

The State Bar's Proposed New Rules of Professional Conduct

BY ROY SIMON

(Editor's note: This is the first in a series of articles by Roy Simon that will describe and explain the proposed New York Rules of Professional Conduct that have been approved by the New York State Bar Association's House of Delegates and will be reviewed by the Presiding Justices of the Appellate Divisions during the coming year.)

Proposed Rule 1.10: Imputation and Screening

November 3, 2007 was a momentous day for New York legal ethics. After debating proposed New York Rules of Professional Conduct for seven consecutive quarterly meetings (beginning April 2006), the New York State Bar Association's House of Delegates gave final approval to the complete package of rules proposed by the State Bar's Committee on Standards of Attorney Conduct (COSAC). These proposed rules represent nearly five years of work by COSAC, aided by thoughtful comments from the New York City Bar, the New York County Lawyers Association, the New York State Bar Committee on Professional Ethics, and others.

The proposals follow the numbering, format, and much of the language of the ABA Model Rules of Professional Conduct, which have now been adopted in some form in 48 states and the District of Columbia. (California and Maine have unique rules but are in advanced stages of transforming their rules to an ABA Model Rules format. New York is the only state that continues to use the format of the old ABA Model Code of Professional Responsibility.)

Now that the House of Delegates has approved the COSAC rules, the next step is for COSAC to prepare a report describing each proposed rule and how and why it differs from New York's current ethics rules. COSAC expects to complete that report by January 2008. The State Bar will then formally transmit the proposed rules to the four Presiding Justices of the Appellate Divisions, who will review the proposals on their own schedule until they reach a consensus. When the State Bar transmitted comprehensive revisions to the Appellate Divisions in March 1997, the courts took two years and three months (until June 1999) to approve the revised rules. The current proposals are more complex than the 1997 proposals, but I believe the courts will act more quickly than last time.

Current rules on imputation and screening

In the current Code of Professional Responsibility imputation and screening are governed primarily by DR 5-105(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 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.

The enumerated rules govern six types of conflicts:

DR 5-101(A) governs a conflict with a lawyer's personal interests; DR 5-105(A) governs a conflict with a current client that arises before a lawyer accepts a representation; DR 5-105(B) governs a conflict with another current client that arises during a representation; DR 5-108(A) governs a conflict with a former client; DR 5-108(B) governs a conflict with a client of a lateral attorney's former law firm (but not the lateral personally); and DR 9-101(B) governs conflicts arising out of a lawyer's former government service.

Under DR 5-105(D), however, only the Canon 5 conflicts (DRs 5-101, 5-105, and 5-108) are imputed to other lawyers of the firm. When they are imputed, screening off the personally disqualified attorney will not cure the underlying violation or permit the other lawyers in the firm to accept or continue the representation. Under DR 9-101(B), in contrast, if one lawyer associated with a firm is personally disqualified based on former government service, then the rest of the firm may avoid imputation if (a) the personally disqualified lawyer is effectively screened from any participation, direct or indirect, including discussion, in the matter and is apportioned no part of the fee therefrom, and (b) no other circumstances in the particular representation create an appearance of impropriety."

In sum, under the current Code, DR 5-105(D) disqualifies every lawyer in the firm from accepting or continuing employment knowing that any lawyer in the firm is personally disqualified from handling the matter due to (1) a personal conflict or (2) a conflict with (i) another client, (ii) a former client, or (iii) a client of the lawyer's former firm and screening cannot avoid firm-wide imputation of any of these conflicts. But under DR 9-101(B), conflicts arising out of a lawyer's former government service are not imputed to the rest of the firm if the firm builds a timely screen around the former public servant and no other circumstances create an appearance of impropriety.

Finally, DR 5-108(B) indirectly addresses imputation by providing as follows:

Except with the consent of the affected client after full disclosure, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

1. Whose interests are materially adverse to that person; and
2. About whom the lawyer had acquired information protected by section DR 4-101(B) that is material to the matter.

Conversely, under DR 5-108(B) a lawyer may oppose a person in a matter that is the same as or substantially related to a matter handled by the lateral lawyer's former firm if the lateral did not personally acquire any material confidences or secrets.

Similarities between Existing and Proposed Screening Rules

The NYSBA's proposed rules on screening as approved by the House of Delegates in November would retain many features of the current DRs. (The rules and comments quoted in this article were approved by the House of Delegates on November 3rd but have not yet been sent to the Appellate Divisions for approval. Some technical or stylistic changes may occur before the State Bar sends them to the courts.)

Proposed Rule 1.10(a) begins: 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. (Rule 1.7 governs conflicts with other clients and conflicts arising out of a lawyer's personal interests. Rule 1.9 governs conflicts with former clients.) Rule 1.10(a) thus begins like DR 5-105(D).

Proposed Rule 1.10(c)(1) provides that when a lawyer becomes associated with a firm, the firm may not knowingly represent a client in a matter that is the same as or substantially related to a matter in which the lawyer's former firm represented a client whose interests are materially adverse to the client in question unless the newly associated lawyer did not acquire any information protected by Rules 1.6 or 1.9(c) that is material to the current matter. This formulation is essentially identical to existing DR 5-108(B).

Rule 1.10(e) provides: The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11. Rule 1.10(e) thus preserves the special treatment now accorded by the last clause of DR 5-105(D) for conflicts arising from the work of lawyers moving from government service to private practice, or vice versa.

Differences between Existing and Proposed Screening Rules

The imputation provisions in proposed Rule 1.10 differ from DR 5-105(D) in two significant ways: (1) personal conflicts are not automatically imputed, and (2) disqualified laterals may be screened off to avoid imputation in some circumstances.

Personal conflicts.

The first significant difference between proposed Rule 1.10 and existing DR 5-105(D) concerns personal conflicts. Under DR 5-105(D), disqualifying personal conflicts are always imputed to the other lawyers in the firm. Under proposed Rule 1.10(a), they are not. Specifically, Rule 1.10(a) provides that disqualifying conflicts based on a lawyer's own financial, business, property, or other personal interests are not imputed if under the circumstances a reasonable lawyer would conclude that there is no significant risk that the representation will be materially limited or the independent judgment of the participating lawyers in the firm will be adversely affected.

Thus, proposed Rule 1.10(a) imputes some personal conflicts but not others. Which are imputed and which are not? A proposed Comment [3] to Rule 1.10 provides two illustrations (which I have divided into two bullet points):

- Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm or adversely affect the ability of the others in the firm to exercise independent professional judgment on behalf of the client, the firm should not be disqualified.
- On the other hand, if an opposing party in a case is owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

Translating the first example into specifics, consider the emotionally charged case of *Bush v. Gore*. Recall that in 2000 George Bush retained Theodore Olson of Gibson, Dunn & Crutcher (a firm with multiple offices and hundreds of lawyers) to represent him in stopping the Florida recount. Mr. Olson, of course, was highly qualified to take on the representation and had no personal conflicts that would dampen his zeal or distort his independent professional judgment on behalf of Mr. Bush. But suppose (quite realistically) that Mr. Olson knew that a lawyer in Gibson Dunn's Los Angeles office was a prominent Democratic fundraiser who detested Mr. Bush and had good reason to believe that Al Gore would appoint him (the Democrat lawyer) to a high position if Gore won the presidency. Under New York's DR 5-101, I think the prominent Democrat would be disqualified from representing Mr. Bush. If we automatically impute all disqualifying personal conflicts of interest, as DR 5-101(D) does, then every lawyer at Gibson Dunn & Crutcher including Theodore Olson would have been prohibited from taking on the representation even though the Democrat lawyer was in a different office and would have had no involvement whatsoever in representing Mr. Bush.

You might think that this problem would be resolved if Mr. Bush simply waived the Democrat lawyer's conflict and consented to Mr. Olson's representation. That would be a solution if the conflict were consentable, because if the client waives a consentable conflict then the personally conflicted lawyer, if practicing alone (to use the language of DR 5-101(D)) would not be prohibited from handling the matter. But if the conflict is non-consentable, then waiver is probably not possible. In the *Bush v. Gore* example, the Democrat lawyer's conflict is non-consentable (non-waivable) under DR 5-101 unless a disinterested lawyer would believe that the representation of the client [George W. Bush] will not be adversely affected by the Democrat lawyer's personal interests. Given the Democrat lawyer's aspirations for high office in a Gore administration and his intense personal dislike of George W. Bush, I think the Democrat lawyer would fail DR 5-101's disinterested lawyer test, making his conflict non-consentable.

That raises a crucial question under DR 5-101(D): if one lawyer in a firm has a non-consentable conflict, may the client consent to representation by some other lawyer in the firm who has no conflict? In other words, may the client waive the imputation of a non-waivable personal interest conflict to the rest of the firm? No case or ethics opinion has definitively answered that question under DR 5-101(D), but I think the answer is no. If any lawyer in the firm practicing alone would have a non-consentable personal interest conflict, then under DR 5-101(D) every lawyer in the firm is disqualified and the conflict cannot

be cured by consent because DR 5-105(D) has no separate consent provision. If a client cannot waive the underlying personal interest conflicts, then the client cannot waive imputation. A non-consentable personal interest conflict for one lawyer thus becomes a non-consentable conflict for every lawyer in the firm.

Proposed Rule 1.10(a) changes this answer by creating an exception to automatic imputation for personal interest conflicts. In my view, relaxing the strict automatic imputation of non-waivable personal interest conflicts is a sound idea for two reasons.

First, personal interest conflicts often do not pose a significant risk of impairing the quality of the representation or the independent professional judgment of other lawyers in the firm.

Some personal interest conflicts pose that risk, but others do not. When they do not pose a significant risk for example, when the personally disqualified lawyer will have nothing to do with the representation and the lawyers handling the representation can be trusted not to be swayed by the personally disqualified lawyer's views then automatic imputation is unjustified. It is preferable to consider personal interest conflicts on a case-by-case basis, taking into account such factors as the size and structure of the firm, the intensity of the personal conflict, and the relationships between the disqualified lawyer and the lawyers who will be handling the matter. If the personally disqualified lawyer is unlikely to have any influence on the way the other lawyers in the firm will handle a matter, than that conflict should not be imputed.

The second reason for not automatically imputing a disqualified lawyer's personal interest conflicts is that personal interest conflicts are difficult to check when taking on a new matter, difficult to monitor during a matter, and highly disruptive when they arise in mid-matter. Moreover, many lawyers might consider it highly intrusive if a law firm routinely kept a database (for conflict-checking purposes) of a lawyer's financial, business, property, social, political, or other personal interests.

Because of these difficulties, DR 5-105(E) (our mandatory conflict-checking provision) does not require law firms to check for personal interest conflicts when considering a proposed engagement. Moreover, I suspect that many law firms neither withdraw nor seek client consent when the firm belatedly discovers in the middle of a matter that a lawyer in the firm who is not working on the matter would have a disqualifying personal interest conflict. In other words, DR 5-105(10)'s automatic imputation of personal interest conflicts is so difficult to implement, and so potentially disruptive when implemented in mid-matter, that many law firms probably ignore it unless the personal interest conflicts are egregious. Rule 1.10(a) replaces this benign neglect with a realistic standard that does not impute personal interest conflicts unless they threaten a client's representation.

Screening for lateral hires under limited conditions

Unlike DR 5-108(B), proposed Rule 1.10(c)(2) permits a law firm to accept or continue a representation in narrow circumstances even if a lateral attorney coming from another private law firm (the newly associated lawyer) did acquire confidential information regarding the former firm's client that is material to the current matter. This is a major change from the existing Code, which does not permit screening to overcome a former client's objection no matter how watertight the screen. (Some cases have allowed

screens to overcome conflicts, but DR 5-105(D) does not.) However, under proposed Rule 1.10(c)(2), screening works only if three distinct safeguards are satisfied.

The primary safeguard for the former client is that the confidential information acquired by the lateral attorney must be relatively insignificant a reasonable lawyer would conclude that any such information, if used, is not likely to be to the former client's material disadvantage. Thus, little snippets of material information that would be unlikely to harm the former client will not disqualify an entire firm, provided the firm promptly and effectively screens off the lateral.

Even if the confidential information in question is insignificant, the firm must implement two further safeguards. Under Rule 1.10(c)(2)(i), the firm must notify, as appropriate lawyers and non-lawyers in the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client. This does not require a notice to every lawyer and nonlawyer in the firm, since frequent screening notices could overwhelm lawyers and cause them to ignore the notices. But the firm must notify personnel at the firm who are likely to work with or in close proximity to the disqualified lateral. The phrase as appropriate, which is imported from existing DR 1-104(C) (the supervisory duty rule), should protect former clients of the lateral (or the lateral's former firm) without imposing undue burdens on law firms.

Second, under Rule 1.10(c)(2)(ii) the firm must implement effective screening procedures to prevent any exchange of information about the matter between the lateral attorney (the personally disqualified lawyer) and others in the firm.

The purpose of the screening provision for lateral hires is to strike a better balance between the right of clients to confidentiality the right of clients to choose counsel, and the necessity for lawyer mobility, especially among young lawyers who frequently change firms several times (not always by choice) before settling down. Many lawyers who change firms have informally acquired some confidential information about many of their former firm's clients or at least cannot prove that they did not acquire such information (i.e., cannot prove lack of access at their old firms). Under DR 5-105(0), therefore, such a lateral is personally disqualified from opposing those clients after they join a new firm, and DR 5-105(D) disqualifies the lateral's entire firm via imputation. But in many cases the costs of disqualification significantly outweigh the benefits. The client whose lawyer is disqualified loses the right to choice of counsel and may have to face substantial delays and added costs while a substitute lawyer gets up to speed. The court system (or the economic system, in non-litigated matters) suffers delay and disruption. The countervailing benefits, however, are abstract and uncertain.

But if the confidential information possessed by the lateral attorney would be unlikely to harm the former client materially even if it were used and if the hiring firm promptly employs effective measures to prevent the information from being used, then the risk to confidentiality is *de minimus*. Rule 1.10(c)(2) wisely takes advantage of the benefits of allowing relatively free lateral movement of attorneys (thus reallocating attorney talent more efficiently) while fully protecting against misuse of a former client's confidential information.

Sharing In Fees

Unlike the screening rules of some states, and unlike the screening rule for former government lawyers currently in DR 9-101(B)(IXa) and (B)(2), proposed Rule 1.10(c) does not demand that the screened-off lawyer always be denied any part of the fee from the screened-off matter. Anew Comment [SH] explains that the book-keeping and accounting problems that may arise from prohibiting a personally disqualified lawyer from being apportioned a share in the fees in a matter make it inadvisable to impose a hard and fast rule prohibiting this practice. Nevertheless, if the disqualified lawyer's share in the fee would represent a significant increase in that lawyer's compensation over what the lawyer would otherwise earn, then permitting the lawyer to be apportioned a share in the fee may create incentives to pierce the screen that would call into question the effectiveness of the screening procedures. In those situations, a firm seeking to avoid imputed disqualification under proposed Rule 1.10(c) would be well-advised to prohibit the personally disqualified lawyer from sharing in the fees in the matter.

Conclusion

The proposed rules on imputation are not only more realistic than the existing ones, but they will adequately protect former and current clients without excessively burdening lawyers and law firms.

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