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New York State Bar Association
Committee on Professional Ethics

Opinion 1186 (04/22/2020)

Topic: Legal Aid Society; conflicts of interest; screening; definition of law firm

Digest: Screening cannot prevent imputation of a conflict under Rule 1.10(a). Certain elements of screening may be used to demonstrate that divisions or projects of a legal services organization constitute different law firms for purposes of the conflict's rules. But the bar is high to show that the firms are separate and not merely branches of a single entity.

Rules: Rule 1.0(h), 1.0(t), 1.7(a), 1.7(b), 1.10(a)

FACTS

1. A Legal Aid Society (the "Society") in New York has two divisions. One is a civil division that has programs in the areas of family law, housing and consumer law, immigration law and education law, and the second division represents children in the Family Court of the county where the Society is located. The Society has found over the past several years that it has had an increasing number of conflicts arising between its two divisions, and within the programs in each division. For example, the Society has found that many of its clients who are children, and are represented by an attorney for the child, might also have their own housing or family law issue.

2. The Society would like to minimize conflicts through a firewall that would screen each program and division from the others. The Society believes that it has the ability to screen the programs from each other through its case management system. In addition, we are told that the housing program is on a different floor from the other programs.

QUESTION

3. May a Legal Aid Society avoid conflict imputation between its two divisions and between programs in each division by screening them, or otherwise characterize each division or program as a separate law firm for the purposes of avoiding conflicts and conflict imputation?

OPINION

Conflicts of Interest

4. We assume, for purposes of this opinion, that the Society is correct in its conclusion that certain representations in which it is asked to engage would involve a conflict of interest under the N.Y. Rules of Professional Conduct (the "Rules").

5. Rule 1.7(a) prohibits a lawyer from representing a client if a reasonable lawyer would

conclude that either the representation will involve the lawyer in representing differing interests or there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected, among other things, by the lawyer's own business or personal interests. When lawyers are associated in a firm, Rule 1.10 attributes a conflict under Rule 1.7, 1.8 or 1.9 of one lawyer to all lawyers in the firm. *See* Rule 1.10(a) ("[w]hile 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.").

6. A number of our prior opinions discuss conflicts in legal services offices. *See, e.g.,* N.Y. State 975 (2013) (when Public Defender's office has three part-time criminal PDs and two part-time Family Court PDs, all of whom maintain their own private offices and who do not share files with each other, their conflicts are imputed to each other even though they work on a part-time basis and work in different divisions of the office); N.Y. State 973 (2013) (imputation of conflicts within a legal aid organization and waiver of imputed conflicts); N.Y. State 862 (2011) (imputing conflict from a public defender office to a part-time assistant public defender in private practice, and discussing waiver of the conflict).

Screening as a Cure for Conflicts

7. Although the inquiry asks about "firewalls," the term used in certain conflicts provisions of the Rules is "screening." See definition 1.0(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.")

8. Comment [8] to Rule 1.0 makes clear that screening generally applies only when the screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rule 1.11 (former and current government officers and employees), Rule 1.12 (former judges, arbitrators, mediators or other third-party neutrals), or Rule 1.18 (lawyers who meet with prospective clients who do not become actual clients). Implicit in Comment [8] is that the Rules do not approve screening when a current conflict exists between clients under Rule 1.7(a), at least absent informed client consent confirmed in writing under Rule 1.7(b).

9. Our opinions support the conclusion that, with the exceptions noted above, a screen may not be used to eliminate conflicts under the conflict's rules. For example, in N.Y. State 876 (2011), which involved two separate firms that were unconnected to each other, but each of which had lawyers who were associated with a third firm, the inquirer asked whether the firms could avoid the imputation of conflicts by creating a screen (that is, the third firm would maintain its files electronically and make them available only to the attorneys of the third firm, and the third firm's files would be maintained physically at the two other firms in locked cabinets separated from the general files of the two firms, with locks preventing access to anyone other than attorneys of the third firm) and limiting the practice of the third law firm. The Committee responded:

> 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 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.

May the Society Structure itself into Different Law Firms?

10. Under Rule 1.0(h), a "firm" or "law firm" includes a qualified legal assistance organization under Rule 7.2(b)(1) – (4), including a legal aid office or public defender office operated by a *bona fide* non-profit community organization or by a governmental agency. But Comment [4] to the definition section makes clear that, in certain circumstances, a legal services organization may be considered to be more than one firm: "Depending upon the structure of the organization, the entire organization or components of it may constitute a firm or firms for purposes of these Rules." This proviso is limited to not-for-profit legal services organizations and has no impact on other legal services entities that fall within the definition of "firm" under the Rules.

11. Our opinions note that the determination of whether one or more entities constitute a firm is a fact-intensive one. *See* N.Y. State 1105 (2016) (where one firm lawyer, A, also received case assignments from local daytime courts when the county public defender's office had a conflict of interest, and another firm lawyer, B, accepted a part time position with the county public defender's office to represent clients in evening appearances, whether conflicts of the public defender office would be imputed to Lawyer A depended on whether the public defender's office constituted a single "law firm," which was a question of fact and depended on whether the public defender's office was organized so that matters heard in daytime and evening sessions were handled by different "firms.")

12. We have issued several opinions that discuss the structure that may be indicative of a separate law firm. These opinions focus, among other things, on the physical space where the divisions or projects (sometimes referred to as units) are located, the arrangement for maintaining separate files, including a case management system, the interaction between the units, and the management system for the separate units. *See also* N.Y. City 2009-3 (2009) (factors considered by courts in determining whether a law firm has effectively screened a conflicted lawyer include the timeliness of implementation, the size of the law firm, the size of the office space, the accessibility of files and the relative informality of office interaction, including the extent to which the disqualified lawyer has contact with lawyers working on the other matter). The operating mechanisms designed to create separate units should ensure that (1) the confidential information of clients of each "firm" is not shared with the other firm or firms, (2) the professional judgment of the lawyers in each firm is not affected by close association with the other firm, and (3) public confidence that the Rules are complied with is maintained.

Office Space and Files

13. Several of our opinions have focused on physical space and access to files. N.Y. State 794 (2006) involved a law school legal clinic which had different projects, such as civil rights and domestic violence, and wanted to start a legal clinic involving consumer protection. The law school planned to hire an outside lawyer as the part-time director of the clinic and wanted to avoid the imputation of conflicts to and from the outside lawyer's law firm. The clinic proposed various measures to segregate the projects, including that (1) the offices of the supervising lawyers would not be part of the clinic's common space, although students assigned to the consumer project would continue to work side-by-side with students assigned to other projects; and (2) the consumer project and the other projects would each have exclusive access to a separate client information database for storing documents electronically, although client files would be physically located in

the common clinic space. In that opinion, decided under the equivalent provisions of the former Code of Professional Responsibility, we said:

> The sharing of merely the same leasehold, a library, an electronic research account, restrooms, a central phone system with individual lines, or a common receptionist is not sufficient, alone or in combination, to merge lawyers in separate practices into one. Acceptance of these organizations presupposes, however, that the confidences and secrets of the clients of each separate practice will not be shared or appear to be subject to sharing with lawyers working on a conflicting matter.

14. Nevertheless, this Committee objected to the proposed layout of the proposed clinic space, because students involved in the consumer project would be working side-by-side in the same space with students working on the clinic's other matters, and because, even though an electronic barrier would be erected to prevent access to client documents on the electronic database, no physical barrier would separate consumer project students from access to the physical files of other clinic matters, or vice versa. We therefore opined that the legal clinic should be treated as a single law firm:

> Two or more lawyers carrying out conflicting assignments in close proximity in the same space with common tables, facilities, and files engender subtle influences that could affect the exercise of independent professional judgment. EC 5-21, EC 5-23. These "numerous influences might weigh against the unswerving fidelity to the client's interest that professional duty compels." ABA Inf. 1474 (1982) (quoting ABA Inf. 1235 (1972)). In addition, there is a "real danger that a client's confidences and secrets will be divulged" through the use of "shared clerical staff, common files, or otherwise." ABA Inf. 1474 (1972)). "If the physical organization of the office suite places client confidences at risk, it is appropriate to treat the association as a firm or to determine that adverse interests may not be represented." *Commonwealth v. Alison*, 434 Mass. 670, 691, 751 N.E.2d 868, 890 (2001).

See also N.Y. State 1085 (2016) ¶ 6 (quoting N.Y. State 794 as opining that "[s]o long as the clinic's students work in a common space and have shared access to physical files, the entire legal clinic, including the project in question, is a law firm").

15. These opinions contrast sharply with the facts in N.Y. State 1141 (2017), in which a law school's clinical education program proposed to have students collaborate as co-counsel with a New York not-for-profit legal services organization. The clinic and the legal services organization were financially separate, operated out of different offices, maintained their own files, did not share any overlapping personnel, and represented numerous clients other than those in which they would serve as co-counsel. There, we said that the two entities would not be considered "associated" for purposes of imputing all conflicts of each firm to the other.

16. In determining the risk that client confidences may be shared, it is important to consider the size of the physical space and the interaction between the lawyers. New York courts, when determining if a moving lawyer should be able to rebut the presumption that he or she acquired confidences of a former client before moving to a new firm, have adopted special rules that apply where the former firm was small. *See Cardinale v. Golinello,* 43 N.Y.2d 288, 372 N.E.2d 26 (1977). *Cardinale* and its progeny suggest that, when the original firm is small, and characterized by informality, "constant cross pollination" and a "cross current of discussion and ideas" among the firm's attorneys, and when all firm files are open and available to all lawyers in the firm, then

the presumption that the moving lawyer gained confidential information at the first firm is not subject to rebuttal. Similar considerations may apply to the creation of separate firms when a legal services organization is small and characterized by a cross current of discussion and ideas. Even in a legal services organization in a large city, if the lawyers in different units share common eating spaces and discuss cases over lunch or at coffee breaks, it may be problematic to characterize them as separate firms.

17. The Rules governing confidentiality also require special precautions where the different units use a single email system. For example, in N.Y. State 1102 (2016), we discussed the design of the office space of the in-house legal department of an insurance company that represented the company's insureds. After discussing the physical separation of space and files, we turned to whether the use of the insurance company's computer system would adequately safeguard client confidential information. Citing N.Y. State 939 (2012), we analogized, to lawyers who shared office space as well as a single computer, when each lawyer had a separate administrative password to the computer that was not known to the others. In addition, we noted another potential obstacle to confidentiality:

> Here, if the insurance company's technical administrators have access to the Department's client files and are not prohibited from sharing them with persons outside the Department, the lawyers in the Department will be violating their duty to preserve the confidentiality of client information.

18. Moreover, if a single office-wide email system were used to communicate with lawyers in different units, the units might seem more like branches of a single entity than like separate "firms" and might undermine the management considerations discussed below.

Law Firm Management

19. Another consideration in determining whether different units of a legal services firm should be considered separate firms is the manner in which the units are managed, which is indicative of the independence of the units. For example, in N.Y. 914 (2012) we considered whether a "conflict panel" of lawyers established to provide legal assistance to clients who could not be served by the local Legal Aid office because of a conflict of interest should be considered part of the same firm as the Legal Aid office. We concluded that, because neither the Legal Aid office nor its lawyers would exercise any supervision or control over the legal services provided by the conflict panel, they were not part of the same firm.

20. In contrast, N.Y. State 975 (2013) involved a small upstate county whose Public Defender's office had three part-time criminal PDs and two part-time Family Court PDs, all of whom maintained their own private offices and who did not share files with each other. Despite these facts, we concluded that the Public Defender was still a single law firm:

> While it is relevant that in actual practice the Assistants work independently, that factor is outweighed by others. The structure of the office and the central role of the Public Defender are prescribed by statutory provisions [citing County Law § 716]. There is a single attorney who is the Public Defender and who is publicly listed with that title. The other attorneys in the office serve as Assistant Public Defenders and are publicly identified as such. The Public Defender appoints those assistants, and fixes their compensation, subject to authorization by the board of supervisors. It is the Public Defender who is statutorily charged with representing the clients of the office. See County Law § 701(2) . . . . We

accept the inquirer's representation that the defenders typically do not share assignments or files, but they could, consistent with the underlying statutory provisions, sometimes work together collaboratively.

21. N.Y. State 1036 (2014) involved a national legal services project focusing on immigration matters. The project had a national board, which also employed several lawyers at the national level, as well as a number of separately incorporated local sections. The local sections received both national and local financing. They also shared the same logo, and a case management system that enabled each attorney to have access to the information of all of the project's clients in all sections, and did not have a reliable means for confining confidential information to any one office. In addition, the national board designated several lawyers as "Regional Attorneys" to supervise the attorneys in multiple state offices. We concluded that the regional offices and the national office constituted a single law firm. The project's use of a single case management system with shared access to client files was dispositive. Similarly, the fact that regional supervisors oversaw local lawyers indicated that the local lawyers were not acting independently.

22. Some central management activities would certainly not run afoul of this common management prohibition. For example, we believe that central fundraising and HR activities would be permitted. At the other end of the spectrum, supervision of legal matters in all entities clearly would be prohibited. Between those extremes – for example, in the setting of budgets – there are many activities that are fact specific and inappropriate for general advice. In all cases, the access to confidential information of persons with central management authority should be restricted.

Public Appearance

23. Finally, it is important to note that Comment [2] to Rule 1.0 (on the definition of "Firm") says, with respect to lawyers who share offices, "if they present themselves to the public in a way that suggests that they are a firm . . . they should be regarded as a firm for purposes of these Rules." This may present problems where the units "holistically" represent a single client, e.g., if the housing unit commonly refers its clients to another unit for help with other legal problems without emphasizing that the two units are separate firms and do not share information without the client's consent. Similarly, where the units share a single office building, it would be important for the Society to expressly communicate that its units are separate firms so that the public is not confused.

24. In summary, to qualify as a separate "firm" under the Rules, a unit of a legal services organization must ensure the confidentiality of client confidences. Separate physical space helps to achieve that goal. Our opinions have objected where divisional or project lawyers have too much interaction with those in another unit. *See* N.Y. State 794 (2006) (students from different projects would work side-by-side). Confidentiality also requires that client files of each unit not be accessible to lawyers in the other firm or firms. But separate space and files alone are not enough when the programs are managed by a common manager. *See* N.Y. State 975 (2013) (separate space and files are not sufficient if management of the programs is done centrally); N.Y. State 1036 (single case management system and supervision across different local offices made the offices more like branch offices of a single firm than like separate firms).

25. The Society here has one division occupying a separate floor. Whether that will be enough to support designation as a separate firm will depend on the degree of interaction between lawyers in that division and those in other divisions or projects, how client files are maintained, how the various projects are supervised and managed and how the various projects present themselves to the public. As for the projects that share space, it will be more difficult to establish the necessary

separateness for purposes of the definition of "firm" or in the minds of clients or the public. In order to demonstrate that different units are separate firms, the Society must also demonstrate that each firm is managed and operated independently. While having certain shared services, such as a library, an HR department, and a telephone system, are not inconsistent with having separate firms, central management of legal matters and legal policy for all divisions and projects would be problematical.

CONCLUSION

26. Firewalls and screens cannot prevent imputation of a conflict under Rule 1.10(a). In the context of not-for-profit legal aid organizations, certain elements of screening may be used to demonstrate that divisions or projects of a legal services organization constitute different law firms for purposed of the conflict's rules. But the bar is high to show that the "firms" are separate and not merely branches of a single entity.

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