



Committee on Professional Ethics

Opinion 895 (12/6/11)

Topic: Spousal conflicts of interest.

Digest: Absent informed consent confirmed in writing, a sole practitioner may not represent a client in a matter where the opposing party is represented by a lawyer in a five-lawyer firm in which her spouse is the senior partner. The lawyer in her spouse's firm representing the opposing party may also have a conflict, which would be imputed to all lawyers in the spouse's firm unless it can be and is cured by informed consent, confirmed in writing.

Rules: 1.0(h) & (j), 1.6(c), 1.7, 1.10(a), (d) & (h)

QUESTION

1. A sole practitioner practices law from home in a small community, but occasionally uses the conference room and telephone lines in her spouse's law firm. The spouse's firm is a five-lawyer firm at which her spouse is the senior partner. May the sole practitioner and a lawyer from the spouse's firm (but not the spouse) serve as opposing counsel in a case in which the sole practitioner's client is a minor?

OPINION

2. On April 1, 2009, the New York Rules of Professional Conduct (the "Rules") replaced the New York Code of Professional Responsibility (the "Code") but, as we show below, there is no substantive difference in the provisions governing the answers to these inquiries.

A. Does a conflict arise from the spousal relationship?

3. The essence of the question is whether a lawyer may represent a client if the opposing counsel is an attorney in the law firm where her spouse is the senior partner.

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4. To analyze conflicts arising from a spousal relationship, we start with Rule 1.10(h), which provides as follows:

A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer ***unless the client consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client.*** [Emphasis added.]

5. Thus, under Rule 1.10(h), a conflict of interest arises when spouses represent opposing parties in a matter. However, the facts indicate that the sole practitioner's spouse is not representing the opposing party, but rather another lawyer in the spouse's five-lawyer firm. Therefore, Rule 1.10(h) itself does not apply.

6. However, Rule 1.10(h) is essentially a more specific version of Rule 1.7(a)(2), the general rule on concurrent conflicts arising from a lawyer's personal interests. Under Rule 1.7(a)(2), unless a lawyer complies with Rule 1.7(b), "a lawyer shall not represent a client if a reasonable lawyer would conclude that ... there is a significant risk that the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's own financial, business, property or other personal interests." Rule 1.7(b)(1) allows a client to waive a conflict of interest if the lawyer reasonably concludes that she can competently and diligently represent the client, but Rule 1.7(b)(4) adds that consent must be both "informed" and "confirmed in writing." These conditions for waiver also apply to a conflict arising under Rule 1.10(h). See Rule 1.10(d) ("A disqualification prescribed by this Rule may be waived by the affected client ... under the conditions stated in Rule 1.7.").

B. Is the conflict imputed to other lawyers in the spouse's firm?

7. Rule 1.10(a) imputes one lawyer's conflict of interest under Rule 1.7, Rule 1.8, or Rule 1.9 to all lawyers "associated in" the same firm, but Rule 1.10(a) does not explicitly impute a disqualification arising under Rule 1.10(h). "Unlike disqualifications under most other ... Rules, disqualifications under DR 9-101(D) are not imputed to the rest of the disqualified lawyer's firm." ROY D. SIMON, SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED 1450 (ed. 2008). (Rule 1.10(h) is identical to former DR 9-101(D).) Rule 1.10(h) applies only when the spouses personally represent opposing sides. Here, the lawyer's spouse does not personally represent the opposing party – a partner in the spouse's firm does. Yet this does not end our analysis, because we must also consider whether the sole practitioner or the opposing counsel in her spouse's firm – or both – have a conflict under Rule 1.7(a)(2). If the lawyer in the spouse's firm has a conflict under Rule 1.7(a)(2), then pursuant to Rule 1.10(a) that conflict would be imputed to all other lawyers in the spouse's firm.

8. This Committee considered an issue similar to the one here in N.Y. State 654 (1993). That opinion addressed whether a district attorney could prosecute a defendant

represented not by the D.A.'s spouse but by the other lawyer at the two-lawyer firm where the D.A.'s spouse worked. Despite the heightened emphasis on fairness and the appearance of fairness in criminal cases, this Committee stated that under DR 5-105(D) (predecessor to Rule 1.10(a)), "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." But the Committee qualified this general statement by noting that "whether others in the firm are disqualified will turn on the particular facts and circumstances, including the basis of the primary disqualification and the underlying policies and interests to be served." The Committee listed several relevant factors for the attorney to consider, including (i) "the size of the spouse's firm," (ii) "the spouse's position in the firm," (iii) "whether the spouse will derive direct or indirect financial or other benefit as a result of the [representation]," and (iv) "whether the spouse played any role in the [client's] seeking representation by the firm."

9. Applying these factors to the district attorney's inquiry in N.Y. State 654, this Committee concluded that the spouse's entire firm was disqualified by imputation. Our determination was based largely on the size of the firm. Because the spouse was a partner in a two-partner firm, this Committee noted that "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."

10. N.Y. State 654 shows that our analysis does not end simply because Rule 1.10(h) does not explicitly impute the conflict of interest to the spouse's entire firm. In accordance with Rule 1.7(a)(2), the inquiring sole practitioner here must ask whether a reasonable lawyer would conclude that there is a "significant risk" that the professional judgment of a lawyer in the inquirer's position (*i.e.*, married to the senior partner of the opposing law firm) would be "adversely affected by the [inquiring] lawyer's financial, business, property or other personal interests." As in N.Y. State 654, factors relevant to assessing the risk of an adverse effect on the inquiring lawyer's professional judgment include the size of the spouse's firm, the spouse's position in the firm, whether the spouse would share in fees earned from the representation, and the spouse's involvement in the representation of party opposing the inquirer.

11. Here, the firm at which the inquirer's spouse works has only five lawyers. The inquirer's spouse is the senior partner in the firm, and therefore would presumably share in the fees generated in the matter in which the inquirer is adverse counsel. Moreover, as the senior partner, the spouse may well have a supervisory role in the matter. Accordingly, a favorable result for the sole practitioner's client would most likely be an unfavorable result for her spouse. Thus, a conflict arises under Rule 1.7(a)(2). (If the sole practitioner's spouse was personally working on the case, then the sole practitioner and her spouse would be representing opposing parties, which would trigger Rule 1.10(h) – but the facts indicate that the spouse is not working on the case.)

12. Because there is a conflict under Rule 1.7(a)(2), the sole practitioner may represent her minor client only if she complies with Rule 1.7(b). Specifically, the sole practitioner may represent the minor client only if she reasonably believes that she can

provide competent and diligent representation and her client gives informed consent, confirmed in writing. See Rule 1.7(b)(1) and (4). (Another condition, set out in Rule 1.7(b)(2), is that the representation is not prohibited by law. That condition explicitly turns on a question of law on which we have no authority to offer an opinion, but we will assume for purposes of this opinion that the condition is met because very few representations are prohibited by law.)

13. To ensure that the client's consent under Rule 1.7(b)(4) is "informed," the inquirer must adequately explain to her client "the material risks of the proposed course of conduct and reasonably available alternatives." Rule 1.0(j) (defining "informed consent"). Comment [11] to Rule 1.7 suggests some of the material risks when closely-related lawyers are representing opposing clients in the same matter. Even though the inquiring lawyer and the spouse are not both representing clients in the same matter, we think the concerns in Comment [11] apply. Comment [11] provides, in relevant part, as follows:

When lawyers representing different clients in the same matter or in substantially related matters are closely related, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers, before the lawyer agrees to undertake the representation. ...

14. We assume that the lawyer in the spouse's firm who is representing the opposing party is aware of this entire situation (*i.e.*, knows that the senior partner is married to the sole practitioner). Therefore, the lawyer in the spouse's firm who is representing the opposing party has a mirror-image conflict under Rule 1.7(a)(2). Because the sole practitioner's spouse is a senior partner in that lawyer's firm, a reasonable lawyer would conclude that there is a significant risk of an adverse effect on the lawyer's professional judgment. For example, the sole practitioner's spouse may not want the lawyer opposing her to be too aggressive against the sole practitioner, or may want the sole practitioner to win a large money judgment and a corresponding large fee to add to the family coffers. Many different scenarios are possible. Thus, a conflict arises under Rule 1.7(a)(2), and Rule 1.7(b)(1) and (b)(4) require that the lawyer opposing the sole practitioner's client must take appropriate action to deal with his conflict of interest. Specifically, the lawyer in the spouse's firm may not undertake or continue to represent the opposing party here unless he reasonably believes that he can competently and diligently represent the interests of his client and, if so, the client gives informed consent, confirmed in writing.

C. May a minor consent to a conflict?

15. The requirement that the sole practitioner obtain her minor client's informed consent raises the issue of whether a minor acting alone can give informed consent. This issue has been addressed in a number of opinions. In three opinions decided

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under the old Code of Professional Responsibility – N.Y. State 256 (1972), N.Y. State 274 (1972), and N.Y. State 790 n.4 (2005) – this Committee determined that a minor by himself or herself could not consent to a conflict. Nothing in the Rules of Professional Conduct changes this conclusion.

16. However, those opinions did not address the ability of a *representative* of a minor (such as a parent, guardian *ad litem*, custodian, guardian, committee, trustee or court) to give the necessary consent. The ability of a minor's representative raises questions of law beyond the jurisdiction of the Committee to decide. See, e.g. General Obligations Law §2-102 (defining the term "minor") and §§3-101 *et seq.* (addressing the effect of status as a minor). Other provisions relating to minors are found in the Penal Law, Family Court Act, Surrogate's Court Procedure Act, Social Service Law, Estate, Powers and Trusts Law and Domestic Relations Law. The sole practitioner should examine those sources.

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C. Do the shared office facilities create a conflict?

17. Independent of the spousal relationship between the lawyers, there is also a question whether the sole practitioner's occasional use of the conference room and telephone lines in her spouse's firm means that they are deemed to be in the same "firm" for purposes of the Rules. In N.Y. State 715 (1999), which addressed temporary lawyers, we said: that "lawyers who share office space but are not in the same firm have been deemed to be 'associated' in a firm for purposes of the conflicts rules and vicarious disqualification rules. See *also* Rule 1.0, cmt. [2] (stating that whether two lawyers constitute a "firm" will "depend on the specific facts," and giving some examples). If the inquirer's use of the spouse's office facilities makes the inquirer "associated in" the same "firm" as the spouse within the meaning of Rules 1.0(h) and 1.10(a), then the sole practitioner would be disqualified from representing the minor to the same extent as a partner or associate in the spouse's firm. See N.Y. State 437 (1976); N.Y. State 609 (1990).

18. Based upon the facts in the instant matter, however, we do not believe that the sole practitioner's occasional use of the spouse's conference room and telephones rises to the level of at which the sole practitioner is "associated in" her spouse's firm for conflicts purposes (but that could change if the office sharing relationship expands or becomes more than occasional). See N.Y. State 609 (1990).

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19. Nevertheless, the office sharing arrangement is relevant to another aspect of conflict of interest analysis. As we have noted above, the sole practitioner has a conflict of interest under Rule 1.7(a)(2) because the opposing counsel works at her spouse's firm, so she must obtain informed consent under Rule 1.7(b)(4) before agreeing to represent the minor client. As part of obtaining informed consent, the sole practitioner should disclose to her minor client (or the minor client's representative) the facts regarding her occasional use of the office facilities at the opposing firm. Those facts – including the risks to the client's confidential information – are part of the "information adequate for the person to make an informed decision" as to whether to retain or

continue using the lawyer, and part of an adequate explanation of “the material risks of the proposed course of conduct and reasonably available alternatives,” both of which are elements in the definition of “informed consent.” See Rule 1.0(j) (defining “informed consent”). Needless to say, the sole practitioner should also take every reasonable measure to protect her client’s confidences when using the conference room or telephone lines at her spouse’s firm. Cf. Rule 1.6(c) (requiring lawyer to “exercise reasonable care” to prevent others from disclosing a client’s confidential information except as permitted by Rule 1.6).

20. Since we conclude that the sole practitioner and her spouse are not part of the same “firm” based on the sole practitioner’s occasion use of her spouse’s office facilities, we need not decide whether the sole practitioner and her spouse’s firm would have a conflict of interest under Rule 1.7(b)(3), which provides that a conflict is waivable only if “the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.”

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CONCLUSION

21. Absent informed consent, confirmed in writing, a lawyer may not represent a client in a matter in which the opposing party is represented by a lawyer in a five-lawyer law firm where her spouse is the senior partner. The lawyer in her spouse’s firm who is representing the opposing party may also have a conflict, which would be imputed to all lawyers in the spouse’s firm unless it can be and is cured by informed consent, confirmed in writing.

(25-10a)