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Committee on Professional Ethics

Opinion 890 (11/17/11)

Topic: Disqualification of spouses practicing in different firms from appearing on opposite sides of a litigation.

Digest: Conflicts of spouses representing clients on opposite sides of the same litigation under Rule 1.10(h) are not automatically imputed to other lawyers in the disqualified lawyers' firms, but imputation may arise in the particular circumstances of any given case. At least in civil matters, even if the conflict is imputed to other lawyers in the spouses' firms, the resulting conflict may, depending on the facts of the particular case, be waived by the client or clients with their informed consent. If substitute counsel from outside the firm is engaged, the originally retained lawyer may share confidential information with the substitute counsel as long as the affected client gives his or her informed consent or the disclosure is impliedly authorized to serve the best interests of the client under Rule 1.6.

Rules: 1.0(j), 1.6(a), 1.7(b)(1), 1.10(a) & (h).

FACTS

1. The inquirer and his wife are lawyers working in a small city. The inquirer is the managing attorney of a legal services office and his wife is in private practice at a local firm. Recently, a client engaged the inquirer's wife to bring an eviction. The respondent in that proceeding sought the assistance of the inquirer's office.

QUESTIONS

2. Is the prohibition in Rule 1.10(h) that, absent a valid consent, precludes husband and wife from personally representing opposing parties in litigation imputed to other lawyers in their respective firms?

3. If the conflict is imputed, can consent cure the conflict, and, if so, is consent of one or both clients needed?

4. If the inquirer chooses to recommend that the client engage instead volunteer outside counsel, can the inquirer share with the outside counsel information derived from the legal services office's intake interview?

OPINION

5. The inquirer recognizes that he cannot personally represent the client in litigation against an adversary represented by his wife. His concern is well founded. Under the terms of Rule 1.10(h), the prohibition on lawyers representing clients in any matter where the adversary is represented by the lawyer's spouse is subject to consent by the lawyer's client "after full disclosure" and only if "the lawyer concludes that the lawyer can adequately represent the interests of the client." While worded differently, this inquiry is the same as that set forth in Rule 1.7(b)(1), the general concurrent conflict rule: whether "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation" to the affected client or clients. Because both husband and wife are subject to the same prohibition, for both lawyers to remain on the case, both would have to conclude that they could adequately represent the interests of their clients, and both clients would have to consent. In the Committee's view, it would be a rare case in which spouses could reasonably conclude that they could adequately represent the interests of their respective clients in appearing personally as lead counsel on opposite sides of a litigation.

6. The prohibition set forth in Rule 1.10(h) is not, however, automatically imputed to other lawyers in the law offices of the husband and wife. Rule 1.10(a) provides for automatic imputation where the conflict arises under Rules 1.7, 1.8 or 1.9, but does not list conflicts arising under Rule 1.10(h). This Committee has previously observed that, under essentially identical provisions of the former New York Code of Professional Responsibility, even in cases involving criminal prosecutions, "disqualification of the district attorney's spouse in a particular case does not result in automatic disqualification of other lawyers in the spouse's firm under DR 5-105(D) [now Rule 1.10(a)]." N.Y. State 654 (1993); *accord* N.Y. State 660 (same as to lawyers in close dating relationship).

7. Nevertheless, the conflict may be imputed under the facts and circumstances of a given case, where the policies underlying the primary disqualification are also implicated by participation of other lawyers in the firm. N.Y. State 654 (1993); N.Y.

State 638 (1992); N.Y. State 632 (1992). In N.Y. State 654, we enumerated certain factors that should be considered in determining whether a conflict was imputed in a given case:

> Relevant facts would include the size of the spouse's firm, the spouse's position in the firm, whether the spouse will derive direct or indirect financial or other benefit as a result of the defendant's employment of the firm, and whether the spouse played any role in the defendant's seeking representation by the firm.

In that opinion, we concluded that the conflict that prevented the spouse of a district attorney from representing a criminal defendant was imputed to the spouse's firm, and that consent of the criminal defendant would not cure the conflict. We rested heavily on the fact that the case was a criminal matter and the concern that the public might perceive favoritism in the district attorney's handling of the matter: "Since the firm of the district attorney's spouse is quite small, the public would be likely to see the potential for abuse whether the defendant were represented by the district attorney's spouse's partner or associate, or by the district attorney's spouse." N.Y. State 654.

8. This opinion, by contrast, involves a civil landlord-tenant case that does not implicate the public interests present in a criminal matter. In these circumstances, whether a colleague in the inquirer's office or a colleague in the wife's law firm, or both, could proceed with the representation in the eviction matter would depend primarily on whether, under all the facts, "there is a significant risk that the [litigating] lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own . . . personal interests" occasioned by that lawyer's relationship with one or the other spouse. Rule 1.7(a)(2). This is an objective test based on the particular circumstances: the lawyers involved, "acting reasonably," must "determine whether . . . the lawyer's judgment may be impaired or the lawyer's loyalty may be divided if the lawyer accepts or continues the representation." Rule 1.7, Cmt. [2]. The answer may depend on, among other things, whether both spouses withdraw from the affected representation or only one of them does. In the latter case in particular – where a colleague is litigating directly against one of the spouses – we believe it is quite likely, if the respective law offices are relatively small, that a significant risk of an adverse effect on the litigating lawyer's professional judgment would arise.

9. Even if there is such a significant risk, however, that conflict can be cured by consent of the affected clients as long as the lawyer involved reasonably believes that, notwithstanding that risk, he or she will in fact be able to provide competent and diligent representation to the affected client. Rule 1.7(b)(1). Any consent will often be conditioned on effective screening of the disqualified spouse from all contact with the matter.

10. Whether consent needs to be obtained from one client or both also depends on the circumstances. For example, a colleague in the inquirer's office, where the inquirer is managing attorney, might well conclude that he or she must obtain consent of the

respondent in the eviction matter. Yet perhaps the colleague in the wife's firm, given facts such as the size of that office and the lawyer's role in it, might reach a different conclusion. It would always be most prudent for all the various lawyers involved to obtain consent from their clients, but whether that is *required* depends on the analysis above.

11. Information derived from the intake interview is confidential whether or not the lawyer assumes representation of the prospective client. *See* Rule 1.18(b). If the representation were taken over by a colleague in the inquirer's legal services office, the inquirer could discuss information from the intake interview with that colleague. *See* Rule 1.6 Cmt. [5] ("lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers"). If outside counsel is retained to take over a representation, however, confidential information may be disclosed to the new lawyer only, under Rule 1.6(a)(1), with the "informed consent" of the respondent as that term is defined by Rule 1.0(j), or, under Rule 1.6(a)(2), if the disclosure is impliedly authorized to advance the best interests of the client and reasonable under the circumstances or customary in the professional community.[1] Assuming that the client is aware that the inquirer has undertaken to find replacement counsel, briefing new counsel is likely to be both reasonable and customary unless the information derived from the intake interview was adverse to the interests of the client.

CONCLUSION

12. Conflicts under Rule 1.10(h) are not automatically imputed to other lawyers in the disqualified lawyers' firms, but imputation may arise in the particular circumstances of any given case. Even if the conflict is imputed to other lawyers in the spouses' firms, the resulting conflict may, depending on the facts of the particular case, be waived by the client or clients with their informed consent. If substitute counsel is engaged, the originally retained lawyer may share confidential information with the substitute counsel as long as the affected client gives his or her informed consent or the disclosure is impliedly authorized under rule 1.6(a)(2).

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[1] This is not a case in which the lawyer's contact with a prospective or former client is so remote as to call into question whether disclosure to serve the client's best interests could ever be reasonable or customary. To the contrary, the inquirer's involvement with the respondent is ongoing. Without trying to formulate general rules, we conclude on the present facts – where a lawyer has obtained confidential information from a prospective client and has undertaken, with permission, to hand the matter over to new counsel identified by the lawyer – that the lawyer may be impliedly authorized to disclose information to the new lawyer if doing so meets the tests set forth in Rule 1.6(a)(2).