

Conflicts of Interest & “Limited Service” Pro Bono Programs: New DR 5-101-a

BY ROY SIMON

On November 9, 2007, effective immediately, the four Presiding Justices of the Appellate Divisions issued a new Disciplinary Rule, § 1200.20-a, entitled “Participation in Limited Pro Bono Legal Service Programs.” (NYPRR reprinted the full text of the Rule in the December 2007 issue.) In contrast to the new advertising Rules, which were prompted by a lengthy study by a N.Y. State Bar Association Task Force and were circulated for a six month public comment period (an initial 90-day comment period followed by a 90-day extension), § 1220.20-a came out of the blue, without any warning to the bar or any opportunity for advance comment before its adoption. It is not a model of draftsmanship, but if you are a lawyer at a big Wall Street firm (or even a medium-sized one), the Rule should make it much easier for you and other lawyers at your firm to participate in short-term, limited legal services programs – but the new Rule has one potentially serious flaw. This article will analyze the new Rule.

Background: The Problem

For many years, legal services organizations, courts and various nonprofit organizations have been organizing pro bono programs designed to help people solve their legal problems with only limited, one shot representation. For example, from October through July, on specific nights each month, the New York City Bar runs a free program called the “Monday Night Law Clinic.” The City Bar’s web site describes the program as follows: “At the clinic, attorneys will meet with clients for one-half hour appointments to discuss a variety of legal topics, such as bankruptcy, consumer issues, matrimonial, basic employment and landlord-tenant. ... A client must schedule an appointment for the Monday Night Clinic. ... Walk-ins are not permitted.”

The City Bar also runs a program called the “Legal Hotline,” which offers “legal information, advice and referrals” to low-income New Yorkers who could not afford a private attorney or have access to legal representation. The Hotline assists nearly 1,000 callers a month on a range of civil legal issues, including “matrimonial and family law, housing law, domestic violence, bankruptcy and debt collection and benefits.” The Nassau County Bar Association offers “Senior Citizen Free Legal Consultations,” a free monthly clinic that “offers a 30-minute private consultation with an attorney.” (Advance telephone registration is required.)

In these programs, lawyers typically meet with clients only one time, for a relatively brief period. The lawyers give rudimentary advice, help client’s complete legal forms, and refer clients to other resources (e.g., psychologists, credit counselors, tenants’ rights groups) all with the aim of assisting clients to address their legal problems without needing further legal assistance. The lawyers who participate in these programs establish a lawyer-client relationship, but the program organizers make clear to the client that the lawyer’s representation of the client will not continue beyond the limited consultation.

Establishing an attorney-client relationship, however, creates the potential for conflicts – and therefore the obligation to check for conflicts. Lawyers need to make sure that a short-term, one-shot pro bono client is not seeking advice on how to sue one of the pro bono lawyer’s current clients, or defend against a suit by a current client, or oppose one of the lawyer’s past clients in a substantially related matter. Most of the lawyers who advise clients during these limited service pro bono programs could probably check their own individual conflicts adequately by consulting their memories and perhaps a small laptop computer database showing the clients they have served. Lawyers who work in firms (probably most of the participating lawyers) also generally know the names of some of the other clients served by their firms. But few lawyers know the names of all of their firm’s current clients, much less all of the firm’s past clients, and checking thoroughly for conflicts takes time. Therefore, an on-the-spot conflict check isn’t a realistic option.

Before the courts issued the new § 1200.20-a, that created a serious dilemma. New York has the most explicit Rule in the country on the duty to check for conflicts. DR 5-105(E), drafted and adopted by the courts exactly a dozen years ago (in May of 1996), requires all law firms to have in place a policy implementing a conflicts-checking system, and to check all proposed new engagements against all of the firm’s current and past engagements. That language is certainly broad enough to encompass clients that lawyers serve through short-term, one-shot pro bono programs of the kind we are discussing. But (as we’ve already said), and as noted in Comment 1 to ABA Model Rule 6.5, “Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation.”

Origins of New York’s New Rule: ABA Model Rule 6.5

In 2002, as one of the reforms proposed by the ABA Ethics 2000 Commission, the ABA adopted a new Rule 6.5 to resolve the dilemma. Rule 6.5, entitled “Nonprofit and Court-Annexed Limited Legal Services Programs,” has a simple structure, with two main paragraphs.

Rule 6.5(a) establishes the scope of the Rule. It is addressed to a lawyer who provides “short-term limited legal services” to a client under the auspices of a program sponsored by either a nonprofit organization or a court, where neither the lawyer nor the client expects that the lawyer will provide “continuing representation” in the matter. In that situation, Rule 6.5(a)(1) provides that the lawyer is subject to the basic Rules governing conflicts with current and former clients (equivalent to New York DR’s 5-101, 5-105, and 5-108) “only if the lawyer knows that the representation of the client involves a conflict of interest.”

Rule 6.5(a)(2) then provides that the lawyer is subject to the Rule on imputed conflicts (equivalent to New York DR 5-105(D)) only if the lawyer “knows” that another lawyer associated with the lawyer in a law firm is disqualified by the Rules on conflicts with current and former clients.

Rule 6.5(b) provides that except as provided in subparagraph (a)(2), the Rule on imputed conflicts “is inapplicable to a representation governed by this Rule.” At first blush this does not appear to add anything to Rule 6.5(a)(2), since that subparagraph makes clear that the imputed conflicts Rule does not disqualify the pro bono lawyer unless the pro bono lawyer knows that a partner or associate or of counsel lawyer has a disqualifying conflict. But in fact Rule 6.5(b) adds something very important: when the short-term, limited representation ends, the pro bono lawyer does not take any conflicts back to the firm

because of the limited services program. In other words, Rule 6.5(b) cuts off imputed conflicts running in both directions – from the firm to the pro bono lawyer and from the pro bono lawyer to the firm. Cutting off imputation from the firm to the pro bono lawyer means that the pro bono lawyer can serve clients at the limited services program without stopping to check thoroughly for conflicts. Cutting off imputation from the pro bono lawyer to the firm means that the firm can keep on representing all of its current clients, and take on new clients, without recording the pro bono lawyer’s short-term client on the roster of former clients in its conflicts database. Thus, according to Comment 4 to Rule 6.5:

[A] lawyer’s participation in a short-term limited legal services program will not preclude the lawyer’s firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program’s auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

This leniency is justified because, as Comment 4 to ABA Rule 6.5 points out, “the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer’s firm” But if the representation goes beyond the limited, short-term representation contemplated by all concerned, the imputation Rule kicks back in. As cautioned in ABA Comment 5, if the lawyer (contrary to everyone’s expectations) “undertakes to represent the client in the matter on an ongoing basis,” then the normal conflicts Rules apply to the pro bono lawyer again with full force, and the imputed conflict Rule will attribute those conflicts to the rest of the pro bono lawyer’s firm.

In sum, ABA Model Rule 6.5 provides that when a lawyer offers short-term, limited legal services to a client as part of a program sponsored by a nonprofit organization (such as a bar association or Legal Aid Society) or by a court, the lawyer does not have to worry about her own conflicts of interest or about the conflicts of lawyers associated with her in a firm, except for the conflicts she “knows” about at the moment she sits down with the client.

New York’s Version: DR 5-101-a

New York’s new Rule, § 1200.20-a or DR 5-101-a, is similar to ABA Model Rule 6.5, but not identical. Let me go through New York’s Rule paragraph by paragraph.

As a preliminary matter, do not confuse DR 5-101(A) (the personal interest conflicts Rule) with DR 5-101 a (the new Rule). They are two completely separate and independent Rules, just as 22 NYCRR §§ 1200.20 and 1200.20-a are two different Rules.

DR 5-101-a(a) is nearly the same as ABA Model Rule 6.5(a), but whereas the ABA Rule refers only to programs sponsored by “a nonprofit organization or a court,” the New York version covers programs sponsored by “a court, government agency, bar association or not-for-profit legal services organization....” Since virtually all bar associations and legal aid societies are nonprofit organizations, this does not add anything of substance to the ABA Rule. But the New York courts were right to include a “government agency” expressly, because it is not covered in the ABA formulation.

DR 5-101-a(A)(1) is identical in substance to ABA Model Rule 6.5(a)(1) but is a lot more verbose. The Rule provides that DR 5-101(A), DR 5-105, and DR 5-108 (§§ 1200.20, 1200.24, and 1200.27) apply “only if the lawyer has actual knowledge at the time of commencement of representation that the representation

of the client involves a conflict of interest.” The Rule also notes that the listed Rules “concern[] restrictions on representations where there are or may be conflicts of interest as that term is defined in this part.” That is an unnecessary reminder, and is slightly misleading because the term “conflict of interest” is not in fact “defined” in these Rules. Rather, the various Rules listed each describes a different type of conflict (personal interest conflict, client-to-client conflict, former client conflict). Those are not definitions, but if the courts want to refer to the Rules that way, no harm is done.

DR 5-101-a(A)(2) is apparently intended to be identical in substance to ABA Model Rule 6.5(a)(2), but gets at the same result from a different angle. Basically, instead of saying straight out (as the ABA does) that the imputation Rule, DR 5-105(D), applies only if the pro bono lawyer “knows” that some other lawyer in the firm is disqualified by DR 5-101, 5-105, or 5-108, New York says that the lawyer must comply with those Rules “only if the lawyer has actual knowledge at the time of commencement of representation that another lawyer associated with the lawyer in a law firm is affected by those sections.” I don’t think this is what the courts meant to say, but it should do the job because people will understand it to mean that the conflicts under DRs 5-101, 5-105, and 5-108 are not imputed to the pro bono lawyer unless she knows about those conflicts when she begins to represent the short-term client.

DR 5-101-a(B) is apparently intended to be identical in substance to ABA Model Rule 6.5(b), but again New York takes a slightly different approach, and the literal meaning is not what I think the courts intended. DR 5-101-a(B) states that both DR 5-105 (1200.24) and DR 5-108 (1200.27) “are inapplicable to a representation governed by this section,” meaning that the pro bono representation will not be prohibited by a conflict between the pro bono lawyer and one of the pro bono lawyer’s present or former clients unless (as provided in (A)(2)) the pro bono lawyer “knows” that some other lawyer in the firm would be disqualified due to a conflict with a current or former client.

My translation: the pro bono lawyer will not be disqualified from the short-term representation either by his own conflicts with current and former clients or by imputed conflicts with the current and former clients of other lawyers at the firm unless the pro bono lawyer knows about those conflicts when the representation starts. Thus, no formal conflict check is necessary when a lawyer takes on a short-term, limited services client.

DR 5-101-a(C) defines “short-term limited legal services” as:

services providing legal advice or representation free of charge as part of a program described in subdivision (a) with no expectation that the assistance will continue beyond what is necessary to complete an initial consultation, representation or court appearance.

This definition essentially moves part of Rule 6.5(a) to a free-standing paragraph.

DR 5-101-a(D) provides that a lawyer providing short-term limited legal services “must secure the client’s informed consent to the limited scope of the representation,” which imports verbatim part of the first sentence of Comment 2 to ABA Model Rule 6.5. DR 5-101-a(D) also provides that the short-term representation “shall be subject to the provisions of section 1200.19,” which is New York’s confidentiality Rule, DR 4-101. Thus, a lawyer has the same duty of confidentiality to a short-term client as he would to a full-fledged, long-term client.

DR 5-101-a(E) is something new under the sun, with no ABA equivalent. It says that DR 5-101-a in its entirety does not apply if either (1) “the court before which the representation is pending determines that a conflict of interest exists” (a clause that applies only to litigation pending before a court), or (2) “if during the course of the representation, the attorney providing the services becomes aware of the existence of a conflict of interest precluding continued representation.” Thus, even if the pro bono attorney does not know of any conflict, or believes that the facts presented to her do not create a conflict, the court can overrule her judgment and disqualify the lawyer *and the lawyer’s entire firm by imputation*. (Alternatively, I suppose the court could condition continued representation on obtaining consent from all affected clients, presumably including not only the pro bono client but also the law firm’s conflicting client – but the short-term nature of the services may make the dual consent route totally impractical.)

Moreover, even if the pro bono lawyer does not know of any conflict when the representation commences, the discovery of a conflict during the representation – whether in litigation or not – negates DR 5-101-a and triggers the normal operation of the conflict Rules, including the imputation Rule. This result takes away with the left hand what the right hand gave in the earlier sections of the Rule. Therefore, we have to interpret the rest of the Rule to reflect this hidden risk. Apparently, the Rule should actually say that a lawyer participating in a short-term legal services program is exempt from DRs 5-101, 5-105, and 5-108 “unless the lawyer has actual knowledge at the time of commencement of representation that the representation of the client involves a conflict of interest *or the lawyer gains such knowledge at any time during the representation.*” (Emphasis added.)

If that is what the Rule really means, then participating in a short-term limited legal services program carries almost as much risk as before DR 5-101-a was adopted. Interviewing a short-term, one-shot client is like interviewing a prospective client, and can lead to a firm’s disqualification. But I can’t believe the courts intended that meaning. I think they meant only that the pro bono lawyer is disqualified from representing the *short-term client* if the pro bono lawyer knows of a personal or imputed conflict at the outset of the representation or discovers a conflict during the short-term representation itself. Thus, the pro bono lawyer does not have to perform a formal firm-wide conflicts check before counseling the short term client, but the lawyer must continue to be alert for conflicts during the short-term representation. For example, the pro bono lawyer may discover a conflict during the short-term representation when the client tells the lawyer more about the facts and issues or shows the lawyer some documents, perhaps implicating additional adverse parties or just further jogging the pro bono lawyer’s memory.

I do not think the courts meant in subparagraph (E) that the pro bono lawyer’s firm would have to stop representing one of the firm’s regular *current* clients simply because the short-term client triggered a conflict – but literally, that’s what DR 5-101-a(E) means. Subparagraph (E) says that the provisions of “this section” (meaning all of DR 5-101-a) “shall not apply” where, “during the course of the representation,” the pro bono attorney “becomes aware of the existence of a conflict of interest precluding continued representation.” If DR 5-101-a does not apply, then the other conflict Rules do apply. Perhaps the courts meant for subparagraph (E) to apply only to litigation, since it refers to “the court before which the representation is pending,” but the rest of subparagraph (E) is does not refer to a court and is not limited to litigation. Since Disciplinary Rules written directly by the courts are not explained by any Ethical Considerations, Comments, or legislative history, the literal language of the Rule is likely to be applied until a court interprets it pragmatically. In the meantime, risk-averse lawyers will, quite sensibly, take the Rule at face value.

How the Rule Works: An Illustration

Let's give an example to illustrate how new DR 5-101-a works. Suppose Lisa Mulroy, a third year associate at the noted Wall Street law firm of Sullivan & Proskauer LLP, volunteers to meet with elderly clients for a night as part of a bar association pro bono program. The program provides short-term, limited legal services to the people who sign up in advance. The bar association makes clear to the clients that this is a one-shot program and that the lawyers in the program do not expect to have any further involvement with the clients after tonight. The lawyers echo this limitation in scope of services at the beginning of each client interview, and obtain client consent to the limitation.

Lisa sits down for a half-hour consultation with her first client for the night, Sadie Greenberg, an elderly widow facing eviction because her landlord, Traubman & Company, is converting Sadie's building to a condominium. Sadie wants to prevent Traubman from going ahead with the condominium conversion. Thus, Sadie will be directly adverse to Traubman & Company. Ordinarily, Lisa would have to press the pause button here to check her firm's entire database of current and past clients to determine whether her law firm has a conflict opposing Traubman in this matter. But DR 5-101-a says that in a limited services program of this type Lisa needs to consider only the conflicts she "knows" about. Lisa therefore racks her brain – but not any other database – to check for conflicts.

In about thirty seconds, Lisa concludes that she does not have a conflict in advising Sadie. She is not doing any legal work for Traubman & Company, never has done so in the past, and does not have any conflicting financial or personal interests, so she does not perceive any conflicts arising from her own clients or from her personal interests. Lisa knows that her law firm has done some work for Traubman & Company in the past, but she does not know whether anyone in the firm is still working on Traubman matters, or what the prior matters were. Because she does not "know" that Traubman is a current client of the firm, and does not "know" of a former client conflict, DR 5-101-a(A)(2) excuses Lisa from any imputed conflict. Moreover, Lisa does not know whether any other client of her firm is a Traubman affiliate, so she has no knowledge about corporate family conflicts. Thus, Lisa has completed her lightning-fast seat-of-the-pants conflicts check and can turn her attention to advising Sadie.

Lisa reads Sadie's wrinkled documents, gives her some elementary advice about tenants' rights, refers Sadie to the Tenants' Rights Project at a local law school, and bids Sadie good night. The short-term representation is over.

When Lisa returns to her firm the next day, she finds out by coincidence (at the water cooler) that Traubman & Company is one of her firm's major clients and that the firm often defends Traubman against angry tenants trying to stop condo conversions. Ordinarily, pursuant to DR 5-108(A), Lisa would be prohibited from working on Traubman's defense if Sadie were to sue Traubman to halt the condo conversion in Sadie's building. And under DR 5-105(D), Lisa's individual conflict would be imputed to every other lawyer in her firm, prohibiting any lawyer in the firm from defending Traubman against Sadie's suit. But under DR 5-101-a(B), since Lisa did not learn of the conflict until after her short-term representation of Sadie ended, Sadie's suit will not create either an individual conflict for Lisa or an imputed conflict for the other lawyers in the firm. Lisa will be bound by a duty of confidentiality to Sadie, but her short-term representation of Sadie will not disqualify her firm from defending Traubman against Sadie's eventual suit.

But now let's rewind the tape and see what happens if the scenario changes slightly. Suppose that, during her half-hour consultation with Sadie, Lisa learns that Sadie also has a strong claim against Condominium Converters, Inc., a company that Traubman has hired to clear its building of tenants. Lisa is stunned. She has been working long hours lately defending Condominium Converters, Inc. against a suit brought by residents and former residents of a large apartment building on the Upper West Side. The suit alleges that Condominium Converters used fraud and misrepresentation to get the tenants out of the building. Lisa has a clear conflict. Now what?

When Lisa discovers "during the course of the representation" that she has a conflict "precluding continued representation," DR 5-101-a(E) kicks in. According to DR 5-101-a(E), the provisions of "this section" (DR 5-101-a) "shall not apply." Therefore, DR 5-105(D) and DR 5-108 are revived and apply to Lisa's short-term representation of Sadie. Under DR 5-108, Lisa would be personally prohibited from continuing her discussions with Sadie during the conference or from opposing Sadie when Sadie sues Traubman. More significantly, under DR 5-105(D) Lisa's *entire firm* will be disqualified by imputation. In less than a half hour of trying to do good by volunteering for a short-term, limited services pro bono program, Lisa has disqualified her firm from defending a major client against a suit soon to be brought by Lisa's former client. That is exactly the nightmarish result that DR 5-101-a was intended to prevent. Unfortunately, the language of the Rule does not match its intent.

Conclusion

The new Rule is well intentioned, and should significantly reduce a law firm's anxiety about encouraging its lawyers to participate in short-term, limited pro bono programs. The Rule certainly relieves the pro bono lawyer and her firm of the heavy burden of performing a full-bore conflicts check before meeting with a short-term client. But subparagraph (E) of the new Rule appears to take away all of the benefits of the Rule if a lawyer happens to learn, during the course of the representation, that a conflict precludes further representation. In that instance, the conflict will be imputed to the entire firm. To avoid that risk, small as it might be, some firms may decide not to participate in short-term, limited service pro bono programs. That would be a sad result, and I doubt it is a result the courts intended. I hope the courts will quickly amend the Rule to avoid that result.

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