

“Of Counsel” Lawyers And Conflicts of Interest

BY ROY SIMON

The Second Circuit recently decided a case called *Hempstead Video, Inc. v. Incorporated Village Of Valley Stream*, 2005 WL 1274244 (2d Cir. May 31, 2005), that turns conventional wisdom upside down. If this article were in Newsweek’s weekly feature about “conventional wisdom” (“CW”), it would say:

Old CW: If a lawyer serves as “of counsel” to your firm, then that lawyer is “associated” with your firm for purposes of DR 5105 (D) (the imputed disqualification rule), and all of the “of counsel” lawyer’s conflicts with his current and former clients are imputed to your firm.

New CW: If a lawyer serves as “of counsel” to your firm, then whether or not the “of counsel” is “associated” with your firm, and whether or not the “of counsel” lawyer’s conflicts are imputed to your firm, depends on all of the facts and circumstances and must be determined on a case by case basis.

Old CW: If a lawyer associated with your firm has a conflict of interest with one of your firm’s current clients, that conflict will be imputed to your entire firm, and a screen between the conflicted lawyer and the rest of your firm cannot avoid your firm’s disqualification.

New CW: If a lawyer associated with your firm has a conflict of interest with one of your firm’s current clients, then establishing a screen between the conflicted lawyer and the rest of the firm may avoid your firm’s disqualification.

In the world of conflicts of interest, these are enormous changes. This two part article explains these changes and their background. This month, I discuss whether an “of counsel” lawyer’s conflicts of interest are automatically imputed to your firm. Next month, I will discuss the circumstances in which screens may avoid imputed disqualification.

The Old Conventional Wisdom

Let’s start with the basics of imputed conflicts. The key New York rule governing the imputation of conflicts is DR 5105 (D), which provides as follows:

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 5101(A), DR 5105(A) or (B), DR 5108(A) or (B), or DR 9101(B) except as otherwise provided therein.

I often call this the “Three Musketeers Rule” because it parallels the motto of the Three Musketeers, “All for one and one for all.” A law firm is ordinarily considered to be a single unit, like one lawyer with many

heads, so if any one lawyer in a firm is disqualified from handling a matter based on the rules listed in DR 5105(D), then all of the lawyers in the firm are disqualified. In other words, if any lawyer in the firm is disqualified due to a personal conflict of interest (DR 5101), a conflict with another current client (DR 5-105), a conflict with a former client (DR 5108), or a conflict arising from former government employment (DR 9101), then no other lawyer associated with the firm may begin or continue employment in that matter.

The equivalent rule in the ABA Model Rules of Professional Conduct, Rule 1.10(a), is essentially the same, except with respect to a lawyer's personal conflicts of interest. Rule 1.10(a) provides:

While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 [which govern conflicts with current and former clients], unless the prohibition is based on a personal interest of the prohibited lawyer"

Thus, under both New York's DR 5105(D) and ABA Model Rule 1.10(a), the trigger for imputing conflicts is the word "associated." Under both rules, conflicts are imputed to and from all lawyers who are "associated" in a law firm. By negative implication, if a lawyer is not "associated" with a law firm, then that lawyer's conflicts are not imputed to the firm, and the firm's conflicts are not imputed to the non-associated lawyer.

Lawyers in New York (and many other jurisdictions) have long been told that when a lawyer serves as "of counsel" to a law firm, the "of counsel" lawyer's conflicts are imputed to all other lawyers associated with firm. In other words, we have been told that any lawyer with the title "of counsel" is "associated" with the firm for purposes of the rules governing imputed conflicts. Ethics opinions have taken this position explicitly. In N.Y. City 19968 (1996), for example, the Committee said:

If the law firm reaches the conclusion that an "of counsel" designation is appropriate, it should bear in mind that for purposes of analyzing conflicts of interest, "of counsel" relationships are treated as if the "counsel" and the firm are one unit. ...

More recently, in N.Y. State 773 (2004), the New York State Bar Committee on Professional Ethics said "[I]f a lawyer acting alone would be disqualified from a particular representation based on any of the rules enumerated in DR 5105(D), then that disqualification is imputed to a law firm with which that lawyer has an 'of counsel' relationship."

Prior Case Law in New York and Elsewhere

New York case law, while less explicit, has usually reached the same result. The most often cited New York State decision on this point is *Nemet v. Nemet*, 491 N.Y.S.2d 810, 112 A.D.2d 359 (2d Dep't 1985). There, attorney Bernard Stamler had worked at the law firm representing the defendant husband, and "had worked directly on defendant's case in preparing answers to interrogatories." In the middle of the litigation, Stamler left the firm representing the husband and entered into an "of counsel" relationship with Joel Brandes, who was representing the wife. Stamler did not work on the *Nemet* case, but he was given office space in Brandes' suite. The husband moved to disqualify Brandes, and the Supreme Court granted the motion. The wife appealed, arguing that "the appearance of impropriety should be balanced

against the prejudice to plaintiff ..., that no confidential information was exchanged between the attorneys, and that the 'of counsel' relationship is distinct from that of an employee or associate relationship." The Second Department disagreed and affirmed the disqualification, stating:

In general, in order to disqualify a party's attorney, there need not be direct evidence of breach of a confidential relationship, as the issue is not the 'actual or probable betrayal of confidences, but the mere appearance of impropriety and conflict of interest.' This 'appearance of impropriety' is evident in the 'of counsel' arrangement between these attorneys. The principle of attribution [i.e., imputation] will be invoked to disqualify the Brandes firm as well as Mr. Stamler.

Courts outside New York have generally expressed the same view. In *Roberts & Schaefer Co. v. SanCon, Inc.*, 898 F. Supp. 356 (S.D. W. Va. 1995), for example, the defendant moved to disqualify Steptoe & Johnson because a partner in that firm had undertaken a preliminary evaluation of the anticipated litigation on behalf of the defendant. Some months later, a lawyer named Ruley merged his West Virginia firm with Steptoe & Johnson and filed suit on behalf of the plaintiff. When defendant moved to disqualify Steptoe & Johnson, the firm changed Mr. Ruley's status to "of counsel," then argued that because Mr. Ruley was only "an independent contractor to Steptoe & Johnson", he was not "associated" with the firm for purposes of the imputed disqualification rule. The court quickly rejected the argument and disqualified Steptoe & Johnson, stating that an "of counsel" relationship "qualifies as an association within the meaning of Rule 1.10." The court used a similar analysis in *Atasi Corp. v. Seagate Technology*, 847 F.2d 826 (Fed. Cir. 1988) (interpreting DR 5105 (D) to include "of counsel" attorneys and disqualifying a firm whose "of counsel" lawyer had a conflict).

Imputing an "of counsel" lawyer's conflicts to the firm – and vice versa – often makes sense. According to DR 2102(A) ("Professional Notices, Letterheads, and Signs"), a lawyer may be designated as "of counsel" on a law firm's letterhead only if there is a "continuing relationship with a lawyer or law firm, other than as a partner or associate." Ethics opinions construing DR 2102 (A) have elaborated on this language. For example, in N.Y. City 19968, the Committee said: "The principal characteristic implied by the title 'of counsel' is a 'close, regular, personal relationship, but not one of a partner, principal of a professional corporation or associate." In N.Y. City 19958, the Committee said that an "of counsel" designation was permitted only where there is a close, continuing, regular and personal relationship or there is a "present day today working familiarity with the affairs of the law firm in question." Conversely, N.Y. City 19958 noted, an "of counsel" relationship may not be used to designate a relationship that arises "by the mere referral of business between firms or an occasional consulting relationship." Similarly, ABA Formal Op. 90357 stressed that an "of counsel" designation must mean more than merely "a relationship involving only occasional collaborative efforts among otherwise unrelated lawyers or firms."

The New Conventional Wisdom: Hempstead Video

Against this background, the Second Circuit considered the appeal in *Hempstead Video v. Incorporated Village of Valley Stream*, 2005 WL 1274244 (2d Cir. May 31, 2005). The essential facts are relatively simple. The plaintiff, Hempstead Video, is an "adult" video store operated by a man named James Alessandria. In 1994, to resolve a permit and zoning dispute with the Village of Valley Stream, Hempstead Video filed a § 1983 civil rights suit against the Village. In 1996, the Village and Hempstead Video reached a settlement, "so ordered" by Magistrate Judge Thomas Boyle of the Eastern District of New York, which (among other things) prohibited Hempstead Video from having "enclosed viewing rooms."

Seven years later, the Village discovered that Hempstead Video had installed several enclosed viewing rooms. Around May 2003, after negotiations to resolve the problem had failed, the Village asked the law firm of Jaspan Schlesinger & Hoffman LLP to seek judicial enforcement of the 1996 settlement agreement.

In July 2003, while the Hempstead Video matter was pending, the Jaspan firm entered into an “of counsel” relationship with William Englander, a solo practitioner in his mid70s who wanted to “semi-retire” and work fewer hours. Englander therefore agreed to turn the representation of several of his clients over to the Jaspan firm, and he became “of counsel” to Jaspan to help effect “an orderly transition of those matters.” But Englander continued representing all of his other clients as part of his solo practice, just as he had always done. The Jaspan firm had no access to files regarding the clients of Englander’s solo practice.

Among Englander’s clients were James Alessandria and his businesses (including Hempstead Video), which Englander had represented on labor matters for more than twenty years. For example, in April 2003 Englander had agreed to assist in defending Hempstead Video against a former employee’s complaint that Hempstead Video had fired her on account of her pregnancy. Englander was still representing Hempstead Video in that matter and was thus personally disqualified from opposing Hempstead Video. Accordingly, Hempstead Video moved to disqualify the Jaspan firm based on its “of counsel” relationship with Englander.

Hempstead Video may have thought it would easily win its motion to disqualify, but it was wrong. Magistrate Judge Boyle denied the motion to disqualify the Jaspan firm, concluding that Englander represented Hempstead Video only as a solo practitioner and was affiliated with Jaspan in a manner “too attenuated to merit imputation of the conflict of interest.” Hempstead Video appealed.

On appeal, the Second Circuit recognized that an attorney’s conflicts “are ordinarily imputed to his firm based on the presumption that ‘associated’ attorneys share client confidences.” DR 5105 reflects this presumption. But “attorneys with limited links to a firm are not always considered to be ‘associated’ with the firm for purposes of conflict imputation.” Englander was a good example of this exception. Before July 2003, Englander’s law firm was “entirely independent” of the Jaspan firm. His only connection to the Jaspan firm had been to lease space from it. Englander maintained separate files for his clients and there was “no reason to believe he shared client confidences with Jaspan.” Therefore, if Hempstead Video had filed its motion to disqualify Jaspan before Englander had become “of counsel” to the Jaspan firm, there would have been no basis to disqualify the Jaspan firm.

In July 2003, the relationship between Englander and Jaspan had changed, but “only to a limited degree.” Englander was given the title “of counsel” and began to share a limited number of clients with Jaspan, but “[i]n all other respects, Englander continued to operate a separate firm in the same manner he had before acquiring the new title.” Did the limited change require the Jaspan firm’s disqualification? The court said:

The case before us does not fit easily within the existing framework for analyzing conflict imputation from an attorney to his firm. The first step in that framework is to determine whether an attorney is “associated” with the firm. If he is, a rebuttable presumption arises that the attorney and the firm share client confidences, and the court then proceeds to the second step,

which involves determining whether that presumption has been rebutted. If the attorney is not “associated” with the firm, no presumption of confidence sharing arises, and, in the absence of other evidence demonstrating taint of the proceedings, the firm will not be disqualified....

However, the court found it “not altogether clear” whether Englander should be deemed to be “associated” or “not associated” with the Jaspan firm. “Whether an attorney is associated with a firm for purposes of conflict imputation depends in part on the existence and extent of screening between the attorney and the firm.” An “of counsel” attorney who “handles matters independent of his firm and scrupulously maintains files for his private clients separate from the files of the firm” reduces the chances that he will be considered “associated” with the firm, compared to an attorney in the same position whose client files are not effectively segregated from the firm’s files. At the same time, “whether the screening between an attorney and his firm is considered adequate to rebut the presumption of shared confidences depends in part on the closeness and extent of the relationship between the attorney and the firm.”

The court then reviewed a number of judicial opinions and ethics opinions that had adopted “a per se rule imputing conflicts between all ‘of counsel’ attorneys and their firms.” A per se rule has “the virtue of clarity,” the court acknowledged, but given the “wide variation in the nature and substance of relationships lumped together” under the title “of counsel,” a per se rule did not appropriately respect “the individual’s right to be represented by counsel of his or her choice and the public’s interest in maintaining the highest standards of professional conduct.” Moreover, a per se rule “risks elevating the label assigned to a relationship over the substance of that relationship.” In addition, the cases that had adopted a per se rule, including *Roberts & Schaefer*, *Atasi*, and *Nemet v. Nemet*, were all distinguishable. Accordingly, the Second Circuit said:

We believe the better approach for deciding whether to impute an “of counsel” attorney’s conflict to his firm for purposes of ordering disqualification in a suit in federal court is to examine the substance of the relationship under review and the procedures in place. The closer and broader the affiliation of an “of counsel” attorney with the firm, and the greater the likelihood that operating procedures adopted may permit one to become privy, whether intentionally or unintentionally, to the pertinent client confidences of the other, the more appropriate will be a rebuttable imputation of the conflict of one to the other. Conversely, the more narrowly limited the relationship between the “of counsel” attorney and the firm, and the more secure and effective the isolation of nonshared matters, the less appropriate imputation will be. ... Furthermore, imputation might well interfere with a party’s entitlement to choose counsel and create opportunities for abusive disqualification motions.

The court described several district court decisions that had denied disqualification motions involving “of counsel” attorneys based on this “functional approach”: *Renz v. Beeman*, 1989 WL 16062 (N.D.N.Y. 1989); *Regal Marketing Inc. v. Sonny & Son Produce Corp.*, 2002 WL 1788026 (S.D.N.Y. 2002); and *Gray v. Memorial Medical Center, Inc.*, 855 F. Supp. 377 (S.D. Ga. 1994). Here, as in those cases, Englander’s relationship with Jaspan was “too attenuated and too remote from the matter in question to attribute Englander’s potential conflict to the firm.” Englander became “of counsel” only for the “limited purpose” of providing transitional services for a few selected clients. He continued representing all his other clients, including Hempstead Video, in his “independent capacity,” and the Jaspan firm “had no access to the confidences of Englander’s private clients.” Hempstead Video had never discussed the case at issue

with Englander, and Englander had never discussed this case or the EEOC case with anyone at Jaspan. Moreover, as soon as Jaspan learned of the potential conflict, it had instructed Englander not to discuss the pregnancy discrimination case with anyone at the firm and to continue maintaining a separate file on that case.

Based on all of these facts, the Second Circuit held that Englander was not “associated” with the Jaspan firm and that his conflict should not be imputed to it.

At this point, the Second Circuit embarked on an alternative analysis. Even if the court had deemed Englander to be “associated” with the Jaspan firm, were the screens that had been put in place sufficient to rebut the presumption that Englander had shared Hempstead Video’s confidences with the Jaspan firm, and thus sufficient to avoid Jaspan’s disqualification? Next month, I will discuss the Second Circuit’s analysis of that issue.

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