New York State Bar Association

Committee on Professional Ethics

Opinion 807 – 1/29/07

Topic: Imputation of conflicts of interest; dual representation of buyer and seller of real estate

Digest: A part-time associate of a law firm is "associated" with the law firm for the purpose of imputation of conflicts of interest. The buyer and seller of residential real estate may not engage separate attorneys in the same firm to advance each side's interests against the other, even if the clients give informed consent to the conflict of interest.

Code: DR 5-105(C), (D)

QUESTION

1. A law firm employs a part-time associate who works for the firm two days per week. When not working at this law firm, the part-time associate operates her own separate private practice of law, at a separate location, where she works as a sole practitioner and handles her own clients, maintains her own files and has her own trust account. A client approached the sole practitioner at her separate practice and asked her to represent the client in buying some residential real estate. The seller approached a partner in the law firm that employs the sole practitioner part-time and asked the partner to represent him as the seller in the same transaction. May the law firm, with full disclosure and consent, represent the seller in a residential real estate transaction while its part-time associate, operating out of her separate practice, represents the buyer in the same transaction?

OPINION

Designation of part-time lawyer as an associate

2. A threshold question is whether it is proper to refer to the part-time lawyer as an "associate" of the law firm. The New York City Bar ethics committee has opined that a lawyer who works for a law firm on a continuing basis and spends 10-15 hours per week on firm matters, but does not work exclusively for that law firm, cannot be referred to by the law firm as an "associate." N.Y. City 1996-8. The New York City Bar opinion cites numerous authorities for the proposition that an "associate" means a "salaried lawyer-employee" and concludes that to call a per diem lawyer—who is paid to work only on specific matters and who does not work exclusively for the firm—an "associate" would be misleading. We agree that it would be misleading to clients and the public to call a lawyer an "associate" where that lawyer is called in from time to time to work only on specific matters and is paid on a per diem basis.[1]

3. We do not believe, however, that a part-time lawyer must work for only one firm in order to be properly called an "associate." Where the part-time lawyer is regularly available to consult with the firm and its clients on a variety of matters, albeit during limited hours, the term "associate" can be proper even though the lawyer does not work exclusively for that firm. In this connection we note that a single lawyer can be a partner in two different law firms. *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976). We see no reason that a lawyer cannot be an associate in two law firms where the lawyer has a part-time relationship with each firm, if the relationship with each otherwise bears the typical hallmarks of a firm-associate relationship as it is generally understood.

Imputation of conflicts to a part-time associate

4. Disciplinary Rule 5-105(D) provides 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(A), DR 5-105(A) or (B), DR 5-108(A) or (B), or DR 9-101(B) except as otherwise provided therein."

5. A lawyer who is held out to the public as an associate is plainly "associated" with the firm for purposes of DR 5-105(D). The clear implication of calling a lawyer an "associate" of the law firm is that the lawyer is "available to the firm for consultation and advice on a regular and continuing basis." N.Y. State

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[1] *Cf.* N.Y. State 715 (1999) ("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.").

262 (1972) (term 'of counsel' may only be used where there is a continuing relationship). *See also* N.Y. State 794 (2006); N.Y. State 793 (2006); N.Y. State 773 (2004); ABA 90-357 (1990). A law firm may not denominate a lawyer as an associate and then take the position that the lawyer is not an associate for the purpose of imputation of conflicts of interest.

6. While properly calling a lawyer an associate means that he or she is associated with the law firm for the purposes of imputation of conflicts of interest, calling the same lawyer something else does not by itself mean that conflicts are not imputed. The label is not dispositive. A lawyer who has another title, such as "contract lawyer," will be deemed to be "associated" with the law firm in the circumstances set forth in our opinion N.Y. State 715 (1999).

Associated lawyers representing buyer and seller in real estate transactions

7. The buyer and the seller of real estate will ordinarily have differing interests in the transaction. Such differences, which would require the exercise of independent legal judgment by the lawyers for each party, include such things as the nature of the deed to be given; customs to be followed in making adjustments; points in the title report which may or may not be disregarded; and what title company to use. N.Y. State 38 (1966).

8. We recognized in N.Y. State 38 (1966) and N.Y. State 611 (1990) that "in unusual and very limited circumstances" one lawyer might properly undertake dual representation of both parties to a real estate transaction. Our conclusion was based on former Canon 6 and later on Disciplinary Rule 5-105(C), which provides:

> In the situations covered by DR 5-105(A) and (B) a lawyer may represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.

9. We concluded in N.Y. State 162 (1970) that a single lawyer could represent both parties to a real estate transaction where the interests of buyer and seller are not actually or potentially differing or would vary only slightly. In N.Y. State 611 (1990), we opined that a single lawyer could represent the seller and the lender in a real estate transaction where the parties have reached a complete accord on the business terms of the transaction, no points of importance remain for negotiations, and a title policy is to be obtained. *See also* N.Y. County 615 (1973) (lawyer may represent in a real estate transaction, with their consent, both buyer and seller who had already agreed upon the purchase price, time and manner of payment, and other terms and conditions of the sale).

10. Where such dual representation by a single lawyer might be permissible, we have cautioned that the lawyer "should not routinely assume that dual representation of these parties will be ethically permissible in every transaction." N.Y. State 611. A lawyer undertaking to represent both buyer and seller of real estate should heed the admonition of N.Y. State 38 (1966), repeated in N.Y. State 162: "Dual representation should be practiced sparingly and only when it is clear that neither party will suffer any disadvantage from it. It is difficult to justify, except in unusual and very limited circumstances . . . "

11. Under DR 5-105(D), these limitations on a single lawyer representing two parties in a real estate transaction apply as well to representation by a single law firm. The opinions discussed above, in which we concluded that a single lawyer may, in unusual and very limited circumstances, undertake dual representation of both parties to a real estate transaction, involve cases where there is little or no actual adversity between the two parties and they have both sought out a single lawyer (or law firm) to represent them jointly. This might occur, for example in a family transaction or where two clients of a lawyer or law firm have agreed on substantially all of the terms of the transaction and together ask the lawyer or law firm to document the transaction for them both.[1]

12. The situation under consideration in this opinion is quite different: Here a buyer and a seller of residential real estate each determined at the outset of the negotiations to be represented by separate lawyers in separate firms, and the two clients separately approached lawyers in different firms to negotiate the terms of the transaction between them. The parties' decision at the outset that they should be represented by two different lawyers in two different firms reflects an actual adversity and conflict of interest between them that would require the two lawyers to negotiate or bargain against each other as adversaries.

13. A conflict like the one here is not consentable under DR 5-105(C). In such a situation, a disinterested lawyer would not conclude that the two lawyers could "competently represent the interests of each." *See* N.Y. City 2001-2 ("If the dual representations require lawyers to directly negotiate the substantive business terms with each other, the direct adversity could preclude such concurrent representation -- even with consent.").[2]

CONCLUSION

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[1] Even in this situation, if potential adversity between the clients became actual, the single lawyer or law firm would usually have to withdraw from representing both of the parties unless the clients have consented to have the lawyer continue for only one of them. DR 5-108(A) (a lawyer may not, without consent, represent a client adverse to a former client in the same or a substantially related matter); EC 5-15.

[2] This conclusion is much the same as that which would be reached if two lawyers in the same firm sought consent for one to represent plaintiff and the other defendant in contested litigation.

14. The question is answered in the negative.

(11-06)
