

The Contract Lawyer And Imputed Disqualification

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In the first article in this series on the temporary or “Contract” Lawyer, we dealt with the safeguards available to the hiring partner in screening for existing or potential conflicts of interest caused by the temporary herself. In this article, we discuss imputed or vicarious disqualification. Imputed or vicarious disqualification occurs when an entire law firm is infected with the Conflicts virus which resides in the temporary lawyer.

For conflicts of interest analysis, the temporary or Contract Lawyer is infected with a virus whenever she is deemed to represent a client. This occurs “if the lawyer is privy to information about the client that would constitute confidences of the client within the meaning of DR 4-101 (A). In our opinion, this does not depend upon having any contact with the client.” N.Y. State Bar Op. 715 (2/26/99). *See* NYPRR, April 1999.

The temporary or Contract Lawyer arrives at her new assignment with a history of employment at other firms. Her contacts with clients at those firms may have infected her with the Conflicts virus. The virus will lie dormant only so long as she is isolated from all contact with clients other than those she’s assigned to work with. Once she acquires a confidence or secret of another client, the virus begins its spread throughout the firm and no one is immune.

Treatment In NYSBA Opinion 715

The spectre of vicarious disqualification was raised in NYSBA Opinion 715. The Opinion states, “The issue of conflicts does not arise solely where the Contract Lawyer is personally involved in the representation. Under DR 5-105(D), lawyers who are associated in a firm cannot accept or continue employment when any one of them would be prohibited from doing so because of a conflict of interest.”

DR 5-105(D) provides: “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...”

The key word in resolving questions of vicarious disqualification is “associated”. When does a lawyer who renders temporary service become “associated” with a firm? The NYSBA acknowledges that the term is not defined in the Code.

The Opinion does, however, offer a few general guidelines. The key issue in determining whether “association” has occurred is the extent to which the temporary lawyer gains access to information about clients of the firm other than the clients whom she is serving directly. Applying this test, the NYSBA advises that a Contract Lawyer to whom a case is referred and who serves as co-counsel, working from her own office, shall not be deemed to have access to the confidences of the firm’s other clients. On the other hand, a lawyer who shares office space with the firm but is not a firm member may become “associated” with the firm by being exposed to information concerning a client of the firm.

Key Is Exposure To Confidences

What about the temporary or Contract Lawyer who is hired to work on one or several matters? The key is the extent to which she gains access to the confidences and secrets of other clients. This depends, in turn, on “the circumstances, including whether the firm has a system for restricting access to client files and for restricting informal discussions of client matters.” NYSBA 715.

One of the circumstances to be considered is the size of the firm. The NYSBA Opinion cites two Court of Appeals opinions which dealt with issues of disqualification: *Cardinale v. Golinello*, 43 N.Y.2d 288, 372 N.E.2d 26 (1997) and *Solow v. WR. Grace & Co.*, 83 N.Y.2d 303, 632 N.E.2d 437 (1994). On the basis of these decisions, the State Bar concludes that “it would be difficult for small firms hiring a Contract Lawyer to avoid vicarious disqualification where the Contract Lawyer is given space at the firm.” On the other hand, lawyers in large firms with different departments should not be presumed to have contacts with one another in deciding disqualification issues. However, the Opinion offers no guidance on the definition of “small” and “large” as the terms apply to law firms. Is a firm with fifty lawyers a “small” firm? When does a “small” firm become a “large” firm? What is an “independent department” of a law firm? How do independent departments prevent “cross pollination” between themselves?

In Op. 88-356, the ABA stated that whether a temporary lawyer is associated with a firm for purposes of the rule “must be determined by a functional analysis of the facts and circumstances involved in the relationship between the temporary lawyer and the firm consistent with the purposes of the rule.” This functional analysis must weigh the extent of access the temporary lawyer had at all of his previous firms to information about the firms’ clients. The more extensive the access, the greater the risk that the temporary lawyer will have been “associated” with the firms for purposes of imputed qualification. The ABA provided a useful example:

a temporary lawyer who works for a firm, in the firm office, on a number of matters for different clients, under circumstances where the temporary lawyer is likely to have access to information relating to the representation of other firm clients will be deemed “associated with” the firm. . . unless the firm, through accurate records or otherwise, can demonstrate that the temporary lawyer had access to information relating to the representation only of certain other clients. ABA Op. 88-356.

Screens And Other Solutions

How does a firm demonstrate that it has limited its temporaries to access only of the files and information they need to work on? The best way, of course, is to hire only those temporaries who are able to do their work from their homes or another office. Another may be to confine their access to a particular room in the office and only to the files they need to see.

One effective way is to have in place a well-articulated and carefully-policed system for defining what files are available to each lawyer in the firm. Another is to erect a screen around the temporary. Opinion 715 points out that the New York courts have not adopted the concept of “Chinese Walls” to isolate the temporary. However, the Opinion does encourage the use of screens: “...even if screens are not generally accepted as a means of preventing a tainted lawyer from disclosing information, we believe screens should be accepted as a means of ensuring that part time lawyers are not deemed to be ‘associated’ with a law firm.”

The opinion cites *Kassis v. Teachers Insurance and Annuity Association*, 24 A.D.2d 191, 678 N.Y.S.2d 32 (1st Dept. 1998) (leave granted, _N.Y.2d..J1998). In that case, the First Department ruled that disqualification is not automatic when a firm seeks to oppose a former client in a substantially related matter without the client’s consent. In *Kassis*, the court found that an adequate screen had been erected by a 26-person firm around a first-year associate who had previously worked for another law firm on a matter in which the firm was involved. The screen consisted of removing the relevant files from the area in which the associate worked, instructing the associate not to touch the files, avoiding discussions about the matter in the presence of the associate, and instructing other firm members not to discuss the matter with the associate. (See Roy Simon’s critical review of the *Kassis* decision in the September 1998 edition of NYPRR.)

NYSBA Offers Examples

Opinion 615 closes its treatment of imputed or vicarious disqualification with the following examples:

1. Firm A and Firm B are on opposing sides in *Jones v. Smith*. Contract Lawyer is not working on *Jones v. Smith* at either law firm. Does either firm’s continued employment of Contract Lawyer affect its ability to continue to represent its client in *Jones v. Smith*?

If a Contract Lawyer is denied access to all information relating to each firm’s clients other than the ones he or she is working on, and the firms are large enough to rebut the normal presumption of cross pollination among lawyers in a law firm, then the Contract Lawyer is not considered to be “associated with” either firm and the two firms may continue their representation.

2. Same as Hypothetical 1 but Contract Lawyer is working on *Jones v. Smith* at Firm A, and the work rises to the level of representation. May Contract Lawyer work at Firm B on matters unrelated to *Jones v. Smith*?

Not during the pendency of the litigation. The vicarious disqualification provisions of DR 5-105(D) would require the disqualification of Firm B from representing Smith.

3. Firm A and Firm B are on opposing sides in *Jones v. Smith*. Contract Lawyer worked on unrelated matters at Firm A, then leaves Firm A. May Contract Lawyer work on *Jones v. Smith* at Firm B?

The answer depends upon the size of Firm A and the measures taken to ensure that Contract Lawyer was not privy to confidences of clients other than those upon which he or she worked.

Whether the NYSBA conclusions are adopted by the New York courts will depend on the decision of the Court of Appeals in cases like Kassis. NYPRR will report these decisions as soon as they are handed down.

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