

## Checking For Conflicts Under DR 5-105(E)

BY ROY SIMON

New York is one of the few states that require lawyers to check for conflicts of interest before accepting any new engagement. Yet little has been written about how to comply with the obligation to check for conflicts. This article attempts to fill that gap.

In 1996, NY adopted DR 5-105(E), a new paragraph of New York's main rule governing conflicts of interest. DR 5-105(E) contains three sentences (which I set off here in bullets to make the rule easier to read):

- A law firm shall keep records of prior engagements, which records shall be made at or near the time of such engagements and shall have a policy implementing a system by which proposed engagements are checked against current and previous engagements, so as to render effective assistance to lawyers within the firm in complying with DR 5-105(D)."
- "Failure to keep records or to have a policy which complies with this subdivision, whether or not a violation of DR 5-105(D) occurs, shall be a violation by the firm."
- "In cases in which a violation of this subdivision by the firm is a substantial factor in causing a violation of DR 5-105(D) by a lawyer, the firm, as well as the individual lawyer, shall also be responsible for the violation of DR 5 105(D)."

The rule thus embodies two separate obligations. Law firms must:

1. Make and keep contemporaneous records of prior engagements at or near the time of such engagements
2. Have a policy implementing a system for checking proposed engagements against current and previous engagements.

If a law firm either fails to keep contemporaneous records of engagements or fails to adopt a policy implementing a system for checking those records to detect conflicts with current and former clients, the law firm - as an entity - is violating DR 5-105(E). The key questions, therefore, are: (1) what records must a law firm keep to reflect current engagements? and (2) what type of system must a law firm implement to satisfy the conflict checking obligation?

Unfortunately, no EC's were written or adopted to explain these new and complex obligations and only one bar association ethics opinion in New York has addressed DR 5-105(E) in detail. Therefore, the best guide to the meaning of the rule is the text of the rule itself.

## **What DR 5-105(E) does not cover**

Before going further, we should delineate the boundaries around DR 5-105(E). The scope of DR 5-105(E) is large but not unlimited. The rule requires a law firm to check for conflicts only to the extent necessary to avoid a violation of DR 5-105(D), the imputed disqualification rule. Subparagraph (D) of DR 5-105 provides as follows:

While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so under DR 5-101(A), DR 5-105(A) or (B), DR 5-108(A) or (B), or DR 9-101(B) except as otherwise provided therein.

Thus, a law firm needs to check engagements with current or former clients to whatever extent is necessary to avoid violations of four conflicts rules: the personal conflicts rule (DR 5-101(A)); the current client conflicts rule (DR 5-105(A) or (B)); the former client conflicts rule (DR 5-108(A) or (B)); and the former government lawyer conflicts rule (DR 9-101(B)).

However, DR 5-105(D) does not expressly mention several other conflicts rules. It does not list the rule on lawyer-witness conflicts (DR 5-102), or the rule against acquiring an interest in litigation (DR 5-103), or the rule regulating business transactions with clients (DR 5-104), or the rule governing aggregate settlement offers (DR 5-106), or the rule governing compensation or control by a party other than the client (DR 5-107), or the rule on internal corporate conflicts (DR 5-109), or the rule governing conflicts with a legal services organization (DR 5-110), or the rule governing sex between lawyers and their clients (DR 5-111).

These omissions provide small comfort, however, because conflicts arising under most of these omitted rules are also encompassed under the included rules. For example, a conflict among current clients relating to an aggregate settlement offer ("We'll give you \$400,000 to settle the claims by all four of your clients in this case") ought to be detected under DR 5-105(B), which governs conflicts arising among current clients after a law firm has accepted a matter. A conflict arising under DR 5-107 because an insurance company attempts to assert control over litigation on behalf of one of its insured's ought to be detected either under DR 5-101 (because a lawyer has a financial interest in maintaining a good relationship with the insurance company) or under DR 5-105 (in jurisdictions where the insurance company is considered a co-client with its insured). A conflict arising under DR 5-111 because of a lawyer's sexual relationship with a client ought to be detected in a search for personal conflicts under DR 5-101.

Still, the scope of DR 5-105(E) is also limited in other ways. The only obligation on the law firms is to check "proposed engagements" for conflicts with "current and previous engagements." Thus, the obligation to check for conflicts under DR 5-105(E) is not as broad as the obligation to avoid or cure conflicts under DR 5-105(D).

For example, although DR 5-108(B) governs conflicts caused by laterally hiring an attorney who has worked at another law firm, the language of DR 5-105(E) does not expressly require law firms to check for conflicts upon hiring a lateral associate or partner. (The lateral hire's former clients must be added to

the law firm's data base of former clients - see N.Y. State 720, discussed below - but DR 5-105(E) itself does not trigger a duty to check for conflicts that might arise in pending matters because a new attorney has begun working at the firm.) Nor does DR 5-105(E) require a law firm to check for conflicts when amending a complaint to add a new defendant or a new legal theory. Nor does DR 5-105(E) require a law firm to monitor conflicts of any kind that develop after the law firm has accepted a new engagement. Only when a new engagement is "proposed" does DR 5-105(E) require a law firm to check for conflicts.

Of course, if a conflict arises after an engagement begins and a law firm does not detect and cure the conflict (either by obtaining valid client consent after full disclosure or by withdrawing from the representation), the law firm will be violating one or more provisions of the Code of Professional Responsibility. What makes DR 5-105(E) different is that a law firm violates DR 5-105(E) simply by failing to check for conflicts even if no conflict exists. As the third sentence of the rule says: "Failure to keep records or to have a policy which complies with this subdivision, whether or not a violation of DR 5-105(D) occurs, shall be a violation by the firm." Thus, a law firm must know what records to keep and what kind of policy to adopt about checking those records for conflicts.

One might assume that DR 1-104 (dealing with the responsibilities of a law firm partner or supervisory lawyer to ensure compliance by other lawyers in the firm with the disciplinary rules) would obligate a law firm to check for conflicts, but DR 1-104 was amended to impose the supervisory obligations on the same day that DR 5-105(E) was adopted, so the courts must have intended that DR 5-105(E) should supplement and add to the supervisory obligations imposed by DR 1-104. Thus, while DR 1-104 may subject a law firm as an entity to discipline if a conflict actually arises due to sloppiness in recordkeeping or conflict checking, the mere failure to keep proper records or to adopt a proper system to check for conflicts would not, by itself, seem to violate DR 1-104.

### **Sparse guidance from ethics opinions**

Most of the New York ethics opinions that have cited DR 5-105(E) have mentioned it only in passing. For example, N.Y. County 725 (1998) observed that lawyers may need to keep certain documents from closed files in order to comply with DR 5-105(E). N.Y. City 1998-2 (1998) stated that a law firm could not post a form on its web site to allow new clients to order trademark or copyright searches because the firm would be unable to comply with DR 5-105(E) with respect to new clients. Similarly, N.Y. State 709 (1998) stated that lawyers who practice law on the Internet are not exempt from the fundamental obligation imposed by DR 5-105(E) to avoid conflicts, and N.Y. State 715 (1999) stated that law firms hiring "temporary" lawyers (who work for many different firms) may not escape DR 5-105(E) by concealing the identify of the firm's clients from the temporary lawyers.

The only New York ethics opinion that has squarely addressed a law firm's obligations under DR 5-105(E) in detail is N.Y. State 720 (1999). That opinion addressed a relatively narrow question: When a lawyer is leaving Firm A to join Firm B, what information must Firm B seek from the moving lawyer to allow Firm B to fulfill its obligation under DR 5-105(E) to check for conflicts? The opinion began by observing: "Although this provision [DR 5-105(E)] seems to apply by its terms to prior engagements of the firm, we believe that the intent of the provision can only be affected if a firm adds to its system information about the representations of lawyers who join the firm." The opinion noted that DR 5-105(E), while requiring conflict checks, "does not set forth detailed requirements." Rather, DR 5-105(E) sets forth "a general requirement that the conflict check system enable the firm to check new representations

against current and previous engagements, so as to render 'effective assistance' to lawyers within the firm in complying with DR 5-105(D)." The opinion then struggled to articulate the precise nature of the "information" a law firm must obtain from a lawyer who joins the firm so that the firm can satisfy the "effective assistance" standard.

While grappling with this issue, the opinion reviewed highlights of the body of New York state and federal law governing conflicts of interest with former clients. The opinion cited many cases, but three main landmarks stand out. In *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975), the court refused to disqualify a law firm that had hired an associate from a large, departmentalized law firm (Kelley Drye, which then had eighty lawyers). The court said that a lawyer had not "represented" a client of his old firm if his involvement at the old firm was limited to brief information discussions on a procedural matter or research on a specific point of law.

In *Cardinale v. Golinello*, 43 N.Y.2d 288, 372 N.E.2d 26 (1977), in contrast, the Court of Appeals disqualified a law firm that had hired a lawyer from a small, collegial firm (nine lawyers) where all of the lawyers talked frequently about the various cases in their firm. The court held that there was an "irrebuttable presumption" that a lawyer in such a firm had acquired confidential information that could be used to the disadvantage of the former client - even if the moving lawyer had never worked on the former client's matters - and that disqualification of the new firm was therefore required.

Finally, in *Solow v. W.R. Grace & Co.*, 83 N.Y.2d 303, 632 N.E.2d 437 (1994), the Court of Appeals revisited the question of whether there is an irrebuttable presumption that all lawyers in a firm have shared the confidences of all of the firm's clients. This time, examining a disqualification motion against a large law firm (Stroock & Stroock & Lavan, with over 300 lawyers), the Court of Appeals held that the presumption was rebuttable. If a firm could make a prima facie showing that there was "no reasonable possibility" that the attorneys in question acquired confidential information concerning the client, "a hearing should be held after which the court may determine that disqualification may be unnecessary." However, the court distinguished between large law firms, with attorneys in different departments who could not be assumed to have had any contact with one another, and smaller firms like the one in *Cardinale*, where there was a "constant cross pollination going on" and a "cross current of ideas" among the attorneys on all matters that the firm handled. Sticking to its holding in *Cardinale*, the Court reiterated that in firms characterized by the "informality" exhibited by the firm at issue in *Cardinale*, "disqualification will be imposed as a matter of law without a hearing."

This split in the legal standard regarding imputation of conflicts led the Committee in N.Y. State 720 to set down only fuzzy, fact-intensive, case-by-case guidelines for collecting data about the clients of a moving lawyer's former firm. For example:

[I]f Moving Lawyer is coming to Firm B from small Firm A, Firm B may wish to obtain a list of all clients of Firm A, since the courts may attribute to Moving Lawyer the confidences of all of Firm A's clients. If Moving Lawyer is coming from large Firm C, Firm B may be inclined only to ask the Moving Lawyer for a list of clients at Firm C with respect to whom Moving Lawyer performed work or otherwise obtained confidences or secrets. *Firm B's reasonable effort to obtain information from the Moving Lawyer and to check that information against the firm's records may meet DR 5-105(E)'s "effective assistance" standard even if it does not succeed in identifying all prior*

*representations by Moving Lawyer that a former client might object to or that a court might hold required disqualification of Firm B. [Emphasis added.]*

**An adequate conflicts checking policy** N.Y. State 720's case-by-case approach to identifying the data that DR 5-105(E) requires a law firm to obtain when it hires a lawyer from another firm suggests an important general principle: the data that must be collected and recorded to satisfy DR 5-105(E) in any given situation depends on both the law governing conflicts of interest in that situation and the facts of the specific situation. In particular, N.Y. State 720 teaches that it is crucial to determine who is a "client" or former client for purposes of the conflicts rules. For example:

- If a law firm represents a partnership, is the client the partnership itself as an entity? Or is the client only the general partners? Or are the limited partners also clients?
- If a law firm represents a large corporation with many affiliates and subsidiaries, are those affiliates and subsidiaries considered clients of the firm? Or is only the parent corporation a client? Or are some affiliates and subsidiaries clients while others are not?
- If a law firm represents a small corporation - perhaps a company with only two 50/50 shareholders - are the individual shareholders also clients of the firm? Always, or only sometimes?
- If a law firm represents a trade association, are the members of the trade association clients of the firm? (Only by identifying current clients during a pending engagement will a law firm be able to identify former clients when the engagement is over.)
- If a law firm is retained by the executor of an estate, does the law firm represent the executor, or the estate, or both?
- If a law firm enters into a joint defense agreement and/or shares confidential information with a co-defendant, is the co-defendant a client?
- If a lawyer in a firm interviews a prospective client, but no attorney/client relationship results, has the prospective client become a former client for any purpose? For all purposes?
- If a law firm represents a trustee, are the beneficiaries of the trust also considered clients? Each of these situations (like other analogous situations) has generated its own body of law suggesting factors and tests for determining who is (or was) a client. Accordingly, the task of identifying a client will be painstaking work. It will require substantial research, meticulous attention to detail, and a firm commitment (pun intended) to recording and checking the correct data.

To complicate matters further, under DR 1-105(B)(1) - one of the new rules that took effect in June of 1999 - conflicts in pending litigation will be judged by the professional responsibility rules of the state where the court sits. If a law firm is considering a proposed engagement to defend one of its long-term clients in litigation already pending in a foreign state, then the firm must check for conflicts based on the law of the foreign state. Of course, many times a law firm will not know at the time an engagement is proposed

whether that engagement will lead to litigation or, if it does lead to litigation, where that litigation will be filed. In those circumstances, in my view, a law firm is not required to be clairvoyant or to assess possible conflicts under the law of every jurisdiction where the litigation could be filed. But when the litigation is already pending or when the law firm knows where the litigation will be filed, I believe that DR 5-105(E) requires the law firm to evaluate the conflicts under the law of the governing jurisdiction rather than under the law of New York. This makes the daunting task of identifying who is or was a client all the more demanding and difficult.

## **Conclusion**

Like the recordkeeping rules for trust accounts, DR 5-105(E) imposes stringent recordkeeping rules on law firms regarding conflicts of interest. And just as failure to keep the required trust account records constitutes a violation of the Code of Professional Responsibility even if the trust account itself is in perfect order, so the failure to keep the required contemporaneous records of all engagements, or the failure to adopt a policy and to implement a system for checking those records violates DR 5-105(E) even if no conflict results. Unfortunately, determining what data to record will be arduous work and will require thorough research into rules of professional conduct, judicial opinions, and ethics opinions in New York and elsewhere. That is no easy task. Fortunately, as N.Y. State 720 makes clear, all that DR 5-105(E) demands is a system that provides "effective assistance" - not perfect assistance - in detecting conflicts of interest covered by DR 5-105(D). Thus, in my view, a system of recording data and checking for conflicts that is reasonably accurate and complete will satisfy DR 5-105(E), even if the system is not 100% accurate and complete.

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