

How To Avoid Disqualification In a Multi-Firm Beauty Contest

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In the increasingly competitive world in which law firms contend for business by submitting to beauty contests, the City Bar's Committee on Professional and Judicial Ethics has offered a number of suggestions for avoiding the consequences inherent in an interview between a law firm and a prospective client, especially as part of a multi-firm beauty contest. These consequences can include the risk of disqualification in a subsequent litigation between the prospective client and a former or current client of the firm. (Formal Opinion 2006-2 April 2006.)

The City Bar Committee framed its opinion around the following two scenarios, both of which assume that Company A (the "Prospective Client") is interested in suing Company B for breach of contract, and that Company A invites Firm X to participate in a beauty contest with several other firms.

Scenario 1. Firm X presents its qualifications to Company A. Company A does not reveal any confidences or secrets to the lawyers from Firm X during the interview.

Scenario 2. Firm X presents its qualifications to Company A. During the interview, Company A divulges confidences and secrets regarding the facts and legal theories supporting its claims against Company B.

In both scenarios, we are asked to assume that Firm X is not the successful contender, and that after the beauty contest is over, Company B asks Firm X to represent it in defending a lawsuit by Company A.

Instead, the critical issues in determining whether a firm which participates in a beauty contest will be disqualified are:

1. whether the attorney who participated in the contest for the firm had access to confidences and secrets of the prospective client that could be significantly harmful to the client; and, if so,
2. whether the firm had a) obtained an adequate advance waiver from the prospective client before the contest, or b) "established and acted in accordance with adequate procedures to rebut the presumption that those confidences and secrets were or will be shared with other attorneys in the firm."

The Committee looked first at the individual lawyer in Firm X who participates in the beauty contest with Company A. Whether the lawyer's participation in the contest requires disqualification of the law firm itself depends on whether the lawyer herself is personally disqualified from representing Company B as a result of her part in the contest. The New York Code of Professional Responsibility does not supply a precise answer to this question, but it does suggest that some of the protection extended to a firm's current or former clients apply also to prospective clients.

DR 4-101 instructs New York lawyers to “preserve the confidences and secrets of a client.” DR 5-108 extends this same instruction to former clients. EC 4-1 would extend it to prospective clients as well as current and former clients.

Both the fiduciary relationship existing between lawyer and client and the proper function[ing] of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ the lawyer (emphasis added).

At the same time, it’s necessary to recognize that the obligation to a prospective client is not as extensive as to a current or former client. Because discussions with prospective clients are necessarily limited in time and detail, and because they are essential to the process by which a lawyer determines whether representation of the new client is appropriate or proper – without undue risk of disqualification – the prospective client cannot be accorded all the protection given to a client.

The ABA Model Rules and the Restatement (Third) of the Law Governing Lawyers (2000) strike the proper note in protecting the interests of prospective clients. MR 1.18(b) provides that “[a] lawyer ...shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter.”

Restatement § 15(1)(a) substitutes the term “materially adverse” for the ABA’s “significantly harmful.”

Thus, in imposing the concept of “material” or “significant” harm, both the ABA and the Restatement set “the bar lower than in the case of a lawyer opposing a former client.” In fact, MR 1.9(a) and Restatement § 132, agree with DR 5-108(A) that a lawyer is automatically barred from “acting adversely to a former client in a substantially related matter,” a more rigorous test for the lawyer.

Applying Principles

Applying these principles to the theoretical Firm X lawyer in Scenario 1 above – the lawyer who did not receive any confidences or secrets from Company A during the beauty contest – we conclude that she is not personally prohibited from representing Company B in the litigation between A and B. In a similar case, the failure to offer evidence that the attorney had access to the prospective client’s confidences and secrets was “necessarily fatal to the disqualification motion.” *Interpetrol Berm, Ltd. v. Rosenwasser*, 1988 U.S. Dist. LEXIS 14307 (S.D.N.Y. 1988).

But when, as in our Scenario 2 above, confidences and secrets of the prospective client are disclosed to the lawyer who interviews Company A, she will be prevented from representing Company B against Company A, unless one of the following circumstances exists:

1. The confidences and secrets revealed by Company A will not be significantly harmful to Company A in the litigation with Company B, or
2. Before the beauty contest interview, the attorney obtained Company A’s informed advance waiver of any conflict that might arise as a result of the disclosure of A’s confidences and secrets, or

3. It can be established that Company A's purpose in inviting Firm X to enter the beauty contest and in revealing its confidences and secrets was to disqualify X from representing a party adverse to Company A, not to consider the qualifications of Firm X. Model Rule 1.18 and Restatement § 15(1) support the conclusion that a prospective client whose intention is to cause the disqualification of a law firm in a beauty contest should not qualify as a true prospective client. MR 1.18 defines a prospective client as "a person who discusses with a lawyer the possibility of forming a client-lawyer relationship." Obviously, a client who misuses the beauty contest interview to trap a law firm into the risk of disqualification in a matter does not intend to form a client-lawyer relationship with that firm. In Comment 2 to proposed New York Rule 1.18, COSAC stated: "a person who communicates with a lawyer for the sole purpose of preventing the lawyer from handling a materially adverse representation in the same or a substantially related matter is not entitled to the protection of this Rule."

In structuring an effective advance waiver (see 2. above), a lawyer should ensure a) that the waiver is in writing; b) that it is signed by the prospective client; c) that the prospective client understands the preliminary nature of the beauty contest; d) that the prospective client is instructed not to disclose any confidences or secrets during the interview; and e) that if the prospective client does disclose any confidences and the lawyer is not retained, the consequence of the advance waiver is that the client will be deemed to have waived any objection to 1) the lawyer's retention by a client who may have interests adverse to those of the prospective client, and 2) the lawyer's use of the prospective client's confidences and secrets in that representation.

Effect on the Law Firm

If the lawyer in Firm X who participated in the beauty contest by Company A is personally disqualified from representing Company B in a substantially related matter, Firm X may nevertheless be able to represent Company B in the matter. Ordinarily, if a lawyer in a firm is prohibited from representing a client in a substantially related matter, the prohibition is imputed to the other lawyers in the firm. DR 5-105(D) provides: "[w]hile 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." The language of Model Rule 1.18 is substantially the same.

But, the City Bar Committee advises, imputation to the other lawyers in the firm results only in a presumption of disqualification, not to a per se determination of disqualification. And the presumption can be "rebutted under certain circumstances." The Committee cited *Kassis v. Teacher's Ins. and Annuity Ass'n.*, 695 N.Y.S.2d 515, which stated (518):

...imputed disqualification is not an irrebuttable presumption. A per se rule of disqualification is unnecessarily preclusive because it disqualifies all members of a law firm indiscriminately, whether or not they share knowledge of the former client's confidences and secrets. ...[B]ecause disqualification of a law firm during litigation may have significant adverse consequences to the client and others, it is particularly important that the Code of Professional Responsibility not be mechanically applied (internal citations and quotation marks omitted).

Use of Screens

The Committee endorsed the use of screens to rebut the presumption of disqualification. The Code does not mention screens as a tool to rebut the presumption of shared confidences and secrets except in cases involving employment of government lawyers and judges by private clients (see DR 9-101), but that is not dispositive. As we have noted, the Code fails to cite any specific duty to prospective clients. The courts, however, have found screens to be effective in cases involving prospective clients. *Cummin v. Cummin*, 695 N.Y.S.2d 346 (App. Div. 1999); *Interpetrol Berm., Ltd. v. Rosenwasser*, 1988 U.S. Dist. LEXIS 14307 (S.D.N.Y. 1988).

Other courts have accepted screens to rebut the presumption that confidences and screens are shared among the lawyers within a firm in circumstances other than those involving prospective clients. *Battagliola v. Nat'l Life Ins. Co.*, 2005 U.S. Dist. LEXIS 650 (S.D.N.Y. Jan. 19, 2005); *In re Del-Val Fin. Corp. Sec. Litig.*, 158 F.R.D. 270 (S.D.N.Y. 1994); *Papyrus Tech. Corp. v. N.Y. Stock Exch, Inc.*, 325 F. Supp. 2d 270 (S.D.N.Y. 2004); *Solow v. W.R. Grace*, 610 N.Y.S.2d 128 (1994); *Armstrong v. McAlpin*, 625 F.2d 433, 453 (2d. Cir. 1980) (en banc).

ABA Model Rule 1.18(d) explicitly recognizes the use of screens to rebut the imputation of a lawyer's conflict to the firm's other lawyers in a case involving a prospective client.

(d) When the lawyer has received disqualifying information ...representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

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

(ii) written notice is promptly given to the prospective client.

Assessing a Screen's Effectiveness

The courts have applied the following tests to determine whether a screen is effective to rebut the presumption of disqualification when a conflict by one lawyer is imputed to the other lawyers in the firm:

1. The speed with which the screen is implemented. One court was satisfied with a screen imposed as soon as the conflict was discovered, although that was two months after the conflict arose. *In re Del-Val Fin. Corp. Sec. Litig.*, 158 F.R.D. 270 (S.D.N.Y. 1994). As a general rule, the courts will expect the screen to be put in place as soon as the conflict is discovered.
2. The size of the firm. The courts are reluctant to recognize the use of screens in small firms. They assume that the lawyers will find it excessively difficult to preserve the integrity of the screen. They have responded to screens as follows:

Approved:

400 lawyers *In re Del-Val Fin. Corp. Sec. Litig.*, 158 F.R.D. at 274.

50 lawyers. *Papyrus Tech. Corp.*, 325 F. Supp. 2d at 280 n.10

Rejected:

44 lawyers *Decora Inc. v. DW Wallcovering Inc.*, 899 F. Supp. 132, (S.D.N.Y. 1995)

Less than 30 *Yaretsky v. Blum*, 1981 U.S. Dist. LEXIS 12624,
(S.D.N.Y. Apr. 15, 1981)

15 lawyers *Crudele v. N.Y. City Police Dep't*, 2001 U.S. Dist. LEXIS 13779, (S.D.N.Y. Sept. 6,
2001)

1. Proximity of the conflicted lawyer to the lawyers who will represent the client. A screen was allowed when the conflicted lawyer worked in New Jersey and the others worked in New York. *Battagliola v. Nat'l Life Ins. Co.*, 2005 U.S. Dist. LEXIS 650, (S.D.N.Y. Jan. 19, 2005). A screen was disallowed when the conflicted lawyer worked in the same department as the lawyers representing the client. *Decora Inc.*, 899 F. Supp. at 140; and when the disqualified lawyer worked in the same section as the other lawyers. *Yaretsky*, 1981 U.S. Dist. LEXIS 12624, at 15.
2. When the lawyers involved submit affidavits. One court has approved use of a screen when the conflicted lawyer and the lawyers handling the matter submitted affidavits confirming that they had not shared the confidences and secrets of the client. *In re Del-Val Fin. Corp. Sec. Litig.*, 158 F.R.D. at 274; *Papyrus Tech. Corp.*, 325 F. Supp. 2d at 281.
3. Contact with the conflicted lawyer. A screen may be considered less effective if the conflicted lawyer works on other matters with the lawyers representing the client. *In re Del-Val Fin. Corp. Sec. Litig.*
4. Access to files. The screen may be challenged if the conflicted lawyer maintains files containing the client's confidences and secrets.

The City Bar Committee ended its Opinion by recommending a number of "protocols" which a firm would be wise to follow to avoid disqualification in representing a client with materially adverse interests in a matter involving "the subject of a beauty contest." These are:

1. establish a process whereby the risk of having any lawyer at the firm tainted is minimized, *e.g.*:
 - a. discuss with the prospective client the disqualification issues presented by participating in the meeting;
 - b. seek an advance waiver from the prospective client; and
 - c. avoid obtaining confidences or secrets from the prospective client during the meeting.
2. have a written formal screening process in place that will effectively and immediately seal off the firm's personally prohibited lawyer (assuming a taint exists) from the other lawyers at the firm.