

# Code Violations And Disqualification Motions: Which Rules Apply?

BY NORMAN REDLICH AND DAVID R. LURIE

When faced with motions to disqualify opposing counsel for conflicts of interest, courts frequently must decide whether a lawyer's violation of the disciplinary rules of the Code of Professional Responsibility is a sufficient reason for disqualifying the lawyer or her firm. Because judges have the ultimate responsibility for supervising the litigation process, it is unsurprising that New York courts have been reluctant to grant disqualification motions based solely on a Code violation. Judges are concerned that a party may seek to disqualify an opponent's attorney simply to gain litigation advantage. Moreover, judges are reluctant to deny blameless clients the services of the lawyers of their choice in the midst of litigation, particularly when disqualification will invite disruption of the trial, thereby inconveniencing the courts along with the parties. Reflecting this reluctance to be bound by the Code of Professional Responsibility when faced with disqualification motions, the New York Court of Appeals has indicated that the Code of Professional Responsibility lacks the status of a statute and that courts are free to disregard its plain meaning in litigation matters when important policy interests are at stake.

Since courts appear to be willing to bend, and even to ignore, the Code's mandates when dealing with disqualification motions, it is unclear whether court rulings applying the Code in disqualification cases also apply in disciplinary proceedings that present the same issues. Indeed, it may well be possible for a lawyer to defeat a disqualification challenge grounded upon the lawyer's alleged conflict but to subsequently incur discipline for the very same putative ethical violation. Consider the following hypothetical:

## Framing A Hypothetical

Lawyer Y, an attorney in a large New York law firm, is asked to represent Company B in a product liability claim against Company A. Lawyer Y's firm represented Company A three years earlier, playing a limited role in defending it against a tort claim involving the same chemical product at issue in the instant case. Lawyer X, the attorney who played the lead role in the prior representation of Company A, has since left the firm. And though some lawyers who were tangentially involved in the prior representation of Company A remain with the firm, they did not acquire any confidential information relevant to the current matter.

Lawyer Y is uncertain whether — absent consent from Company A — the firm may ethically undertake the new assignment and whether the lawyers who were involved in the prior representation of Company A might face disciplinary sanctions if they agree to represent Company B in the proposed new matter.

A lawyer faced with this decision would probably initially refer to the New York Code of Professional Responsibility, particularly Disciplinary Rules 5-108(A)(1) and 5-105(D); and — if she relied on the terms of those rules alone — the lawyer would probably conclude that the proposed representation was

impermissible. Disciplinary Rule 5-108(A)(1) precludes a lawyer from undertaking the representation of “another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of [a] former client.” Since the current and former cases involve Company A’s liability for injuries arising from the use of the same product — and thus are likely to concern related scientific matters and disputes — the mandate of DR 5-108(A)(1) would appear to be violated. Further, the fact that no attorney currently at the firm derived any relevant confidences or secrets from the prior representation of Company A does not appear — from the face of Code — to be of any moment. The rules contain no exclusion for such a fact pattern; rather, they focus solely upon the risk that confidences and secrets might have been communicated due to the relatedness of a current and past representation.

Additionally, the imputed disqualification rule of the New York Code, DR 5-105(D), precludes representation by an entire firm if any one member would be disqualified under DR 5-108. And the drafters of the New York’s Code — unlike those in some other jurisdictions — have deliberately chosen not to adopt a provision whereby a law firm can avoid disqualification by “screening” lawyers in the firm who were involved in the earlier case from any involvement in the proposed representation, or by allowing the lawyers to rebut a presumption that they had acquired confidential information relating to the new matter.

### **Code May Not Control Courts**

If, however, the lawyer in our hypothetical expands her analysis beyond the Code’s language to examine the New York disqualification precedents, she will find that the case is far less clear cut. The New York Court of Appeals has stated that — in litigation disputes like the one anticipated here — the clear language and intent of the Code may not control a court’s decision on disqualification. The Court has noted, that the disciplinary rules are not statutes enacted by the legislature. Rather, the Code — the provisions of which are adopted by the four Appellate Divisions — “is essentially the legal profession’s document of self-governance, embodying principles of ethical conduct for attorneys as well as rules for professional discipline.” *Niesig v. Team I*, 76 N.Y.2d 363, 369 (1990); accord *People v. Herr*, 86 N.Y.2d 638 (1995). While the Code’s provisions are “unquestionably important, and respected by the courts, the Code does not have the force of law.” *Niesig*, 76 N.Y.2d at 369. Thus, where the Code directly implicates the interests of non-lawyers, the courts are not required to “read the rules literally or [to] effectuate the intent of the drafters, but [rather] look to the rules as guidelines to be applied with due regard for the broad range of interests at stake.” *Id.*; see also *Grievance Committee for the Southern District of New York v. Simels*, 48 F.3d 640 (2d Cir. 1995) (discussing *Niesig*).

### **Solow And Jamaica Cases**

On facts somewhat similar to our hypothetical, the Court of Appeals, based largely upon a balancing of policy concerns, has refused to permit disqualification. In *Solow v. WR. Grace & Co.*, 83 N.Y.2d 303 (1994), the Court held that a large law firm was not disqualified from representing a plaintiff in an asbestos liability suit against a former client, where the prior representation was very limited in scope, the lawyer with primary responsibility for the prior matter had left the firm, and the remaining lawyers in the firm had not been privy to any confidences or secrets. See also *Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975), overruled on other grounds by *Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980), vacated and remanded, 449 U.S. 1106 (1981). And, in its recent decision in *Jamaica Public Service Co. v. AIU Insurance Co.*, 92 N.Y.2d 631 (1998), the Court emphasized that a former client seeking

disqualification pursuant to DR 5-108 must make a convincing factual showing that confidential information learned in the prior representation is likely to be shared with the new client.

In light of *Solow and Jamaica*, the lawyer in our hypothetical may well conclude that the firm can prevail against a disqualification challenge brought by Company A. After all, the lawyer who bore primary responsibility for the prior representation has left (as in *Solow*) and there is little or no actual risk that Company A's confidences or secrets could be used against it (a risk that the *Jamaica* Court indicated generally must exist to justify an order of disqualification).

### **Different Risks In Disciplinary Proceedings**

Even if the lawyer concluded that she and her client might fend off a disqualification challenge, however, it may well be neither prudent nor ethical to undertake a representation that violates the plain language of, and intent underlying, the Code of Professional Responsibility. The courts have ruled favorably to the firm's position in some disqualification cases, but these were litigation matters. As such, the precedents were informed by policy concerns unique to the litigation context, e.g., the interest in avoiding prejudice to non-lawyers. There is no such risk of a direct negative impact upon a client where a lawyer faces discipline for a past violation of the Code. Thus, it is difficult to argue that a disciplinary committee — or a court reviewing a committee decision — may ignore the standards set forth in the Code in favor of a free floating policy-based construction of the disciplinary rules. It is much easier to argue that, in a disciplinary inquiry, the Code should be applied much more like a statute, with significant deference to its language, as well as to the intent and purpose of the drafters.

If such a rigorous rule of construction does apply in the lawyer disciplinary context, then the lawyers at issue in our hypothetical might well risk a disciplinary sanction if they take on the representation of Company B, even if the firm can defeat a disqualification motion from the former client. There may be little actual risk that lawyers who successfully marshal Court of Appeals precedents to defeat a disqualification motion in litigation will thereafter face discipline for undertaking the representation. Nonetheless, the career consequences of such sanctions would be quite grave for the lawyers involved, making even the limited risk of a disciplinary inquiry dangerous to assume. Moreover, if a lawyer disciplinary panel concluded that the disqualification precedents were inapposite — and instead imposed sanctions based upon the plain language and intent of the Code — these decisions might never be reviewed by a court because lawyers generally accept, rather than appeal, many career-tainting sanctions, such as admonitions or reprimands.

Given the gravity of the risks involved, the lawyer in our hypothetical might be well advised to follow the plain language of the Code and to refuse the representation.

### **Court's Approach Creates Unnecessary Risk**

The foregoing analysis demonstrates the inherent difficulties in the Court of Appeals' current approach to lawyer disqualification challenges, an approach that is often framed as a construction of the Code, but which explicitly reserves to the judiciary the authority to rewrite the disciplinary rules when this will advance policy interests unique to the litigation context. Such reasoning creates an unnecessary risk that lawyers could be confronted with the application of two interpretations of the ethical rules to the same conduct, one for disqualification purposes and one for disciplinary proceedings. The Court of Appeals

and the four Appellate Divisions — which are charged with formulating the standards applicable in both the lawyer discipline and the disqualification contexts — can resolve this confusion in either of two ways.

First, the courts could make it clear that their conflict of interest decisions in the litigation context amount solely to an application of equitable / policy principles, and are not constructions of the Code's Disciplinary Rule. Under this alternative, a lawyer who concludes that a new representation would not pose a risk of injury to the interests of a former or current client sufficient to merit disqualification would be on notice that such a representation might nevertheless violate the Code of Professional Responsibility. Thus, even if the lawyer overcame a disqualification challenge, she would face the risk of a later disciplinary proceeding, in which a different standard — albeit derived from the same Code — would apply.

A better alternative would be explicitly to apply the same standard to both disqualification and ethical inquiries. This is not to suggest that a Code-based analysis would need to ignore the important policy concerns that have been recognized and considered in disqualification decisions rendered by the Court of Appeals and other courts. Rather, New York would be well advised to modify its Code explicitly to address and account for such policy concerns. The ALI's Restatement of the Law Governing Lawyers attempts to achieve this result; it focuses on whether an allegedly tainted lawyer possesses confidential information derived from a past client and relating to the new representation, and, additionally, permits the screening of a lawyer who has actually been tainted by such information. This approach — which would modify the conflict standards of the Code itself to account for the valid policy concerns that animated many disqualification precedents — would be vastly preferable to the present situation, in which different standards seem applicable to disqualification motions and ethical violations.

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