NEW YORK STATE BAR ASSOCIATION
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Committee on Professional Ethics

Opinion 876 (9/9/11)

Topic: Conflicts of interest when lawyers are associated with two or more firms

Digest: Conflicts of interest will be imputed to all lawyers in all firms with which a lawyer is associated as a partner, associate or of counsel, whether or not a screen is established.

Rules: 1.7, 1.9, 1.10(a) & (e)

QUESTION

1. May lawyers associated as partners, associates or of counsel avoid the imputation of conflicts by creating a screen and limiting the practice of one of the firms?

FACTS

2. The ABC law firm and the MNO law firm are separate law firms located in different cities over 200 miles apart. ABC and MNO do not share office space and have no common partners or associates. However, two partners of the ABC law firm and two partners of the MNO law firm intend to form a third law firm, the XYZ law firm. (Other partners of the ABC firm and the MNO firm will continue practicing with their respective firms but will not join the XYZ law firm.) The sole purpose of the XYZ law firm will be to write title opinions for mineral estates associated with real property. The XYZ firm will limit itself to that practice.

3. In an effort to avoid imputing any conflicts of interest from any of the three firms to any other firm, the common members of ABC, MNO and XYZ will enter into agreements prohibiting them from disclosing any proprietary, trade secret, confidential or privileged information of the XYZ law firm to anyone outside the firm. The XYZ firm plans to obtain the informed consent of the XYZ firm's clients to this arrangement.

4. The XYZ law firm will not have a separate physical office. Instead, the XYZ firm will maintain its files electronically and make them available only to the attorneys at the XYZ law firm. In addition, the XYZ firm's files will be maintained physically in file cabinets located at each of the ABC and MNO law firms, but those files will be

separated from the general files of the ABC and MNO law firms, and locks on the file cabinets will prohibit non-XYZ attorneys from gaining access to the XYZ firm's files.

5. The essence of the question before us is whether screening is sufficient to avoid the imputation of conflicts of interest from one law firm to another. We conclude that it is not.

OPINION

6. Effective April 1, 2009, the New York Rules of Professional Conduct (the "Rules") replaced the New York Code of Professional Responsibility (the "Code"). However, the Rules and the Code are similar or identical in substance regarding all relevant issues raised by this inquiry. Consequently, although the opinions and cases we cite in this opinion were decided under the Code, each would be decided in the same manner under the Rules because there are no substantive differences between the applicable Rules and the former Code provisions. Thus, our analysis and our answer under the Rules is the same as it would have been under the Code.

General Principles of Imputation

7. New York's general rule governing imputation of conflicts of interest is Rule 1.10(a), which is nearly identical to former DR 5-105(D). Rule 1.10(a) provides:

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein.

8. For decades, both this Committee and various New York courts have consistently stated that where a lawyer is "associated" with more than one law firm within the meaning of the imputation rule, all of the law firms with whom that lawyer is associated are treated as one law firm for purposes of conflicts of interest. Accordingly, under Rule 1.10(a), all conflicts in each firm are imputed to all lawyers in all of the firms associated with a common lawyer. *See, e.g.,* N.Y. State 807 (2007) (lawyer working part-time at two firms); N.Y. State 794 (2006) (lawyer working at law firm and law school clinic); N.Y. State 793 (2006) (lawyer with "of counsel" relationship with two firms at the same time); N.Y. State 715 (1999) (contract lawyer for two firms); N.Y. State 388 (1975) (sole practitioner and member of partnership); N.Y. City 2000-4 (2000) (affiliated law firms); *Cinema 5, Ltd. v. Cinerama, Inc.,* 528 F. 2d 1384 (2d Cir. 1976) (partner in two law firms).

9. Because multiple law firms that are associated with a common lawyer (or lawyers) are treated as if they were one firm for conflicts purposes, it follows that all law firms with a common lawyer must also be treated as a single unit for purposes of checking for conflicts under the Rules. In that regard, Rule 1.10(e), which includes language similar to former DR 5-105(E), requires law firms to implement and maintain a

system for checking for conflicts of interest. As explained in Comment [9] to Rule 1.10: "Under paragraph (e), every law firm, no matter how large or small (including sole practitioners), is responsible for creating, implementing and maintaining a system to check proposed engagements against current and previous engagements and against new parties in pending matters."

Will Screening Avoid Imputation?

10. The opinions we have cited have not specifically addressed the issue of screening. The terms "screened" and "screening" are defined in Rule 1.0(t) as follows:

> (t) "Screened" or "screening" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or the firm is obligated to protect under these Rules or other law.

11. Here, the XYZ law firm will attempt to screen its files and activities so that only the lawyers who make up the XYZ law firm will have access to the XYZ firm's client files, while the lawyers at the ABC and MNO firms will not. We may assume, without deciding, that these procedures would be "reasonably adequate under the circumstances to protect information that the isolated lawyer or the [XYZ] firm is obligated to protect under these Rules or other law," and would thus fall within the definition of "screening" in Rule 1.0(t). But that is irrelevant because a screen cannot avoid the imputation of conflicts between and among all three firms pursuant to Rule 1.10(a). The screen fails on at least two grounds.

12. First, in promulgating the new Rules, the Appellate Divisions rejected the recommendation of the New York State Bar Association that screening be permitted in appropriate circumstances as a substitute for client consent. *Compare* Proposed Rule 1.10(c) and Proposed Comments [5D] through [5H] of Rule 1.10 (Feb. 1, 2008) *with* Rule 1.10 as adopted effective April 1, 2009.[1]

13. Second, the proposed screening by the XYZ law firm does not permit ABC law firm or MNO law firm to fulfill its obligation under Rule 1.10(e) to implement "a system by which proposed engagements are checked against current and previous engagements" in the circumstances specified in Rule 1.10(e)(1)-(4). Thus, law firms ABC and MNO will be unable to determine whether either firm has a conflict under (*inter alia*) Rules 1.7(a) and 1.9(a)-(b), or whether any conflict arising under Rule 1.7(a) is nonconsentable under Rule 1.7(b)(1)-(3). Moreover, if either the ABC and/or the MNO firm could somehow determine (despite the XYZ screen) that it had a conflict of interest under Rule 1.7 or Rule 1.9, the firm would lack the information necessary to obtain "informed consent" to the conflict from each affected client.

[1] The Proposed N.Y. Rules of Professional Conduct (February 1, 2008) are available on the State Bar's website at *http://www.nysba.org/AM/Template.cfm?Section=Committee_on_Standards_of_Attorney_Conduct_Home&Template=/CM/ContentDisplay.cfm&ContentID=4786.*

14. The fact that the XYZ law firm intends to limit its practice to a discrete area of the law does not avoid these infirmities. Rule 1.10(a) and (e) do not depend on whether a law firm's practice areas are broad or narrow, diverse or discrete, isolated or integrated. Conflicts are imputed among all law firms that are associated with a common lawyer or lawyers, and those firms must check for conflicts of interest. The proposed screening measures do not avoid imputation of conflicts of interest and yet do not permit law firms ABC and MNO to check for conflicts with XYZ's current and previous engagements.

Can the Imputed Conflicts Be Waived?

15. Finally, we consider the effect of Rule 1.10(d), which allows an imputation to be waived under certain circumstances. Specifically, Rule 1.10(d) provides: "A disqualification prescribed by this Rule may be waived by the affected client or former client under the conditions stated in Rule 1.7." One of those stated conditions is Rule 1.7(b)(4), which requires that "each affected client gives informed consent" to the conflict. Here, that condition cannot be satisfied because the screening measures will prevent law firms ABC and MNO from learning the names of the XYZ firm's clients and the general nature of their matters. Lacking that information, law firms ABC and MNO will be unable to obtain informed consent to any conflicts that XYZ's practice may create. Thus, Rule 1.10(d) does not permit a waiver of the imputed conflicts at issue here.

CONCLUSION

16. When two law firms are both associated with lawyers at a third firm, the conflicts of each firm are imputed to the lawyers in all three firms as if they were a single law firm. Screening, no matter how elaborate, cannot avoid that imputation. Therefore, the three law firms must conduct interrelated conflict checks as if they were one firm. The screening measures proposed here would prevent two of the law firms (ABC and MNO) from checking for conflicts and would likewise deprive those two firms of the information necessary to obtain informed consent from clients to waive the imputation of any conflicts that might exist. Limiting the practice of the firm that will be screened does not change the analysis. Accordingly, lawyers associated as partners, associates or of counsel cannot avoid the imputation of conflicts by creating a screen or by limiting the practice of one of the firms.

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