NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 1141 (12/15/17)

Topic: Conflicts of Interest; imputation of conflicts to co-counsel

Digest: Separate law firms that act as co-counsel in discrete matters are not associated in the same firm for purpose of imputing all conflicts of each firm to the other.

Rules: 1.0; 1.6, 1.7, 1.8, 1.9, 1.10, 6.1, 7.2.

FACTS

1. The inquiring attorney, who is admitted in New York, teaches at an accredited law school in New York. The attorney is involved in the law school's clinical education program, which considers itself a large law firm with different divisions working on particular types of matters. The inquirer supervises one of these divisions, which handles only one type of matter: engaged, *pro bono publico*, in pursuing claims on behalf of indigent clients at hearings before an administrative agency. The inquirer wishes to have the students in the inquirer's clinic division collaborate as co-counsel with a New York not-for-profit legal services organization. The clinic and the legal services organization are financially separate, operate out of different offices, maintain their own files, do not share any overlapping personnel, and represent numerous clients other than those in which they serve as co-counsel. Although the faculty supervisors' positions are constant, the students who participate in the clinic do so for only a semester or two, and thus turnover of student personnel is a characteristic of the program.

2. The inquirer is concerned that, if the legal clinic and legal service organization collaborate as co-counsel, then the N.Y. Rules of Professional Conduct (the "Rules") may treat the law school's entire clinical program and the legal services organization as a single firm for conflicts purposes. Specifically, the inquirer seeks guidance on whether the clinic must clear all its clients with the legal service organization (and *vice versa)*, or must instead check only those clients in matters in which the two serve as co-counsel.

QUESTION

3. When a law school clinic acts as co-counsel with a legal services organization in particular matters involving the same types of claims, must the clinic clear conflicts for all of its clients with those of the legal services organization, or only those clients involved in the matters in which the two serve as co-counsel?

OPINION

4. Rule 1.0(h) defines a law firm to include, among other things, any "association authorized to practice law" and "lawyers employed in a qualified legal assistance organization." Rule 1.0(p) defines a "qualified legal assistance organization" to mean one of the organizations listed in Rule 7.2(b)(1)-(4), the first of which is a legal aid office "operated or sponsored by a duly accredited law school." Under the forerunner of the Rules – the New York Code of Professional Responsibility (the "Code") – we said that a law school legal clinic qualifies as a "law firm," N.Y. State 794 ¶ 8 (2006) ("the rules governing law firms are equally applicable to the law school's legal clinic"), and that the clinic must be considered a single law firm for purposes of conflict imputation, despite separate divisions, if the students in the clinic share common offices, files, work areas, and information, N.Y. State 794 ¶ 16. No changes in the Rules from the Code alter this conclusion. *See* N.Y. State 876 ¶ 6 (2011) (when the provisions of the Code and the Rules are similar or identical to each other on matters relevant to the inquiry, opinions under the Code apply with equal force). Accordingly, the question is whether two separate law firms acting as co-counsel on a series of matters implicates Rule 1.10, governing the imputation of conflicts when lawyers are "associated" in a law firm, specifically conflicts arising under Rules 1.7 (governing concurrent conflicts of interest in general), Rule 1.8, (addressing conflicts in specific circumstances), and Rule 1.9 (outlining duties to former clients).

5. In the circumstances presented, the answer is no.

6. Very briefly stated, Rule 1.7(a) prohibits a lawyer from representing a client if "a reasonable lawyer would conclude either" that the representation "will involve the lawyer in representing differing interests" or if a "significant risk" exists that a "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." This prohibition is subject to exceptions outlined in Rule 1.7(b), among them where the affected client gives informed consent confirmed in writing, Rule 1.8 is a litany of standards in specific conflict situations, none of which this inquiry raises. Rule 1.9 prohibits a lawyer to be "materially adverse" to a former client in "the same or substantially related matter" without informed consent confirmed in writing. Rule 1.10 says that, while "lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them would be prohibited from doing so" by Rules 1.7, 1.8, or 1.9. Thus, the imputation standard in Rule 1.10 extends the conflicts provisions of the foregoing Rules only when lawyers are "associated" in the same law firm.

7. The Rules do not define the term "associated." In general, however, to be "associated in a firm" means to be a member of, employed by, "of counsel" to, or "affiliated" with the law firm, in each instance reflecting a close and continuing relationship with the firm to warrant imputation of the conflicts of any one lawyer in the firm to the other lawyers there. *See* N.Y. State 876 ¶ 13 (2011) (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"); NY State 793 (2006) ("of counsel" relationship gives rise to imputation); N.Y. State 773 (2004) (same); ABA 90-357 (1990) (same); N.Y.C. 2000-4 (2000) (use of the term "affiliated" denotes relationship that is "close and regular, continuing and semi-permanent" requiring imputation of conflicts). Substance, not form, controls; merely maintaining separate practices, free of connective titles, does not invariably elude the concerns animating Rule 1.10's imputation

provisions. *Consolidated Theatres v. Warner Bros. Cir. Man. Corp.*, 216 F.2d 920, 927 (2d Cir. 1954) ("we have never believed that labels alone – partner, clerk, co-counsel – should control our decisions in so sensitive an area [as imputation of conflicts]").

8. Thus, for instance, an office sharing arrangement between two separate practitioners could give rise to imputing the conflicts of each practice to the other. *Compare* N.Y. City 80-63 (1980) (solo practitioners sharing an office in which each has ready access to information of the other's practice imputes the conflicts of each to the other) *with* N.Y. State 881 ¶ 12 (2011) (the "occasional use of" telephone lines or conference space "does not, by itself render the inquirer 'associated in'" another lawyer's firm "for purposes of the rule on imputation of conflicts"). *See* Rule 1.10, Cmt. [2] ("two practitioners who share office space and occasionally consult or advise each other would not ordinarily be regarded as constituting a firm," unless they "present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm").

9. Motions to disqualify law firms based on some form of association with counsel of record, though legal issues beyond our jurisdictional charter, afford some insight into the imputation rule. Some of these courts refer to their analysis as a "functional" approach, which is analytically indistinguishable from the ethics opinions of this and other Committees that stress the nature of the relationship not the names that the firms choose to characterize that relationship. Illustrations include: *Cinema 5, Ltd.* v. *Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1975) (disqualifying two law firms representing adverse interests while sharing a common partner such that shared confidences are presumed); *The Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1977) (disqualifying successor back-up counsel with which conflicted counsel had ongoing communications about the matter); *Homestead Video, Inc.* v. *Village of Valley Stream*, 409 F.3d 127 (2005) (denying disqualification where there was an "attenuated and remote" "of counsel" relationship between the lawyer and counsel acting for the adversary and holding that "no presumption of confidence sharing" arises between a firm receiving confidential information and "a separate firm serving as co-counsel," absent evidence to the contrary); *Benevida Foods, LLC* v. *Advance Magazine Publishers, Inc.*, 2016 U.S Dist. LEXIS 81186 (June 15, 2016) (disqualifying co-counsel who conferred with a prospective client about a matter but did not comply with Rule 1.18 on protecting confidential information received in such consultation but denying disqualification of co-counsel who conferred with, but received no confidential information from, disqualified counsel about the matter); *Dietrich* v. *Dietrich*, 136 A.D.3d 461 (1st Dept. 2016) (denying disqualification when counsel of record is co-counsel with a potentially disqualified lawyer on an unrelated matter).

10. The predominant theme of these cases and ethics opinions is the protection of client confidential information within the meaning of Rule 1.6. The term "co-counsel" ordinarily means attorneys or firms jointly representing a client or clients with respect to a particular litigation or transaction. The relationship is episodic rather than enduring. Exchange of confidential information between co-counsel is a necessary incident to serving the interests of their mutual client(s). We see nothing in the proposed relationship to justify the merger of the two entities for all conflicts.

11. None of the criteria typically seen in merging firms for conflicts purposes – common personnel or finances, shared office space, ready access to client files, regular and substantial overlap of clients – is present in the co-counsel relationship contemplated here. That the legal

clinic plans to bring in the legal services organization as co-counsel in only discrete types of matters does not change this result; in private for-profit practice, it is not at all unusual for a law firm litigating in a foreign forum regularly to choose the same local law firm to act as its local co-counsel in that forum, without fear that all the conflicts of one firm would be imputed to the other firm. *See* ALI, RESTATEMENT OF THE LAW GOVERNING LAWYERS (THIRD), § 123, Cmt. c(iii) (co-counsel who associate for purposes of handling a particular matter are not subject to vicarious disqualification). In light of the Rules' strong encouragement of voluntary *pro bono* legal services, codified in Rule 6.1, it cannot be said that the arrangement proposed here requires stricter standards.

CONCLUSION

12. Serving as co-counsel in particular matters does not mean that a law firm legal clinic is "associated in" the same firm as a legal services organization for purpose of the imputation provisions of Rule 1.10. Consequently, when the clinic and organization serve as co-counsel in a matter, the Rules require the clinic and organization to clear conflicts individually and separately, only in matters in which the two serve as co-counsel.

[29-17]