

Imputed Disqualification And Public Perception

BY DAVID M. COST

The jurisprudence governing disqualification motions in the New York courts has attempted to balance the perceived integrity of the legal profession with pragmatic concern for the lawyers and judges involved in the motions. In the earlier cases, courts tipped the scales on these motions in favor of protecting the profession from the appearance of impropriety.

However, in our current practice, concern over appearance is usually absent from the fact-specific analysis that is utilized by the courts in evaluating whether or not a law firm should be disqualified for a conflict of interest in one of its attorneys. While the courts routinely pay homage to the principles of professional integrity, their decisions, especially in cases of imputed disqualification, appear to ignore these principles in their actual analysis of the facts.

Disciplinary Rule 5-108(A)(1) of the New York Code states that without the consent of the former client after full disclosure, an attorney who represented the client in a prior matter shall not "thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to those of the former client." By virtue of DR 5-105(D), the disqualification of one lawyer is imputed to all lawyers in a firm.

When initially confronted with the issue of imputed disqualification, the Court of Appeals limited its inquiry to the public perception and impact of the Rules. The Court justified this approach by declaring that "the lawyer may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting the obligations of the professional relationship." *Cardinale v. Golinello*, 43 N.Y.2d 288, 296 (1977).

Without a showing of actual harm, a client was "entitled to freedom from apprehension and to certainty that his interests will not be prejudiced in consequence of representation of the opposing litigant by the client's former attorney." *Id.* at 296. The Court made clear that the right of a party to select an attorney of his own choosing was not limitless. *Greene v. Greene*, 47 N.Y.2d 447, 453 (1979). It confirmed the principle that the law strictly forbids an attorney from placing himself in a position enabling him to advance, or, indeed, appear to advance, conflicting interests in litigation. *Id.* at 451. Thus, the Court placed the public's perception of the integrity of the legal process ahead of its concern for the pragmatic interests of attorneys.

However, faced with the realities created by the expansion of law firms into hundreds of attorneys in multiple offices both here and abroad, the Court of Appeals soon determined that 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 former client's confidences and secrets." *Solow v. W.R. Grace & Co.*, 83 N.Y.2d 303, 309 (1994). The Court carved out an exception to DR 5-108(A)(1) to enable law firms to continue representation of a client in opposition to a former client by

demonstrating that "there is no reasonable probability that any of [the firm's] other attorneys acquired confidential information concerning the client," *Id.* at 313.

In essence, the Court of Appeals limited the impact of DR 5-108(A)(1) by coupling it with DR 5-108(A)(2), which mandates that an attorney may not use "any confidences or secrets of the former client except as permitted by DR 4-101(c)." Using this juncture of principles, the Court, in effect, changed an absolute prohibition into a rebuttable presumption.

The Court of Appeals has also directed that consideration be given to such factors as the size of the law firm, the size of its office space, the accessibility of its files, the level of informality in office interaction, and whether the firm shares its offices with other lawyers. *Kassis v. Teacher's Ins. and Annuity Ass'n*, 93 N.Y.2d 611, 617 (1999). In its later decisions, the Court has acknowledged its previous commitment to avoid the appearance of impropriety, but it has not factored that concern into its analysis of disqualification. *Id.* at 616; *Solow* 83 N.Y.2d at 129; *see also, Jamaica Pub. Svc. Co. Ltd. v. AIU Ins. Co.*, 92 N.Y.2d 631 (1998).

Without any inquiry into whether allowing a particular firm to avoid disqualification for representing a client against a former client would communicate an appearance of impropriety to a reasonable observer, the rebuttable presumption has become an exception that swallows the true intent and purpose of the Rules - i.e., protection of the former client and of public perception of the legal system.

The rebuttable presumption has the effect of placing the individual interests of law firms over the interests of the legal system. The Court in *Solow* justified the presumption by reasoning that a per se disqualification rule "is subject to abusive invocation purely to seek tactical advantages in a lawsuit,...conflicts with public policies favoring client choice and restricts an attorney's ability to practice." *Id.* at 310. These are the factors which now determine disqualification motions, not any inquiry into the public's perception of the impact on the former client.

The problem with injecting a concern for the attorney's right to practice in a disqualification motion is that, as Harvard Law Professor Charles Fried pointed out, "when we speak of the lawyer's right to represent whomever he wishes, we are usually defending his moral title to represent whoever pays." In reality, the argument that the rebuttable presumption is intended to protect an attorney's right to practice creates its own additional image of impropriety...that a paycheck can trump the loyalty owed to a former client. As Supreme Court Justice Joseph Harris stated, "[t]he legal system was not created for the benefit of its practitioners. While the free movement of attorneys through the legal system is a goal to be cherished, it is not the essence thereof and may have to give way to what in fact is the true essence of the legal system - absolute confidence of litigants in the attorney-client privilege." *Trustco Bank New York v. Melino*, 164 Misc. 2d 999, 1006-1007 (Sup. Ct. Albany Co. 1995).

Further, the time-honored principle of equal representation before the law runs the risk of taint and abuse when a law firm is allowed to continue to represent a party when an attorney in the firm is subject to disqualification for a conflict of interest. Indeed, "the attorney serves in significant part to assure equality before the law...[t]he lawyer has been referred to as 'the equalizer' who 'places each litigant as nearly as possible on equal footing under the substantive and procedural law under which he is tried.'" Monroe H. Freedman, *Lawyer's Ethics in an Adversary System*, Indianapolis, Bobbs-Merrill Company (1975).

Although the Court of Appeals has cautioned against the risk that a charge of imputed disqualification against an entire firm may be used as a "tactical advantage" by the opposition, it is also true that an impartial observer may view continued representation by the disqualified lawyer's firm as a "tactical advantage." The Court attempted to adjust for this possibility by accepting the view that a "Chinese Wall" would dispel the appearance of impropriety. See *Kassis* 93 N.Y.2d at 617. However, neither the public nor the motion court can ever truly determine what occurs within a firm's walls. Indeed, a "Chinese Wall" may have holes that invite whispers, and there is always a reasonable chance the wall itself may come "tumbling down". *Trustco Bank*, 164 Misc. 2d at 1007. Such is the essence of an appearance of impropriety.

Although considerations of attorney mobility, tactical advantage and client choice are all policy matters that should be factored into the court's analysis, they should not control a motion involving a question of imputed disqualification. The court should include as an important factor an evaluation of the impact of the facts on a reasonable public observer. For lawyers to be perceived as "equalizers" and for the profession to be seen as truly dedicated to client service, then appearance matters, and public faith in the system should be the final latch on the gate controlling disqualification. Without any inquiry as to whether continued representation by a law firm in a particular matter will create an appearance of impropriety to an impartial observer, we cannot hope to achieve "the protection and assurance of clients." *Cardinale, supra*. To gain maximum public approval, the inquiry should reflect the former client's point of view.

Courts considering a motion for disqualification should first determine how the public is likely to respond to its decision. If there is a possibility of communicating an appearance of impropriety, that fact should be cited in the decision as one of the factors the court has considered. It should be cited not as a general professional principle but be included as one of the elements the court must weigh in the context of the facts as they bear on the case and the former client.

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