting access to client files and for restricting informal discussions of client matters. This, in turn, may depend on the size of the firm and the formality of procedures for restricting access to such information. The mere fact that the Contract Lawyer has an office in the employing firm or uses its library or rest rooms does not necessarily mean that the Contract Lawyer should be presumed to have access to confidential information about all clients in the firm. If the Contract Lawyer has general access to the files of all clients of the firm and regularly participates in discussions of their affairs, then he or she should be deemed “associated” with the firm. However, if the firm has adopted procedures to ensure that the Contract Lawyer is privy only to information about clients he or she actually serves, then, in most cases, the Contract Lawyer should not be deemed to be “associated” with the firm for purposes of vicarious disqualification.

15. A similar conclusion applies in opinions addressing office sharing among separate law firms or lawyers in solo practice. We and others have found that, depending on the facts and circumstances of a particular situation, DR 5-105(D) may prevent lawyers who practice separately but share office space from representing clients with differing interests.¹⁰ Under these opinions, with appropriate safeguards, and assuming that the arrangement is not misleading to prospective and actual clients, the sharing of merely the same leasehold, a library, an electronic research account, restrooms, a central phone system with individual lines, or a common receptionist is not sufficient, alone or in combination, to merge lawyers in separate practices into one. Acceptance of these organizations presupposes, however, that the confidences and secrets of the clients of each separate practice will not be shared or appear to be subject to sharing with lawyers working on a conflicting matter.

16. Such is our objection to the clinic’s proposal. Two or more lawyers carrying out conflicting assignments in close proximity in the same space with common tables, facilities and files engender subtle influences that could affect the exercise of independent professional judgment.¹¹ These “numerous influences might weigh against the unswerving fidelity to the client’s interest that professional duty compels.”¹² In addition, there is a “real danger that a client’s confidences and secrets will be divulged” through the use of “shared clerical staff, common files, or otherwise.”¹³ “If the physical

¹⁰ *E.g.*, N.Y. State 583 (1987); N.Y. State 437 (1976); ABA Inf. 1486 (1982); N.Y. County 680 (1990); N.Y.C. 1995-8 (1995); N.Y.C. 80-63 (1981).

¹¹ EC 5-21, EC 5-23.

¹² ABA Inf. 1474 (1982) (quoting ABA Inf. 1235 (1972)).

¹³ ABA Inf. 1474 (1982).

organization of the office suite places client confidences at risk, it is appropriate to treat the association as a firm or to determine that adverse interests may not be represented.”¹⁴

17. Here, students involved in the Consumer Project will be working side-by-side in the same space with students working on the clinic’s other matters. Although an electronic barrier will be erected to prevent access to client documents on a database, no physical barrier separates Consumer Project students from access to the files on other clinic matters or vice versa. Such proximity requires that the legal clinic, including the Consumer Project, be treated as a single law firm. Consequently, by reason of DR 5-105(D), the disabilities of any of the legal personnel of the legal clinic are imputed not only to other members of the clinic but also to the law firms with which the faculty advisors are associated.¹⁵

18. We are not inattentive to the clinic’s concern that our result will discourage the participation of private practitioners but we do not believe that concern allows us to ignore what the Code and its interpreters say. Innumerable lawyers in private practice contribute generously of their time to *pro bono* efforts in keeping with the precepts of Canons 4 and 5. No better place exists to instill these values in the profession than applying the same standards to those studying to join it.

CONCLUSION

19. So long as a legal clinic’s students work in a common space and have shared access to physical files, the entire legal clinic’s personnel, including lawyers who supervise only a single project of the clinic, are a law firm within the meaning of the Code so that the conflicts of all those personnel are imputed to the lawyers’ firms, and *vice versa*.

(26-04)

¹⁴ *Commonwealth v. Alison*, 434 Mass. 670, 691, 751 N.E.2d 868, 890 (2001).

¹⁵ See N.Y. State 793 (2006) (conflicts of a lawyer who is of counsel to two law firms, including the conflicts of all lawyers in each firm, are imputed to both law firms).