

City Bar Defines Rules For Checking Client Conflicts

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[Editor's note. This is the first of two articles summarizing Formal Opinion 2003-2 of the Association of the Bar of the City of New York. The second article will discuss the data which should be recorded for each client in a record-keeping system complying with the requirements of DR 5-105(e).]

In an important Opinion (Formal Opinion 2003-2), the ABC- NY has tackled the question:

What records must a law firm keep, and what polices and systems must a law firm implement for checking proposed engagements against current and previous engagements, to comply with New York's mandatory conflict checking rule, DR 5-105(e)?

The City Bar noted first that the State Bar has not adopted any EC's to explain the Rule and that not a single court case has construed the Rule, which was adopted by the Appellate Divisions in 1996 *sua sponte*. It cited an article by Professor Roy Simon for its discussion of the Rule (*Checking for Conflicts Under DR 5-105(e)*, NYPRR, November 2002).

The Opinion by its terms focuses on the first paragraph of DR 5-105(e), which reads:

A law firm shall keep records of their 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).

DR 5-105(d), referred to above, provides:

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), or DR 5-108(a) or (b), or DR 9-101(b) except as otherwise provided herein.

The ABCNY Opinion was arranged in Q & A form. The principal questions and answers are summarized below.

What Is A Law Firm?

The term "law firm" should be construed broadly. It includes not only the traditional law firm, but also all of the following: corporate legal departments, governmental legal departments, non-profit law firms, solo practitioners, and lawyers in "constructive" practice arrangements, e.g., lawyers who share office space

and lawyers in "of counsel" relationships to other lawyers. The term applies whether the "law firm" is organized as a PC, an LLP, or a general partnership, or as a department of a corporation, agency, or organization.

What Conflicts Are Covered?

Rule 5-105(e) applies to all the following conflicts:

- Conflicts among current clients, "whether the conflicts arise before or during the engagement"
- Conflicts with former clients, "including the former clients of laterals and their former firms."
- Conflicts that arise under DR 9-101(b) when a private law firm hires a lawyer who formerly served as a public officer or employee. (However, because these conflicts are governed by many laws and regulations unique to them, the Opinion did not address systems for checking these conflicts.)

What System Is Required For Record-Keeping?

The specific measures required by the Rule will depend on a number of factors: (a) the size and structure of the firm; (b) the nature of the firm's practice; (c) the number and location of the firm's offices; (d) the relationship among the firm's offices; and (e) other characteristics of the law firm and its practice. The records, policies and systems may vary, but every law firm must keep minimum records and implement minimum policies to enable every lawyer to avoid conflicts that will be imputed to him under DR 5-105(d).

In satisfying these minimums, the firm must consider the following:

1. What are "records?" The terms "records" applies to electronic and written records. It does not include "information inside a lawyer's head." Even solo practitioners must keep written or electronic records. "The key characteristic that qualifies information as 'records' is that the information can be systematically and accurately checked when the firm is considering a proposed new engagement." It's not enough that individual files contain information about clients which is potentially searchable on a file-to-file basis. Data kept in electronic files which are electronically searchable (as in word processing programs and law practice management programs) will qualify as "records."

2. When must the records be made? DR 5-105(e) provides that the records of prior engagements "shall be made at or near the time of such engagements..." Although this language is essentially self-explanatory, there can be some question what is meant by the word "near." According to the Opinion, this means the records must be made in time "to assist in checking for conflicts the next time a proposed new engagement comes along." In large law firms, proposed new engagements arise every day.

...we think DR 5-105(e) requires that law firms make the necessary record within days, not weeks, after commencing a new engagement....In addition, although it is required by DR 5-105(e), the best practice would also be to update the records periodically with additional parties or other pertinent information, for example, when a complaint is amended to add new parties or where there other developments with respect to a matter that might create a conflict under another rule....

3. How Far Back Must Records Go? Rule 5-105(e) took effect on May 22, 1996. Nothing in the Rule suggests that law firms were required to reconstruct their records so as to "develop a comprehensive list of prior engagements going backward in time" from the effective date. The Rule did contemplate the inclusion of matters under way on the effective date. Each law firm can determine whether it needs to supplement its records to fill in gaps in past records to provide effective assistance in avoiding conflicts.

4. How Should The Records Be Organized? The information in the records must be readily accessible. Many methods are possible, but one straight-forward method would be to list clients and former clients alphabetically and to list all engagements for each client chronologically under the client's name.

Regarding adverse parties, a firm should probably maintain a list cross-referenced to the client and matter in which the adverse parties were involved. But a law firm may use any method that makes it possible for the firm to check the records in a timely fashion, and the type and organization of the records may depend largely on, among other things, the software and search engine employed to create and check the records.

5. What Records Must A Law Firm Keep? Rule 5-105(e) is silent about the kind of records a firm must maintain. The nature of the records will depend on the size, history, structure and nature of the law practice involved. A solo practitioner with a start-up practice in negligence law will need only the simplest written records to jog his memory. At the other end of the spectrum, a large law firm with hundreds of lawyers, thousands of matters and multiple offices will require complex records for effective conflicts checking.

The Opinion rejects as the answer for large and middle-size firms a standard bookkeeping requirement "specifying in detail the precise data that all firms must keep." "We...adopt a variable bookkeeping requirement so that the nature of the required records depends on the size and nature of the law firm...because a variable requirement takes into account the differences among firms and recognizes that firms may have to change the nature of their records as they grow and change..."

The Opinion continues:

Against this background, the Committee believes that the following records are the minimum that any lawyer or private law firm must keep in order to comply with DR 5-105(e).

[Editor's note: The second article in this series will discuss the minimum requirements listed by the Opinion.]