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Two Years on: Conflicts, Disqualification Under 2009 Professional Conduct Rules

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In April 2009, New York's Rules of Professional Conduct, 22 NYCRR 1200.0 et seq. (2009 Rules) replaced the Code of Professional Responsibility that had formerly governed lawyer-client relationships. The preamble to the 2009 Rules clarifies that basic "touchstones" of the lawyer-client relationship underlie any conflict analysis. These are: the lawyer's obligation to assert the client's position under the rules of the adversary system, to maintain the client's confidential information except in limited circumstances, and to act with loyalty during the period of the representation. As had previously been the case, the new rules clarify that "violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer…."

The 2009 Rules incorporated several changes that are pertinent to attorney disqualification. A survey of cases decided since the new rules took effect indicates that in most circumstances courts and litigants have regarded the 2009 Rules as identical for all practical purposes to the Code of Professional Responsibility. Pre-2009 case law remains frequently cited and reliable guidance for practitioners considering whether or not to accept a representation, or whether to file a motion to disqualify an opponent. See, e.g., *Pierce & Weiss LLP v. Subrogation Partners LLC*, 701 F.Supp.2d 245, 251 (EDNY 2010) ("Even though the Canons have been replaced by the New York Rules of Professional Conduct, the new rules still incorporate much of the substance of the old rules… Therefore, much of the precedent interpreting the old rules still remains applicable") (citing *Merck Eprova AG v. ProThera Inc.*, 670 F.Supp.2d 201, 207-08 n. 1 (SDNY 2009)). Notwithstanding this analysis, as illustrated below, however, the 2009 Rules arguably narrowed duties owed to former clients in some respects, while broadening obligations in others.

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This article briefly summarizes the 2009 changes that are most relevant to identifying conflicts of interest and, relatedly, to attorney disqualification. The article then discusses exemplary published cases where courts have specifically considered the 2009 changes in the rules in resolving motions to disqualify.

Summary of Changes

Current Clients—Rule 1.7. Under the 2009 Rules, as before, significant restrictions exist on the concurrent representation of clients with different interests. Subject to certain exceptions set forth in subparagraph (b) of the Rule, Rule 1.7 provides that "a lawyer shall not represent a client if a reasonable lawyer would conclude that either: (1) the representation will involve the lawyer in representing differing interests; or (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests."

These provisions reflect, respectively, a broadening and narrowing of duties as compared to the rules they replaced. Where the disciplinary rule equivalent had permitted dual representation unless a reasonable lawyer would believe the client was likely to be "adversely affected by the lawyer's representation of another client," Rule 1.7(a)(1) sets out a per se ban on the representation of "differing interests."

By contrast, where the previously governing disciplinary rule proscribed dual representation if "the exercise of professional judgment on behalf of the client will be or reasonably may be affected," Rule 1.7(b) now permits such representation unless there is a *significant risk* that the lawyer's professional judgment on behalf of a client will be or is likely to be adversely affected." Rule 1.7(a)(2) (emphasis added).

Paragraph (b) of the rule permits representation notwithstanding a conflict under 1.7(a), other than in certain situations, including the express addition in the 2009 Rules of a requirement that informed consent be in writing, and the proviso that the representation cannot "involve the assertion of a claim by one client against another client represented by the lawyer in

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the same litigation or other proceeding before a tribunal." Rule 1.7(b) (3) and (4).

Screening—Rules 1.10 and 1.11. Rule 1.10, governing lateral movement in the private sector, contains no express provision for screening, in a continued departure from the ABA's Model Rules. Rule 1.11, however, creates an explicit scheme for the transition of government lawyers to private practice. Rule 1.11(a) provides that a former government lawyer "shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation."

Rule 1.11(c) provides that a lawyer/public servant who acquired "confidential government information" may not use that information on behalf of a private client where doing so would disadvantage a person to whom the confidential information pertains. Rule 1.11(c) contains no consent exception. Rule 1.11(b) provides that the rest of the lawyers in the firm may handle the matter if (1) the personally disqualified lawyer is promptly screened from the matter, and (2) no other circumstances in the particular representation create "an appearance of impropriety."

Prospective Clients—Rule 1.18. Prior to the 2009 Rules, some courts had extended the duties of confidentiality contained in disciplinary rule 5-108 to prospective clients, e.g., *Fierro v. Gallucci*, No. 06-cv-5189, 2007 WL 4287707, at 7 (EDNY Dec. 4, 2007), but the rules themselves did not expressly address the creation of duties where no attorney-client relationship ensued. Rule 1.18 eliminates any ambiguity and clearly states that "a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a "prospective client," to whom confidentiality obligations equal to those owed former clients are due "even when no client-lawyer relationship ensues." Rule 1.8 (a) & (b).

Unless prompt notification, written consent and screening are employed, and a reasonable lawyer could conclude that the representation is appropriate, neither a lawyer governed by the confidentiality provisions of the rule, nor his or her firm, shall represent a client with interests "materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter." N.Y. R. Prof. Conduct 1.18(c).

Lawyer as Witness—Rule 3.7. The changes to the provisions restricting lawyers who might be called as witnesses are relatively minor, but still represent a broadening of the prior limitations on such representation. The prior rule, Disciplinary Rule 5-102, governed situations where "the lawyer learns or it is obvious that" the lawyer is likely to be called as a witness, where Rule 3.7(a) of the Rules of Professional Conduct applies to situations where the lawyer is "likely to be a witness" on a significant issue of fact.

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Judicial Application

At least three courts have commented on current Rule 1.7's higher standard for conflicts of interest as compared to earlier rules. In *DeAngelis v. American Airlines*, No. 06-CV-1967 (NGG), 2010 WL 127005 (EDNY March 26, 2010), U.S. District Judge Nicholas Garaufis disqualified a law firm from simultaneously representing both an airline and its cleaning vendor in a slip-and-fall case. Judge Garaufis observed that "the Rules of Professional Conduct apply a different standard to conflicts of interest" than the disciplinary rules they superseded. Because of the per se bar on representing "differing interests," regardless of consent, disqualification was mandated based on the co-defendants' "starkly divergent" interests. These included the interest of each in trying to bear a lesser share of the damages, and relatedly "in defining their duties of care, notice and breach because each Defendant would benefit from shifting liability to the other."

Likewise, *Stevens Distribs. Inc. v. Gold*, 2010 WL 2984352, 2010 N.Y. Slip. Op. 31839 (Sup. Ct. 2010), though not an official opinion of the court, provides an interesting example of disqualification under Rule 1.7. The court held that an attorney could not simultaneously represent—in unrelated actions—both a plaintiff in one action and a partnership in which plaintiff's adversary in a different action held indirect interests. Even though the proceedings were unrelated, the court found the dual representation ran afoul of the express prohibition in Rule 1.7(b)(3) against simultaneous representation "in the same litigation *or other proceeding before a tribunal*." (emphasis in opinion). The court also found disqualification to be warranted pursuant to the language enacted in 2009 that proscribes representation of "differing interests," and quoted in full the broad definition of that term to mean "every interest that will adversely affect either the judgment or loyalty of a lawyer to a client…."

Another judicial analysis of what it means to have "differing interests" as that term is employed in the 2009 Rules, appears in *DeLorenz v. Moss*, 897 N.Y.S.2d 669, 2000 N.Y. Slip. Op. 51519 (U) (Sup. Ct. Nass. Co. 2009). In that case, plaintiff moved to disqualify defense counsel from representing either of two defendants in the damages phase of a vehicular accident case. Defendants had divorced following the accident, and after defense counsel asked to be relieved of representing one defendant, plaintiff sought to disqualify the lawyer from representing either defendant.

The Supreme Court, Nassau County, rejected each of the grounds that plaintiff contended rendered the parties' interests "materially adverse." Even though one defendant might testify adversely against her former spouse concerning punitive damages, the court held that such testimony would be solicited by plaintiff's attorney, not defendants', and there had been no showing of any potential abuse of confidences.

Though ultimately finding that defendants had intentionally waived any conflict, the court took care to note that the request to withdraw was valid. "While [the former spouses'] interests do not appear to be 'materially adverse,' they were certainly 'differing interests' as that term is defined by the New Rules." Id. at 4. Accordingly, "as a 'differing interest' is broader in scope and reach than a 'conflicting interest,'" defense counsel reasonably could have concluded that withdrawal was necessary. Id.

Chernick v. Lehman Brothers Inc., 909 N.Y.S.2d 285 (Sup. Ct. New York Co. 2010) focused on Rule 1.11, and contains one of the most thorough analyses of the 2009 Rules since their implementation. The *Chernick* case involved a motion to disqualify a law firm based on the hiring of a former government attorney. The firm countered that it had sufficiently "screened" the conflicted attorney from an ongoing federal prosecution to avoid disqualification. In granting the motion to disqualify, Justice James Yates analyzed similarities and differences between the 2009 Rules, disciplinary rules, and ABA Model Rules—in particular, the re-promulgation of screening provisions in Rule 1.11—in deciding that the 2009 Rules were intended to endorse attorney screening despite prior judicial disfavor. Nevertheless, Justice Yates concluded that disqualification was required, based on a careful reading of Rule 1.11 and its commentary.

Justice Yates focused on the proviso (which does not appear in the Model Rules) that "there must be no other circumstances in the particular representation that create an appearance of impropriety." He also construed the requirement that attorneys in a screening firm be given notification "as appropriate" to mean "at the very least, clear, unequivocal direction to other attorney in the firm," albeit "the Rules do not require written notice in every case," and indeed are "sparing and selective in requiring 'written' notice as a general matter. The court also noted the caution in the comments that "if a personally disqualified lawyer is working on other matters with lawyers who are participating in a matter requiring screening, it may be impossible to maintain a screen."

The express codification of duties to prospective clients in Rule 1.18 of the 2009 Rules, which previously had existed only at common law, dictated the outcome in *Miness v. Ahuja*, __F. Supp.2d__, No. 09-cv-2794 (ADS), 2010 WL 5646077 (EDNY July 31, 2010). Although the decision expressly indicates that it is confined to the facts of the specific case, Judge Arthur Spatt's application of Rule 1.18 is of significant interest to attorneys in both the social and professional contexts.

In *Miness*, the party seeking disqualification was a long-time member of the same golf club as the attorney he sought to disqualify. The two were close friends who breakfasted and played golf together regularly. Although the moving party and the allegedly disqualified attorney differed sharply in their accounts of information conveyed during the relationship, the party seeking disqualification alleged that during the course of the friendship he had confided business concerns that could be useful to an opponent. The moving party had never employed his attorney friend, and the opinion recites that the attorney-friend had never solicited business, having been informed that a different firm had been retained for all business matters. The attorney had, however, advised his friend that he was there if the friend needed him, including to provide services for his business.

In granting Michael Miness' motion to disqualify, Judge Spatt noted that prior to 2009, there had been two "traditional" grounds for disqualification in federal court: (i) whether a conflict undermines the client's confidence; or (ii) where the attorney might be in a position to misuse information acquired during a prior representation. Judge Spatt viewed the 2009 Rules as codifying a "third basis," by adding duties to potential clients that had "no direct analogue in New York's pre-April 2009 disciplinary rules." Id. at 13.

Though acknowledging "without a doubt, Mr. Miness was not a prototypical 'prospective client,'" Judge Spatt determined that in the totality of the circumstances, including the long-time friendship, the discussion of business matters including those at issue in the litigation, and the offering of services, Mr. Miness was indeed a prospective client to whom duties were owed under Rule 1.18. Turning to the issue of whether his friend ever acquired confidential information that could be "significantly harmful," the court found that prong was satisfied as well.

Conclusion

Inevitably, more situations will arise where the precise textual choices made by the drafters of the 2009 Rules determine whether or not attorneys may be disqualified. The lessons thus far are several. First, in assessing conflicts, be attuned to all "differing interests," not merely those that are "materially adverse." Carefully analyze how the interests not only of clients, but of affiliated parties, might diverge. This means, of course, asking the right questions to discover the existence of other litigations (since the rule governs representation before "any" tribunal).

Second, if you decide that screening may be a way to wall off a potentially conflicted lawyer, prudence would seem to dictate written notice. Promptness and formality are essential. Though a court may accept that the best intentions were had by all, a written record of timely and stringent notification streamlines the necessary inquiry and increases the likelihood of a finding in your favor.

And third, perhaps most importantly, be cautious in dispensing advice. Take to heart the caution that confidentiality obligations may, in some circumstances attach even where no attorney-client relationship ensues.

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