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New York Law Journal

Lateral Attorney Transitions Under the Ethics Rules

By Barry Temkin and Kate DiGeronimo

December 16, 2024

Law firms hiring lateral lawyers should be careful that they are not conflicting themselves out in the process. This is because a lateral lawyer's conflicts are imputed to the new firm under the Rules of Professional Conduct (RPC). This principle applies to lateral partners as well as associates.

Absent informed consent, confirmed in writing, a lawyer may not switch sides and sue a former client in the same or a substantially related matter. New York Rule of Professional Conduct 1.9 prohibits a lawyer from acting adversely to a former client about whom the lawyer acquired material confidential information:

Unless the former client gives informed consent, confirmed in writing, 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.

2. About whom the lawyer had acquired information protected by Rules 1.6 [the confidentiality rule] or paragraph (c) of this Rule that is material to the matter. (NY RPC 1.9(b))

The U.S. Court of Appeals for the Second Circuit has ruled that disqualification may be ordered where:

Courtesy Photo

Barry Temkin, left, and Kate DiGeronimo. Partners at Mound Cotton.

(1) The moving party is a former client of the adverse party's counsel.

(2) There is a substantial relationship between the subject matter of the counsel's prior representation of the moving party and the issues in the present lawsuit.

(3) The attorney whose disqualification is sought had access to, or was likely to have had access to, relevant privileged information in the course of his prior representation of the client. (*Hempstead Video v. Incorporated Village of Valley Stream*, 409 F. 3rd 127, 133 (2nd Cir. 2005) (holding that counsel's connection to law firm was too attenuated to impute disqualification to entire firm)).

Imputation of Conflicts

When hiring a lateral lawyer, the new firm must screen for potential conflicts with former clients. This is because RPC 1.10 imputes such conflicts to the entire firm:

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 newly associated lawyer, or a firm with which that lawyer was associated, formerly represented a client whose interests are materially adverse to the prospective or current client unless the newly associated lawyer did not acquire any information protected by Rule 1.6 or Rule 1.9(c) that is material to the current matter.

Rule 1.6 broadly protects "confidential information," which includes information protected by the attorney-client privilege, which is likely to be embarrassing or detrimental to the client, or which the client has requested be kept confidential.

De Minimus Exception

But not every lawyer who assisted on a case is deemed to have represented a client within the meaning of the Rules of Professional Conduct. Junior lawyers who played minor roles in a matter will not be subject to disqualification. For example, a lawyer who merely does research, or drafts routine documents, is not necessarily subject to disqualification. See *Silver Chrysler Plymouth v. Chrysler Motors*, 518 F. 2nd 751 (2nd Cir. 1975). Professor Roy Simon writes that the ethics rules do not require disqualification of junior lawyers with fleeting, de minimus roles:

"A lawyer whose work was limited to brief, informal discussions on jurisdictional (i.e. 'procedural') matters and to specific points of law will not be deemed to have 'represented' the client on whose matter he worked, even if the lawyer billed the time to the client." (Roy D. Simon, Simon's New York Rules of Prof. Conduct Anno. (2023) at Section 1.9:11 at 719).

In one leading case, a lawyer from a large firm had done some research and drafting work for an auto company. (*Silver Chrysler Plymouth v. Chrysler Motors*, 518 F. 2nd 751 (2nd Cir. 1975)). When the lawyer started his own firm, he became adverse to the former client. A motion to disqualify the lawyer was denied due to the de minimus nature of the associate's work. As the Second Circuit reasoned:

"[The associate's] involvement was, at most, limited to brief, informal discussions on a procedural matter or research on a specific point of law. ... But there is reason to differentiate for disqualification purposes between lawyers who become heavily involved in the facts of a particular matter and those who enter briefly on the periphery of a limited and specific purpose related solely to legal questions." (*Silver Chrysler Plymouth*, 518 F. 2nd at 756).

Screening

As currently constituted, the New York Rules do not expressly provide for an ethical screen except in limited circumstances. However, a proposal by the New York State Bar Association Committee on Standards of Attorney Conduct (COSAC) would incorporate an ethical screen into the New York rules. That proposed rule change contemplates screening to avoid imputation of conflicts to the firm under RPC 1.10 in most cases. The COSAC proposal has not been adopted by the Appellate Division.

But the courts have designed solutions not contemplated by the Rules of Professional Conduct. Case law permits ethical screens depending on the facts of each case. These facts include the size of the outgoing and incoming law firms, the likelihood that the lateral lawyer has been exposed to confidential information, and the precautions taken by the new firm to prevent the spread of confidential information.

For example, the Court of Appeals, in the leading case of *Kassis v. Teacher's Insurance and Annuity Association*, 93 N.Y.2d 611 (1999), disqualified a small firm which hired a side-

switching associate in the middle of contested litigation. The lateral associate in *Kassis* moved from one small firm to another. He conducted four depositions at his prior firm and represented the plaintiff in multiple mediations. Upon moving to his new firm, he was subject to a variety of safeguards, including exclusion from any meetings or conferences regarding the case and being locked out from access to any client files or documents. The Court of Appeals held that these precautions were inadequate given the small size of the new firm, and the lateral attorney's extensive access to client confidential information in conducting depositions and a mediation (*Kassis*, 93 N.Y.2d at 614). The conflict was imputed to the new firm, which was disqualified.

In *Cummin v. Cummin*, 264 A.D.2d 637 (1st Dept. 1999), an attorney retained by the plaintiff in a matrimonial matter discovered that the firm's managing partner had met with the defendant for one to two hours to discuss the case some six years earlier. The earlier consultation did not result in retention, a new file was not opened and the firm did not have any notes or memoranda on the matter. The partner who met with the potential client had no recollection of their meeting. The court found that because the firm did not have any notes or memoranda regarding the consultation, and there was no indication that the conflicted attorney shared any information with his colleagues, the presumption of shared confidences was rebutted. Accordingly, disqualification was denied.

Recommended Screening Procedures

As mentioned, screening is not addressed for most conflicts in the New York Rules of Professional Conduct. However, the courts have held that screening is permissible in some instances, depending upon the facts. The best practices for firms seeking to implement screening are as follows:

1. **Written acknowledgement.** The disqualified lawyer should acknowledge in writing the fact of the screening, and the obligation not to discuss any aspect of the tainted matter with other colleagues at the firm. Firm management should instruct the legal and non-legal staffs not to discuss the matter with the screened lawyer.

2. **File separation.** Have the files in the tainted matter placed in an area separate from the firm's other client files and made accessible with codes known only to the team members working on the matter. The paper and digital files for the tainted matter should remain inaccessible to the incoming lateral lawyer. In addition, the disqualified lawyer's office should be, insofar as practicable, physically remote from the offices of other lawyers working on the tainted file.

3. **Non-participation in fees.** The tainted lawyer should not share in any fees from the conflicted matter. If the lateral lawyer is not paid on straight salary, then the firm should send a memorandum to its comptroller regarding the disqualified lawyer's nonparticipation in the fees generated in the matter.

Conclusion

Disqualification of a tainted lawyer may be imputed to the incoming law firm. The incoming lawyer may be disqualified if they had access to confidential information at the prior firm. There is a rebuttable presumption that the incoming lawyer had access to such information. This presumption may be rebutted upon a proper showing that the lawyer in fact did not have access to material confidential information. In addition, the transitioning lateral lawyer should be denied access to paper and electronic files regarding the tainted manner.

Barry Temkin *and* **Kate DiGeronimo** *are partners at Mound Cotton Wollan & Greengrass. Temkin is an adjunct professor at Fordham University School of Law and a member of the New York County Lawyers Association Professional Ethics Committee.*

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