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Of Mice, Men, Migratory Lawyers, and Multijurisdictional Practice



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John Steinbeck penned two iconic works in the 1930s that focused upon migrant workers attempting to cope with the Great Depression: *Of Mice and Men*[1] and *The Grapes of Wrath*.[2] And while the fact of lawyers migrating between law firms that span multiple states and jurisdictions does not conjure up the same social justice sensitivities, the professional responsibil-

[1] Published by Coviei Friede in 1937. It has been made into a film on numerous occasions, the first and best was released in 1939 (starring Lon Chaney Jr. and Burgess Meredith); it was nominated for four Oscars. It has also been performed on Broadway several times, most recently in 2014.

[2] Published by Viking Press in 1939 (awarded the National Book Award and Pulitzer Prize for fiction; cited as a principal reason Steinbeck won the Nobel Prize). John Ford made "Grapes" into one of Hollywood's most famous movies in 1940. Starring Henry Fonda as Tom Joad, the film was nominated for seven Oscars, winning two (including best director for Ford). The soliloquy by Fonda is one of the movie industry's most famous set of lines: "Wherever you can look, wherever there's a fight, so hungry people can eat, I'll be there. Wherever there's a cop beating up a guy, I'll be there . . . ." Artists as diverse as Woody Guthrie and Bruce Springsteen have penned songs in honor of Tom Joad.

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ity issues implicated thereby are important and are not easily resolved.

As practicing lawyers know, conflicts e-mails are one of the trademarks of modern multijurisdiction legal practice, rivaled in their ubiquity perhaps only by Seamless.com and the devices through which attorneys receive the e-mails. Hidden behind the comforting familiarity—''Please let me know . . .'' —however, is a nest of conflicting rules and difficult professional responsibility questions.

These issues largely flow from the fact that the rules of professional conduct governing lawyer behavior are rules written by lawyers for lawyers, but based upon an earlier, simpler era. As the business world became increasingly complex, practices grew from single-lawyer, to dozens of lawyers, to (at the extreme end) thousands of lawyers; and potential professional responsibility issues thus not only multiplied, but also mutated into forms that did not exist before. This is especially true with growth pushing law firms into other states and countries, creating the types of conflicts of law issues that always seem to muddle even the simplest of analyses.

Perhaps the best example of these issues, and the one that this article focuses on, comes from New York, one of the world's financial centers and hence a hub of international law firms. After many false starts,[3] the American Bar Association's Model Rules of Professional Conduct (the ''Model Rules'') were amended to authorize, in some instances, the use of screening in order to address conflicts issues arising from a lawyer's prior association with another firm.[4] But the Model Rules are aspirational in nature only; states may (or may not) adopt them in whole or in part. Adopted in 2009, New York's Rules of Professional Conduct (the ''New York Rules''), in fact, do **not** permit screening to address conflicts arising from an attorney's work at her prior firm,[5] reserving screening as a remedy for more atypical situations like former government employees and judges.[6] One can of course make policy judgments about the wisdom of this approach,[7] but the more pertinent question for practitioners in multijurisdiction law firms is what this means for them and how they should orient their practice.

We intend to address this question in two ways. First, we provide a more in-depth summary of the underlying issue. Then, we provide some brief guidance on what practitioners might consider doing in light of this uncertainty.

Understanding the Problem

Applying conflict rules to law firms begins with the fact that, for the most part, neither the Model Rules nor New York's Rules directly regulate law *firms*' conflicts,[8] instead largely proscribing the conduct of individual *lawyers*.[9] Thus, New York's Rules provide that a lawyer is limited in her dealings with a client.[10] When a client deals with a large law firm, however, the client does not understand herself to be dealing with just one lawyer

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[3] Proposals to allow screening go back as far as 2002. *See* Fallyn B. Reichert, *''Screening'' New York's New Rules: Laterals Remain Conflicted Out*, 31 Pace L. Rev. 464, 466 n. 9 (2011) (''The first proposal was submitted by the Ethics 2000 Committee in 2002 and was rejected by a vote of 176-130.'').

[4] Specifically, Rule 1.10(a) has been amended to read:

(a) 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, unless

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a) or (b), and arises out of the disqualified lawyer's association with a prior firm, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

MODEL RULES OF PROF'L CONDUCT R. 1.10(a).

[5] *See* Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.10(a) (providing simply that ''[w]hile 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 Rule 1.7, 1.8 or 1.9, except as otherwise provided therein'').

[6] *See* Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.11(b) (permitting the screening of former government employees); Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.12(d) (permitting the screening of former judges and others who have acted in a judicial or quasi-judicial capacity).

[7] For those interested in such issues, a good place to start is the Majority and Minority Reports submitted in connection with the ABA's revisions to the Model Rules to permit screening. *See* Recommendation of the ABA Standing Committee on Ethics and Professional Responsibility (Feb. 16, 2009), http://apps.americanbar.org/leadership/2009/midyear/daily_journal/Adopted109.doc.

[8] New York Rules 5.1-5.8 and ABA Model Rules 5.1-5.7 are listed under the heading ''Law Firms and Associations'' but deal with other issues like supervising lawyers and the business lines of law firms.

[9] *See, e.g.*, Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.9 (discussing a lawyer's responsibility to former clients); MODEL RULES OF PROF'L CONDUCT R. 1.9 (same).

[10] Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.8.

but with the whole firm. Indeed, an engagement letter is usually signed with a firm, and large law firms often tout the diversity of their capabilities in addition to the strength of individual attorneys.

In the conflicts realm this issue is dealt with through Rule 1.10(a), the beginning of which is the same in both the Model Rules and the New York Rules: ''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 Rule 1.7, 1.8 or 1.9.''[11] On the surface, this squares the circle: a lawyer cannot take on a matter unless all of her colleagues can take on the matter. Clients thus have the allegiance of the entire law firm, not a single attorney. This also preserves confidential information in an era where everything sits in clouds, since, at least in theory, everyone is playing on the same team.

Like many solutions, however, this one encounters problems in the execution; when two attorneys are bound by different ethics rules, what rules apply? Or, to offer a more concrete example, imagine a New York attorney at the firm of Ruth & Torre LLP. Having had a streak of losses with their current counsel, the Yankees want to hire the New York Ruth & Torre attorney to represent them in the ongoing matter of Yankees v. Red Sox. The only hiccup is that Ruth & Torre just hired a lateral associate in their Boston office who previously worked on the matter for the Red Sox, doing low value tasks like document review. If only New York law applied, the rules would seem to be clear.[12] The Boston associate would seemingly be prohibited from representing the Yankees absent consent.[13] And the New York attorney, in turn, could not represent anyone that the Boston associate cannot represent, so Ruth & Torre is barred from working on the matter.[14] Under Massachusetts law, however, the issue would not necessarily be this stark; effective screening could be used, even without consent.[15]

But which rule applies? New York law simply instructs that an attorney cannot take on another matter that another lawyer in the firm would be prohibited from taking on under New York's rules. But the Boston associate is not bound by New York rules.

This is the type of matter that conflicts of law rules are supposed to address, but unfortunately those do not really solve the issue. In the case of a litigation, New York law says that New York law governs.[16] But it is unclear if this means that New York law can reach out and apply to a lawyer who had minimal contact with the state.[17] And for a nonlitigation matter the issue would only be more confused.[18]

Potential Solutions

Given this reality, what is a law firm supposed to do, other than hope for change?[19]

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[11] Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.10; MODEL RULES OF PROF'L CONDUCT R. 1.10(a).

[12] We use the word seemingly because, as described below, New York law is not necessarily as clear as the New York Rules would seem to be.

[13] Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.9(a) (''A lawyer who has formerly represented a client in a 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 the interests of the former client unless the former client gives informed consent, confirmed in writing.'').

[14] Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.10(c) (''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.'').

[15] Under the Massachusetts Rules:

> When a lawyer becomes associated with a firm, the firm may not undertake to or continue to represent a person in a matter that the firm knows or reasonably should know is the same or substantially related to a matter in which the newly associated lawyer (the ''personally disqualified lawyer''), or a firm with which that lawyer was associated, had previously represented a client whose interests are materially adverse to that person unless:
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> (1) the personally disqualified lawyer has no information protected by Rule 1.6 or Rule 1.9 that is material to the matter (''material information''); or
>
> (2) the personally disqualified lawyer (i) had neither substantial involvement nor substantial material information relating to the matter and (ii) is screened from any participation in the matter in accordance with paragraph (e) of this Rule and is apportioned no part of the fee therefrom.

Mass. R. Prof. C. 1.10(d).

[16] Specifically, the rule states that:

> (b) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:
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> (1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and
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> (2) For any other conduct:
>
> i. If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and
>
> ii. If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.5.

[17] This is particularly since the associate may not have even been admitted *pro hac vice*, so there would not necessarily even be a hook for New York law to use (unless of course, the Red Sox bring on a disqualification motion in New York).

[18] *See* C.E. Stewart, *Lawyers and the Border Patrol: The Challenges of Multi-Jurisdictional Practice*,15 N.Y. Bus. L.J. 17 (Summer 2011).

[19] Indeed, in 2011, an ABA group called the Commission on Ethics 20/20 identified this precise issue as a significant problem, but later declined to propose a solution. *See* C.E. Stewart, *Lawyers and the Border Patrol: The Challenges of Multi-Jurisdictional Practice*, 15 N.Y. Bus. L.J. 17 (Summer 2011). In 2010, the New York City Bar proposed that the New York Rules be amended to add a new paragraph to Rule 1.10 to provide that:

> Notwithstanding the foregoing, no conflict will be imputed hereunder where (i) a conflict arises under these rules

One solution, of course, would be to just turn down the Yankees assignment. But, that raises at least three problems. First, you might not be able to afford that house in the Hamptons you have had your eye on. Second, it places a burden on large law firms, requiring that all attorneys follow the rules in the most restrictive jurisdiction. This is essentially a tax on multijurisdiction law firms, favoring law firms that stay in jurisdictions that allow screening, and thus inhibiting the development of large firms that may benefit clients. At the same time, this rule severely limits the mobility of lawyers. In our example, if it hadn't been for the Boston associate, the firm of Ruth & Torre would have been able to take on a high profile (and presumably lucrative) matter. In an age of attorney layoffs and decreased vertical prospects for new attorneys, professional responsibility limits on the mobility of associates (let alone partners) are worrisome.

Alternatively, a law firm could take a more aggressive approach toward the issue.[20] Aside from just a nonrecommended ''devil may care'' attitude toward conflicts, New York case law on conflicts of interest is not necessarily as stark as the New York Rules would suggest. In *Kassis v. Teacher's Ins. & Annuity Ass'n*,[21] the New York Court of Appeals provided limited support for screening, concluding that ''where one attorney is disqualified as a result of having acquired confidential client information at a former law firm, the presumption that the entirety of the attorney's current firm must be disqualified may be rebutted.''[22] According to the *Kassis* court, rebutting a presumption of disqualification requires (1) that ''the party seeking to avoid disqualification must prove that any information acquired by the disqualified lawyer is unlikely to be significant or material in the litigation''[23] and (2) that the firm have adopted ''adequate screening measures to separate the disqualified lawyer and eliminate any involvement by that lawyer in the representation.''[24] It should be noted that the first part of this test is fact intensive. Indeed, the migratory attorney in *Kassis* was too involved for his new firm to successfully rebut the presumption.[25] It is also important to remember that *Kassis* only addresses disqualification; and it was decided under New York's previous ethics code, so its continued validity is not free from doubt. Courts have, however, applied *Kassis* in the recent past.[26]

In addition, this type of situation reinforces the general wisdom of using advance waivers. The comments to the New York Rules provide limited support for such waivers, requiring that the completeness of the disclosure, the extent of the client's understanding of the risks involved, and the procedures contemplated by the waiver all be assessed.[27] And while such advance waivers initially received a mixed reception, of late they have enjoyed more success in court.[28] To be sure, in the migratory attorney situation such waivers are of limited utility since an attorney's new firm will not be a signatory to the old firm's engagement letter. Such provisions can help, however, if the conflict involves two current clients. This is a particular problem for international law firms, since the conflicts rules in foreign jurisdictions can be very different from American rules. For example, one recent case centered around imputing a Hong Kong based representation onto United States litigators despite the fact that, at least according to the respondents on the issue, Hong Kong law would not have prohibited the adverse representation. An advance waiver (albeit in an unsigned engagement letter) prevented the court from having to delve into this thicket of competing regulatory schemes.[29]

Closing Thoughts

Large multistate law firms are certainly here to stay. And so, at least for the foreseeable future, are interstate differences in legal ethics rules.

With states increasingly concerned about migrating lawyers engaging in improper conduct (and tripping over each other in enforcement thereof),[30] the order of the day is caution: law firms need to stop, wait, and carefully analyze each new multijurisdictional matter, as well as each new multijurisdictional hire.

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from the conduct of lawyers practicing in another jurisdiction in accordance with such jurisdiction's rules of professional conduct, and (ii) such conduct is permitted by the rules of professional conduct of that other jurisdiction.

Association of the Bar of the City of New York Committee on Professional Responsibility, *Report on Conflicts of Interest in Multi-Jurisdictional Practice: Proposed Amendments to New York Rules of Professional Conduct 8.5 (Disciplinary Authority and Choice of Law) and 1.10 (Imputation of Conflicts of Interest)*, http://www.nycbar.org/pdf/report/uploads/20071895-ReportonConflictsofInterestinMulti-JurisdictionalPractice.pdf. Although this would have resolved the issue in a blanket fashion, four years later the proposed new language still has not been adopted.

[20] As a former Law School Dean (and legal ethics expert) once observed, big firm lawyers ''are some of the biggest risk-takers that I run into'' when it comes to conflict issues. *See* C.E. Stewart, ''The Legal Profession and Conflicts: Ain't No Mountain High Enough?,'' 11 N.Y. Bus. L.J. 7 (Fall 2007).

[21] 93 N.Y.2d 611, 717 N.E.2d 674, 15 Law. Man. Prof. Conduct 332 (N.Y. 1999).

[22] *Id.* at 617.

[23] *Id.*

[24] *Id.* at 618.

[25] *Id.* at 619-20.

[26] *See, e.g.*, *United States v. Kwiatkowski*, No. 14-CR-102-A, 2014 BL 181323 at *7 (W.D.N.Y. June 30, 2014) (concluding ''that the screening mechanisms presently in place are sufficient to ensure the absence of an actual conflict of interest and the appearance of impropriety''); *Town of Oyster Bay v. 55 Motor Ave. Co.*, 109 A.D.3d 549, 551, 970 N.Y.S.2d 798, 800 (2d Dep't 2013) (applying *Kassis*).

[27] *See* New York Rules of Professional Conduct, Rule 1.7, cmt. 22, http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=50671. The comments to the New York Rules have not been enacted.

[28] *See* C. Evan Stewart, *The End of Conflicts of Interest? Courts Warm Up to Advance Waivers*, 17 N.Y. Bus. L.J. 32 (Winter 2013).

[29] *See generally* Transcript, Macy's Inc. v. J.C. Penney Corp., Case No. 652861/2012, (N.Y. Sup. Ct. Oct. 5, 2012), aff'd, 968 N.Y.S.2d 64, 29 Law. Man. Prof. Conduct 393 (N.Y. App. Div. 2013). Whether the court reached the right result is open to question; *see also supra* n. 28.

[30] *See* H. Gunnarsson, ''Discipline Systems Still Playing Catchup in Policing Increasingly Mobile Attorneys,'' 30 Law. Man. Prof. Conduct 539 (Aug. 13, 2014).

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