



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1105 (10/5/2016)

Topic: Imputed conflict of interest

Digest: Conflicts of a partner in a private law firm are imputed to all of the lawyers associated with the private law firm. Consequently, absent informed, written consent, if the public defender's office in which the lawyer is a part-time public defender is prevented by a conflict from representing a person, then neither the part-time defender nor any lawyer in the part-time defender's private law firm may represent the person.

Rules: 1.0(t), 1.7(a) & (b), 1.10(a) & (b)

FACTS

1. The inquiring lawyer ("Lawyer A") is "of counsel" to a law firm and maintains a large caseload of family court assignments and criminal court assignments, including misdemeanors and felonies, from the local county and city courts. Lawyer A handles exclusively assigned matters and does not discuss them with any other lawyer in the firm.

2. Lawyer A does not accept assignments from town or justice courts that hold court in the evening. Lawyer A receives case assignments from the local courts when the public defender's office has a conflict of interest.

3. Recently, one of the partners of the firm ("Lawyer B") accepted a part time position with the county public defender's office. Lawyer B's caseload for that office consists of misdemeanors and violation level offenses, but not felonies, before town and justice courts with evening appearances.

QUESTION

4. May the inquiring lawyer continue to receive assigned family court and criminal court matters when (i) the public defender's office has a conflict of interest and (ii) a partner in the firm where the inquiring attorney is "of counsel" is also a part-time public defender?

OPINION

Applicable Rules

5. This inquiry directly implicates Rules 1.7 and 1.10(a) of the New York Rules of Professional Conduct (the "Rules").

6. Rule 1.7 provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

- (1) the representation will involve the lawyer in representing differing interests; or
- (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) 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; and
- (4) each affected client gives informed consent, confirmed in writing.

7. Rule 1.10(a) provides: "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 herein." (emphasis added)

Imputation Within the Public Defender's Office

8. Under Rule 1.10, when lawyers are associated in a firm, none of them may undertake a representation when any of them practicing alone would be prohibited from undertaking the representation as a result of a conflict of interest. Comment [2] to Rule 1.10 explains that the rule of imputed disqualification gives effect to the duty of loyalty to the client, as applied to lawyers who practice in law firms. Some courts, for purposes of disqualification motions, will allow this presumption to be rebutted. See, e.g. *Hempstead Video, Inc. v. Incorporated Village of Valley Stream*, 409 F.3d 127 (2d Cir. 2005). But imputation under Rule 1.10(a) is absolute unless waived by the client.

9. Therefore, the initial questions under Rule 1.10 are (i) whether the public defender's office constitutes a law firm and (ii) whether a part-time public defender is "associated" with the firm. Regarding the first question, Comment [1] to Rule 1.10 states that the term "firm" includes lawyers employed in a legal services organization. Comment [4] to Rule 1.0 notes that, with respect to lawyers in legal aid and legal services organizations, depending upon the structure of the organization, the entire organization or components of it may constitute a firm or firms for

purposes of the Rules. This is a factual question that is beyond the jurisdiction of our Committee. However, for purposes of this opinion, we assume that the public defender's office is structured in such a way that the entire office is considered a single law firm. See N.Y. State 1036 (2014) (local sections of a national legal services project are considered a single law firm for conflict of interest purposes where, among other things, the local sections share a single case management system and there is supervision across the local sections); N.Y. State 862 (2011) (public defender's office is a "firm" for purposes of Rule 1.10); N.Y. State 975 (2013) (county public defender office is a firm for imputation purposes even if its lawyers work independently).

10. Regarding the second question, we have previously held that a part-time attorney is "associated" with a firm for purposes of the conflict rules. See N.Y. State 862 (2011) (a part-time assistant public defender is "associated" with that firm). In N. Y. State 862, we noted that the imputation rule applies to all lawyers in a firm, regardless of practice area or department.

Imputation from the Public Defender's Office to Lawyer B's Private Practice

11. Where two "law firms" have a common lawyer, a conflict of interest is imputed to both firms. See *Cinema 5, Ltd. V. Cinerama, Inc.*, 528 F.2d 1384, 1387 (2d Cir. 1976) (counsel disqualified from representing client because a partner in his NYC law firm is also a partner in a Buffalo firm that represents the client's opponent). Thus, in N.Y. State 862 (2011), we opined that a lawyer who was a part-time assistant public defender could not, in the lawyer's private practice, represent a client that another full-time or part-time assistant public defender in the same public defender's office could not represent because of a conflict of interest, unless the conflict could be and was waived.

12. N.Y. State 862 makes it clear that Lawyer B – the part-time public defender -- cannot represent a client in private practice where another lawyer in the public defender's office is disqualified from undertaking the representation, unless the conflict may be and is waived.

Imputation from the Lawyer B to Lawyer A

13. Under Rule 1.10(a), if Lawyer B is disqualified from a representation, then, unless the conflict may be and is waived, the conflict is imputed to all lawyers who are "associated" in Lawyer B's firm. We have long held that a lawyer who is "of counsel" with a firm is "associated" with that firm. See N.Y. State 615 (1991); cf. Rule 7.3(a)(2)(v) (affiliated as a partner, associate or of counsel). Thus, if Lawyer B is disqualified from the representation, then Lawyer A is disqualified by imputation. Consequently, absent a waiver, if the public defender's office has a conflict that prevents it from undertaking a representation, then neither Lawyer B nor Lawyer A may undertake the representation in their private practice.

Exceptions to Imputation

14. The inquirer notes that Lawyer B's cases as a part-time public defender involve solely misdemeanors and violation level offenses before town and justice courts with evening

appearances and that Lawyer A does not handle any cases in such courts. Rule 1.10 applies to law firms. Consequently, unless the public defender's office is organized so that matters heard in daytime and evening session or in different courts were handled by different "firms," the fact that Lawyer A and Lawyer B practice in different courts would be irrelevant.

15. Even if the public defender work of Lawyer A and Lawyer B are effectively screened from the work of the other lawyer, New York does not recognize screening to eliminate conflicts of interest, except where the original disqualification occurs under Rule 1.11, 1.12 or 1.18. See Rule 1.0, Cmt. [8]. This inquiry does not arise under one of those Rules.

16. Finally, Rule 6.5 contains an exception to the application of Rules 1.7, 1.8 and 1.10 for lawyers who participate in "limited pro bono legal services programs," which involve short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter. See N.Y. State 1012 (2014). This inquiry does not involve such a program.

Consent

17. In N.Y. State 862 (2011) we concluded that a conflict of interest could be waived if the conditions set forth in Rule 1.7(b) were met. Assuming that the representation was not prohibited by law and that the lawyer reasonably believed the lawyer would be able to provide competent and diligent representation to the assigned client, we provided additional guidance on obtaining consent:

To cure a conflict, Rule 1.7(b) requires informed consent from "each affected client." Which clients are affected depends on why the conflict arises. If the imputed conflict arises under Rule 1.7(a)(1) because of another current client, then the inquirer (or some other attorney in the Public Defender's office) must obtain informed consent, confirmed in writing, from both the inquirer's assigned client and the conflicted Assistant Public Defender's current client. If the conflict arises under Rule 1.7(a)(2) because of the conflicted Assistant Public Defender's personal interests, then consent is required only from the inquirer's own assigned client, because no other client is affected. If the conflict arises under Rule 1.9 because of the conflicted Assistant Public Defender's former client, then the inquirer must obtain consent from the conflicting former client. (Since the inquirer did not personally represent the former client, we assume that the inquirer does not personally possess any confidential information of the former client. If the inquirer were in possession of any of the former client's confidential information that has not become generally known, further analysis would be necessary.)

18. However, when the lawyer seeks consent from a client who is receiving free legal services, the lawyer must consider whether such consent would be freely given. See N.Y. State 490 (1978) (when a legal aid office seeks consent to share client confidential information with board members of the organization, "the staff should be particularly sensitive to any element of

submissiveness on the part of their indigent clients; and . . . the staff [must be] satisfied that their clients could refuse to consent without any sense of guilt or embarrassment.”)

CONCLUSION

19. Conflicts of a partner in a private law firm are imputed to all of the lawyers associated with the private law firm. Consequently, absent informed, written consent, if the public defender’s office in which the lawyer is a part-time public defender is prevented by a conflict from representing a person, then neither the part-time defender nor any lawyer in the part-time defender’s private law firm may represent the person.

(23-16)