

Imputed Conflicts Under DR 1-106

BY ROY SIMON

My last two articles in NYPRR (October and November 2001) have covered client-to-client conflicts and personal conflicts under the new MDP rules, DR's 1-106 and 1-107, which took effect on November 1, 2001. This article covers *imputed conflicts solely under DR 1-106*, which governs a law firm's provision of nonlegal services to its clients and to members of the general public, either through the law firm's own partners or employees or through separate entities owned, controlled, or otherwise affiliated with the law firm. Before I turn specifically to imputed conflicts under DR 1-106, let me paint a picture of the kinds of arrangements envisioned by DR 1-106. Let's imagine a law firm that takes full advantage of all the relationships contemplated by DR 1-106.

First, pursuant to DR 1-106(A)(1), the firm hires several accountants and financial planners to assist the firm in advising clients in the areas of tax, trusts and estates, and in commercial litigation, which are the firm's main practice areas.

Second, pursuant to DR 1-106(A)(2), the firm hires a bevy of other nonlawyers — engineers, environmental consultants, social workers, and others — so that the law firm can offer a variety of "branded" nonlegal services, using the law firm's good name, to clients of the firm and (more importantly) to the general public. (DR 1-106(A) expressly refers to lawyers or law firms providing nonlegal services to clients "or other persons.") This expansion into more nonlegal areas will enable the law firm to profit by providing nonlegal services that may be unrelated to the firm's law practice; it will keep clients closer to the firm even when they are not using the firm for legal services; and it will extend the firm's reputation (and hopefully attract new clients) by offering more services under the law firm's brand name.

Third, pursuant to DR 1-106(A)(3), the law firm becomes the agent for (thus, "affiliated with") Chicago Title & Trust, a well known title search company, and the firm's lawyers and paralegals become authorized to conduct title searches in the title company's name. The title company provides the services, but it does so through the law firm's personnel.

Fourth, also pursuant to DR 1-106(A)(3), the law firm buys a controlling interest in an architectural firm. The architectural firm continues to operate as it always has, offering services solely through the architectural firm's own employees, but the law firm has a dominant financial interest in the architectural firm's success, and encourages its lawyers to refer clients there.

These four relationships raise two main questions: (1) When does joint provision of legal and nonlegal services to a client by one or more lawyers and/or non-lawyer employees of the firm create a conflict that will be imputed to the other lawyers and nonlawyers in the firm, precluding everyone in the firm from offering legal or nonlegal services to the client's adversaries? and (2) When does a law firm's provision of nonlegal services to a "customer" (i.e., someone who is not using the firm's legal services) create a conflict

that will be imputed to the other lawyers and nonlawyers in the firm, precluding everyone in the firm from offering legal or nonlegal services to the customer's adversaries?

Basics of imputed conflicts

Imputed conflicts are covered in the Code of Professional Responsibility under DR 5-105(D), which provides as follows:

(D) 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.

In other words, if any lawyer in the firm is personally disqualified from handling a particular matter due to a personal conflict under DR 5-101(A), or due to a conflict with another current client under DR 5-105(B), or due to a conflict with a former client under DR 5-108, or due to a conflict brought to the firm by a former government lawyer under DR 9-101(B), then the entire law firm is disqualified and must not deliver any legal services regarding that matter absent the client's informed consent (assuming the conflict is consentable).

DR 1-106 does not itself contain any independent provisions regarding imputed conflicts. Nor has DR 5-105(D) been amended to include DR 1-106 as a source of imputed conflicts. The initial question, then, is whether any lawyer in a firm is personally disqualified under DR 5-101, 5-105, 5-108, or 9-101(B) based on a law firm's direct or indirect delivery of non-legal services under DR 1-106.

We must search for disqualifying conflicts in three separate situations:

- (1) Under DR 1-106(A)(1), when a lawyer within a law firm is delivering nonlegal services that are not distinct from legal services being delivered by his law firm.
- (2) Under DR 1-106(A)(2), when a lawyer is personally delivering nonlegal services through his law firm that are distinct from the legal services being delivered by the firm, but the client has not been adequately warned that the protections of the attorney-client relationship do not exist with respect to the non-legal services.
- (3) Under DR 1-106(A)(3), when a lawyer or law firm serves as an agent of an entity providing nonlegal services or is providing nonlegal services through an entity owned, controlled, or otherwise affiliated with the law firm.

I will address these situations one at a time because each presents different concerns.

Imputed conflicts under DR 1-106(A)(1)

Suppose a lawyer in our fictional law firm is representing Enron against Texaco in a breach of contract suit. The suit alleges lost profits. The lawyer working on the case asks an accountant employed by the law firm to provide nonlegal services by calculating Enron's lost profits in connection with the suit. Under DR 1-106(A)(1), when a law firm is delivering nonlegal services that "are not distinct" from the

legal services being delivered by the law firm, then "the lawyer or law firm is subject to the Disciplinary Rules with respect to the provision of both legal and nonlegal services." The legal and nonlegal services in our example are "not distinct" because the lawyer and the nonlawyer are working on overlapping issues on the same matter. As a result, the accountant is subject to the Disciplinary Rules even though they usually apply only to lawyers.

Let's follow in slow motion the chain reaction caused by the intertwined ("not distinct") legal and nonlegal services. Under DR 5-105(A), the lawyers in the firm are prohibited from undertaking any engagement to oppose Enron (the law firm's current client) in any matter absent Enron's consent. Through DR 1-106(A)(1), the DR's also apply to any nonlawyers in the firm who are delivering nonlegal services that are "not distinct" from the legal services being provided to the same client. Thus, the accountant working for Enron is similarly prohibited from opposing Enron in any matter absent the client's informed consent. In a sense, the lawyers' conflict under DR 5-105 is imputed to the firm's nonlawyers via DR 1-106(A)(1). Finally, under DR 5-105(D), the accountant's personal disqualification from any matter adverse to Enron is imputed to the entire law firm. Thus, no lawyer or *non-lawyer* in the firm may oppose Enron in any matter absent Enron's informed consent.

To illustrate that principle, suppose that while Enron's contract suit against Texaco is pending, Texaco decides to hire the law firm's non-lawyer environmental consultant to provide expert testimony in a separate litigation against Enron over a piece of property that Texaco purchased from Enron. (Texaco has its own lawyers — so Texaco would not be retaining any of our fictional firm's lawyers.) May the nonlawyer environmental consultant undertake the engagement against Enron? No, he may not. The law firm is already providing intertwined, non-distinct legal and nonlegal services to Enron, so nobody at the law firm, whether a lawyer or a non-lawyer, may provide legal or nonlegal services materially adverse to Enron in any matter absent Enron's informed consent. Since the law firm itself and the law firm's accountant would be prohibited from opposing Enron in this matter, no other non-lawyer employee of the firm may do so, either.

Checking For Conflicts

Another point must be made here. Under DR 5-105(E), all law firms must "keep records of prior 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)." Because the lawyers and nonlawyers in a DR 1-106(A)(1) "not distinct" scenario are all part of one law firm, DR 5-105(E) effectively requires the law firm to keep records of all nonlegal engagements, as well as legal ones, so that the law firm can check both the legal side and the nonlegal side for conflicts whenever the law firm takes on a new matter. Since the legal and nonlegal services are both subject to the Disciplinary Rules, the law firm must check each new matter to make sure that the firm's nonlawyers are not currently providing nonlegal services to the adversaries of a dual legal/nonlegal client, and that the nonlawyers do not take on conflicting nonlegal customers as long as the law firm continues to provide intertwined legal and nonlegal services to the adversaries of these customers.

Implications For Future Engagements

Moreover, applying the Disciplinary Rules to both the legal and the nonlegal portions of services that "are not distinct" has implications for future engagements on behalf of other clients. Under DR 5-108(A)(1), a

lawyer who has represented a client in a matter "shall not, without the consent of the former client after full disclosure: (1) Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client." Thus, after a law firm has terminated a relationship in which it provided intertwined legal and nonlegal services to a client, the law firm's lawyers and nonlawyers are prohibited from opposing the former client in any matter that is substantially related to the work the law firm did for the former client.

Here, for example, after the law firm completes all of its legal and nonlegal work on Enron's breach of contract case against Texaco, both the lawyers and the nonlawyers will be prohibited from representing or advising any client who is taking a position adverse to Enron in a substantially related matter. That is a much more restrictive conflict of interest rule than accountants (or other nonlawyers) are ordinarily required to follow, but it is necessary to ensure that the accountants do not get into a situation where they could use the former client's confidences and secrets against the former client. In other words, whether or not the accountant actually acquired confidential information from the client, we should impute the lawyer's confidential information to the accountant because, when the legal and nonlegal services are not distinct, both the legal and nonlegal services are subject to the Disciplinary Rules. Moreover, under DR 5-105(D), if a lawyer who worked on the matter could not oppose the former client due to DR 5-108, then no other lawyer and no other nonlawyer in the firm may do so. A lawyer's disqualification under DR 5-108 is thus imputed to all other lawyers and nonlawyers in the firm.

Finally, DR 1-106(A)(1) has implications for nonlawyer employees of law firms who wish to move from private practice to government service. Under DR 9-101(B)(3), a lawyer serving as a public officer or employee shall not (absent special circumstances) "(a) Participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment" Under DR 1-106(A)(1), this prohibition is, in effect, imputed to nonlawyer employees of the law firm who have rendered nonlegal services that were not distinct from the legal services being rendered by the firm. Thus, with respect to the matter in which the law firm rendered intertwined legal and nonlegal services, the nonlawyer employees are subject to the same restrictions on future government employment as govern the lawyers.

Imputed conflicts under DR 1-106(A)(2)

Now let's move over to DR 1-106(A)(2). Suppose Enron's breach of contract litigation against Texaco is still pending, but Enron has not hired the law firm's accountant to analyze its lost profits. However, Enron has retained the law firm's accountant to assist Enron with some complex tax matters totally distinct from and unrelated to the litigation. Pursuant to DR 1-106(A)(4), the law firm has made it crystal clear to Enron that the accounting services are not legal services and are not the subject of an attorney-client relationship, so "the protection of an attorney-client relationship does not exist with respect to the nonlegal services". Now, recall that the law firm has also employed a nonlawyer environmental consultant to serve nonclients of the law firm. May the environmental consultant employed by the law firm now accept an engagement to provide expert testimony on behalf of Texaco against Enron in connection with a matter unrelated to the breach of contract action?

Yes, he may. Enron is still a legal client of the law firm, so no *lawyer* in the firm may oppose Enron in any matter without Enron's informed consent. But the nonlegal services being provided to Enron by the law firm "are distinct" from the legal services, so the law firm is *not* subject to the Disciplinary Rules regarding

the provision of nonlegal services. Accordingly, the firm's nonlawyers may freely oppose Enron in any matter, even though Enron is the firm's legal client, as long as the *nonlegal* services being provided to Enron "are distinct" from the legal services the firm is providing to Enron (which is the case in our new hypothetical). In other words, the personal disqualification that would be imputed from Enron's lawyer to all other lawyers in the firm via DR 5-105(D) (*i.e.*, a prohibition on opposing Enron in any matter absent informed consent) will *not* be imputed to the firm's nonlawyers via DR 1-106(A)(2).

That brings up a possibility that the drafters of DR 1-106 may not have intended. Let's return to our original breach of contract litigation between Enron and Texaco, but, this time, assume that Enron has not hired the law firm's accountants or other nonlawyers to assist with that litigation. In that situation, may the environmental consultant employed by the law firm provide expert testimony *against* Enron in the *Enron v. Texaco* litigation? In other words, may a law firm be on one side of a lawsuit for legal advice and on the other side of the same lawsuit for nonlegal advice? Doesn't that create a conflict? It certainly sounds strange. We would never let lawyers from the same law firm represent clients on opposite sides of the "v" in litigation — that would be a *per se* conflict under DR 5-105(A) that could not be cured by client consent. We simply don't let a law firm represent both sides in litigation, even with client consent.

But under DR 1-106 we are dealing with something different — a law firm's lawyers on one side, its nonlawyer employees on the other side. Is that a *per se*, nonconsentable conflict? I don't think so. It is probably a conflict, but it is not a client-to-client conflict arising under DR 5-105. The law firm's only client in this scenario is Enron. Enron's adversary, Texaco, is a "customer" for nonlegal services, but it is certainly not the law firm's legal "client."

The lawyer representing Enron against Texaco might have a personal conflict under DR 5-101(A), but even this is by no means certain. The theory is that the lawyer representing Enron would be reluctant to embarrass or vigorously cross-examine an expert who is on the payroll at his own law firm. Therefore, the lawyer's "exercise of professional judgment on behalf of the client will be or reasonably may be [adversely] affected by his own financial, business, property, or personal interests" — the trigger for the "disinterested lawyer" test under DR 5-101(A). But if the lawyer met the "disinterested lawyer" test under DR 5-101 (which I think he would easily meet absent an unusually close personal relationship with the nonlawyer expert), then Enron could consent to the continued representation despite the conflict. In other words, in my judgment, it is a remediable conflict for a law firm to provide legal services to one side in litigation and nonlegal services to the other side in the same litigation as long as the legal client consents after full disclosure.

Imputed conflicts under DR 1-106(A)(3)

The only difference between DR 1-106(A)(2) and DR 1-106(A)(3) is that the nonlegal services under DR 1-106(A)(2) are being provided in the name of the law firm (using the law firm's "brand"), whereas the nonlegal services under DR 1-106(A)(3) are being provided by a separate entity, not by the law firm itself. When the nonlegal services are being provided by a separate entity outside the law firm, and the law firm has made the routine disclaimer set out in DR 1-106(A)(4) (making it crystal clear that the nonlegal services are not legal services and are not the subject of an attorney-client relationship), conflicts are never imputed between legal and nonlegal services. They are like two sides of a river, and conflicts cannot cross because there is no bridge between them.

Thus, the analysis under DR 1-106(A)(3) is the same as the analysis under DR 1-106(A)(2), except that conflicts with a nonlawyer employed by a separate entity outside the law firm will almost always pass the disinterested lawyer test under DR 5-101. With the consent of its legal client, therefore, a law firm may ordinarily provide legal services to one side of a lawsuit or transaction at the same time as a non-lawyer employed by a separate entity that is owned, controlled or otherwise affiliated with the law firm provides nonlegal services to the opposing side.

Conclusion

I often refer to DR 5-105(D) as the "Three Musketeers" rule because it says to a law firm, "All for one and one for all" – if any lawyer in the firm is disqualified due to one of the specified conflicts, then every lawyer in the firm is disqualified. Under DR 1-106(A)(1), which applies when a law firm renders intertwined legal and nonlegal services, this imputation is extended to all of the nonlawyer employees in the firm as well. Thus, once a law firm begins rendering legal and nonlegal services that are "not distinct" from each other, the nonlawyers are subject to all of the same conflict of interest rules that restrict lawyers. In that sense, DR 1-106(A)(1) functions as a new imputed conflicts rule, imputing conflicts to the lawyers in the firm even when the conflicts are created by services rendered by non-lawyer employees of the firm. And through DR 5-105(D), the conflicts transmitted via DR 1-106(A)(1) are transmitted to all nonlawyers in the firm.

The same result may occur if a law firm fails to give a valid disclaimer when rendering nonlegal services pursuant to DR 1-106(A)(2) (governing a law firm's provision of distinct legal and nonlegal services) or pursuant to DR 1-106(A)(3) (governing a law firm's provision of nonlegal services through a separate entity owned, controlled, or otherwise affiliated with the law firm). If a law firm does provide a valid disclaimer under DR 1-106(A)(4), then most conflicts will not be imputed from the lawyers to the nonlawyers, creating the possibility of some strange conflict situations, such as the law firm on one side of a matter and its nonlawyers or a nonlegal entity affiliated with the law firm on the other side of the same matter. Whether the courts and bar association ethics committees will tolerate the literal meaning of the new rule, however, is open to question. Only time will tell.

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[Editor's Note: DR 1-107, which became effective on Nov. 1, 2001, provides for side-by-side contractual relationships between law firms and nonlegal professionals for the purpose of providing legal services by the law firm as well as other nonlegal services. To qualify as a nonlegal professional, the profession of the professional must be included on a list established by the Appellate Divisions. When this article was written, that list had not been released by the Appellate Divisions.]