

ADOPTED AS REVISED

RECOMMENDATION

RESOLVED, That the American Bar Association amends Model Rule of Professional Conduct 1.10(a) and related Comments, and to Model Rule of Professional Conduct 1.0, Comment [8] to read as follows: (additions are underlined; deletions are ~~struck through~~):

Rule 1.10 Imputation of Conflicts of Interest: General Rule

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(a) 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 Rules 1.7 or 1.9, unless

(1) the prohibition is based upon a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a), **(or (b))**, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefore;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with

interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Comment

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10 (b).

* * *

[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.

[8] Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.

[10] The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.

[711] Where a lawyer has joined a private firm after having represented the government, imputation is governed under Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[812] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

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Rule 1.0 Terminology

Comment

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Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

Rule 1.10 Imputation of Conflicts of Interest: General Rule (“Clean version”)

(a) 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 Rules 1.7 or 1.9, unless

(1) the prohibition is based upon a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a), or (b), and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefore;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Comment

Definition of “Firm”

[1] For purposes of the Rules of Professional Conduct, the term “firm” denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether to or more lawyers constitute a firm within this definition can depend upon the specific facts. See Rule 1.10, Comments [2]–[4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10 (b).

[3] The rule in paragraph (a) does not prohibit representation whether neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in

the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did as a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer for formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent,

see Rule 1.0(e).

[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.

[8] Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.

[10] The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.

[11] Where a lawyer has joined a private firm after having represented the government, imputation is governed under Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having

served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[12] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

MINORITY REPORT

We dissent from the Committee's Report with Recommendations because we believe that screening of the lateral hire should remain ineffective to avoid imputation under Model Rule 1.10 unless the lateral lawyer's former client consents. The Committee's proposal departs substantially from the rules in thirty-nine jurisdictions, twenty-three of which permit only consensual screening, and eleven more that permit nonconsensual screens only when a laterally hired lawyer had no substantial responsibility or acquired no significant confidential information in a previous adverse representation.

We believe that the current Model Rules serve lawyers and clients well by providing a bright line rule that protects both. When a lawyer leaves a firm, Model Rule 1.9 prevents that lawyer from acting adverse to her former clients in the same or substantially related matters. Model Rule 1.10 prohibits that lawyer's new firm from the same representations without the consent of the migrating lawyer's former client. Former clients can condition consent on a screen of the lateral lawyer. These consensual screens are becoming more common, and they protect the new firm, the new firm's current clients and the former client's interests

Fiduciary duty is the foundation of both of these rules. Rule 1.9 prohibits the lateral lawyer from using or disclosing confidential information of former clients. Rule 1.10 imputes this obligation to the new law firm because it presumes that lawyers in firms interact for the benefit of their current clients. Both of these conflict of interest rules derive from centuries old agency rules that require client consultation and consent to keep a lawyer-agent focused on the client-principal's interests.

The current articulation of these principles in the Model Rules protects lawyers against our own judgment when it might be impaired by our own or some other client's interests. The lateral lawyer interested in changing law firms and the clients at the new firm have interests of their own which well might conflict with those of the former client. It is this conflict which endows those clients with the right recognized by agency law and the current rules to determine their own best interests.

Consider for example, that in all of the following circumstances, the proposed rules would allow an involuntary screen when a former client reasonably might refuse consent.

1. A lawyer with a significant role in a matter who leaves a law firm while the matter is pending to join the firm representing the opposing party in the same matter.
2. A lawyer who billed no hours to a client matter, but spent a two hour lunch discussing it in detail with the lead lawyer on the case now has joined the firm representing the other side in the same matter.
3. A lawyer who gained significant information about a wife's business transactions soon thereafter joins the law firm representing the same woman's husband in a divorce.

We do not agree that Rule 1.10 should allow firms to set up nonconsensual screens in circumstances like these, where a lateral lawyer who joins the firm has been exposed to substantial material information or has had a significant involvement in the same or substantially related prior representation. In these circumstances and many more, the committee's proposal replaces the necessity of former client consultation and consent with a nonconsensual screen and notice provision. From the former client's perspective, the proposal allows a nonvoluntary screen of a lateral lawyer when the former client would not have consented if consulted. Also, the proposal potentially confuses lawyers, because it invites them to establish nonconsensual screens in situations where courts in disqualification motions may not recognize them. When this occurs, current clients of the firm involuntarily lose their counsel of choice.

The Committee's proposal rests on newly added procedural requirements to foster the former client's comfort with a nonconsensual screen. Yet, former clients may reasonably refuse consent when their lawyer had either a significant role or exposure to material confidential information in the prior representation. We do not dispute the good will of most lawyers who believe that they can establish and maintain effective screens, even in these circumstances. In fact, the committee's proposal acknowledges that the courts may grant disqualification relief to former clients, which put current clients of the firm at risk. But lawyers and clients recognize that both are human, and that law firm systems can break down. When lawyers and clients differ in their estimation of these risks, the client's view should prevail.

Current rule 1.10 protects former clients against the risk of adverse use or disclosure of confidential information. The proposed amendment substitutes the law firm's resolution of this risk for the client's. It catapults the lawyer's interests over the former client's determination at precisely the time the lateral lawyer and the new firm have their own and their client's interests understandably in mind. Lawyers should consult with former clients about these matters and be bound by the client's determination, which is precisely what current Model Rule 1.10 requires.

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