

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

FORMAL OPINION 2003-03

CHECKING FOR CONFLICTS OF INTEREST

Topic: Conflicts of Interest; Recordkeeping, Policies, and Systems for Conflicts-Checking Purposes

Digest: Under DR 5-105(e) of the New York Code of Professional Responsibility, all law firms must keep records and must have policies and systems in place to check for conflicts of interest to the extent necessary to render effective assistance to the lawyers in the firm in avoiding imputed conflicts under DR 5-105(d) based on current or prior engagements. What records the firm must keep, and what policies and systems the firm must implement, depends on a number of factors, including (a) the size of the firm, (b) where the firm practices, and (c) the nature of the firm's practice.

Code: DR 5-105(d); DR 5-105(e)

Question

What records must a law firm keep, and what policies and systems must a law firm implement for checking proposed engagements against current and previous engagements, to comply with New York's mandatory conflict-checking rule, DR 5-105(e)?

Opinion

On May 22, 1996, effective immediately, the Appellate Divisions adopted DR 5-105(e) of the New York Code of Professional Responsibility. In essence, the rule requires every New York law firm to keep records and implement policies and systems that effectively assist the firm in complying with New York's imputed conflicts rule, DR 5-105(d), with respect to conflicts caused by the firm's current and previous engagements.

DR 5-105(e) was drafted by the courts sua sponte. It was not based on any formal proposal by the Bar. It was adopted as part of the package of new and amended rules (also including DR 1-102 and DR 1-104) that made law firms as entities subject to discipline in New York. The requirements of the rule are not well defined or understood. The New York State Bar Association has not adopted any Ethical Considerations to explain DR 5-105(e); not a single court case has discussed the rule; and only one bar association ethics committee opinion has discussed DR 5-105(e) at any length—see N.Y. State Opinion No. 720 (1999), 1999 WL 692571. The rule is unique to New York—no other jurisdiction has adopted a rule anything like it—so other jurisdictions provide minimal guidance. At least one article has been written about the rule—see Roy Simon, *Checking for Conflicts Under DR 5-105(e)*, New York Professional Responsibility Report, November 2002—but little formal guidance is available about the rule and its

requirements. Accordingly, this Committee has been asked to render guidance to the Bar regarding the requirements imposed on law firms by DR 5-105(e).

Discussion

The three sentences of DR 5-105(e) (which we quote verbatim below but break into separate paragraphs for greater clarity) provide as follows:

- “A law firm shall keep records of prior engagements, which records shall be made at or near the time of such engagements and shall have a policy implementing a system by which proposed engagements are checked against current and previous engagements, so as to render effective assistance to lawyers within the firm in complying with DR 5-105(d).”
- “Failure to keep records or to have a policy which complies with this subdivision, whether or not a violation of DR 5-105(d) occurs, shall be a violation by the firm.”
- “In cases in which a violation of this subdivision by the firm is a substantial factor in causing a violation of DR 5-105(d) by a lawyer, the firm, as well as the individual lawyer, shall also be responsible for the violation of DR 5-105(d).”

The text of DR 5-105(d), to which DR 5-105(e) refers four times, 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.”

This opinion will focus only on the first sentence of DR 5-105(e), with particular emphasis on the type and quality of records that a law firm must keep and the policies and systems the law firm must implement for checking proposed engagements against current and previous engagements.

What is a “law firm”?

Because DR 5-105(e) applies only to a “law firm,” we begin by briefly exploring the scope of the term “law firm.” The New York Code of Professional Responsibility (the “Code”) (at 22 N.Y.C.R.R. § 1200.01) defines the term “law firm” as follows:

““Law firm” includes, but is not limited to, a professional legal corporation, a limited liability company or partnership engaged in the practice of law, the legal department of a corporation or other organization and a qualified legal assistance organization.”

This definition of course encompasses large law firms, corporate legal departments, governmental legal departments, and non-profit law firms. We also believe that a solo

law practice, whether or not it is organized as a professional corporation or a limited liability company, is a "law firm" within the meaning of DR 5-105(e).

In addition, since the definition of "law firm" in the Code "is not limited to" traditional law firms and legal departments, the term has been applied for conflicts purposes to other practice arrangements. For example, as this Committee and other ethics committees have opined, lawyers in some practice arrangements must check for conflicts of interest as if they were a single law firm. See, e.g., ABCNY Opinion No. 80-63 (1980) (two firms that shared offices could not represent opposing parties in litigation because of the "strong likelihood" that the separate law firms could not maintain the confidences and secrets of their respective clients); N.Y. County Opinion No. 680 (1990), 1990 WL 677022, *2 ("Even though lawyers who share office space are not partners, they may be treated as if they were partners for some purposes under the Code (particularly the provisions for vicarious disqualification in the event of a conflict of interest)" if they share confidential information.) ABCNY Opinion No. 1995-8 (1995) (when law firms are "of counsel" to each other one-unit conflicts checking is required); ABCNY Formal Op. 1996-08, 1996 WL 416301, *3 ("of counsel" relationships are treated as if the 'counsel' and the firm are one unit").

We think DR 5-105(e) applies to these "constructive" law firms as well as to more traditional firms. In short, we believe DR 5-105(e) applies to a wide range of practice arrangements. We concentrate the remainder of this opinion on private law firms, but the principles and concepts discussed here apply in some fashion to other types of law firms as well, including the legal departments of corporations and government agencies.

Fundamentals of DR 5-105(e)

The essence of the first sentence of DR 5-105(e) is to require every law firm to do two things: (1) create a record of each new engagement at or near the time the engagement commences; and (2) have a policy implementing a system for checking proposed engagements against current and previous engagements. The rule does not specify what records a firm must keep, or what type of policy and system a firm must implement to check proposed engagements against current and previous engagements. Rather, the rule indicates simply that whatever systems are adopted should "render effective assistance to lawyers within the firm" in complying with their obligation to avoid conflicts that would violate DR 5-105(d).

At a minimum, to assist in complying with DR 5-105(d), we think that all firms should have mechanisms for assisting lawyers in identifying and resolving two types of conflicts arising from current or previous engagements that are expressly covered by DR 5-105(d):

- Conflicts among current clients, whether the conflicts arise before or during the engagement – see DR 5-105(a) and (b); and
- Conflicts with former clients, including the former clients of laterals and their former firms – see DR 5-108(a) and (b).

DR 5-105(d) also embraces conflicts that arise under DR 9-101(b) when a private law firm hires lawyers who formerly served as public officers or employees. However, because conflicts with former government lawyers are complicated by laws and rules governing grand jury secrecy, the secrecy of investigative information acquired by the government, governmental privileges, and other factors that make public officers and employees substantially different from private lawyers, this opinion does not address systems for checking the conflicts of former public officers and employees.

What kind of system is required to check for conflicts with current and former clients will turn on the nature of each law firm. In particular, the specific measures that DR 5-105(e) requires will depend on factors such as: (a) the size and structure of the firm; (b) the nature of the firm's practice; (c) the number and location of the firm's offices; (d) the relationship among the firm's separate offices; and (e) other characteristics of the law firm and its operations. The records, policies, and systems will vary from law firm to law firm. But all law firms, whatever their particular characteristics—large or small, urban or rural, litigation or transactional, governmental or private—must keep certain minimum records and implement certain minimum policies and systems suitable to provide effective assistance to the firm's lawyers in avoiding conflicts arising from current or former engagements and that will be imputed to the firm under DR 5-105(d).

Recordkeeping Requirements

The first sentence of DR 5-105(e) begins with a mandate for recordkeeping. It provides, in part, that a law firm "shall keep records of prior engagements . . . made at or near the time of such engagements. . . ." The expressly stated purpose of this recordkeeping requirement is to assist lawyers in the firm in avoiding conflicts of interest that will be imputed to the entire firm under DR 5-105(d) (discussed above). The rule raises a number of questions, which we address one at a time.

1. What are "records"?

To get one preliminary point out of the way quickly, we think the term "records" refers to written or electronic records. Information inside a lawyer's head that has not been written down does not qualify as "records." Thus, even solo practitioners must keep written or electronic records to comply with DR 5-105(e).

Moreover, those records must be maintained in a way that allows them to be quickly and accurately checked for possible conflicts. Thus, the mere fact that the law firm has information about clients and engagements written down in the individual files pertaining to each matter does not satisfy the "records" requirement. It is simply not realistic to think that a law firm can search through every paper file and folder to look for conflicts each time the firm considers a proposed new engagement. However, if the law firm opens electronic files on all of the law firm's clients and prospective clients, and if those records are electronically searchable (as all word processing programs and law practice management programs appear to be), then those electronic files will qualify as "records" for purposes of DR 5-105(e). In other words, the key characteristic that qualifies information as "records" under DR 5-105(e) is that the information can be systematically

and accurately checked when the law firm is considering a proposed new engagement.

2. When must the required records be made?

DR 5-105(e) provides that the required records of prior engagements "shall be made at or near the time of such engagements...." We think this language is largely self explanatory. If the records are made at the inception of a new engagement, that obviously satisfies the rule. If the records are not made at the inception of a new engagement, however, DR 5-105(e) allows them to be made "near" the time the engagement begins. To satisfy that alternative requirement, we think the records must ordinarily be made in time to assist in checking for conflicts by the next time a proposed new engagement comes along. In many law firms, proposed new engagements (including new matters for existing clients) come along every day or every few days. Thus, we think DR 5-105(e) requires that law firms make the necessary records within days, not weeks, after commencing a new engagement. The best practice is to make the records at the time engagements commence, but the rule allows some leeway by using the word "near." In addition, even though it is not required by DR 5-105(e), the best practice would also be to update the records periodically with additional parties or other pertinent information, for example where a complaint is amended to add new parties or where there are other developments with respect to a matter that might create a conflict under another rule. However, the Committee expresses no view in this opinion on whether other rules require such updating.

3. How far back in time must records go?

DR 5-105(e) took effect on May 22, 1996. Since that date, law firms have been obligated to "keep records of prior engagements...." However, nothing in the rule suggests that law firms were required to develop a comprehensive list of prior engagements going backward in time from May 22, 1996. As a practical matter, the rule contemplated only that law firms would begin keeping records of all engagements (including engagements already underway on May 22, 1996) starting on the rule's effective date. With these records in place the firm can determine whether it needs to fill in gaps in past records to provide effective assistance to the firm in avoiding conflicts.

4. How must the records be organized?

Merely recording information about current and previous engagements will not accomplish anything unless the information is readily accessible. The Committee therefore believes that the required records must be kept in a way that permits efficient access to the information they contain. Many methods are possible, but one straightforward method would be to list clients and former clients (perhaps alphabetically) and to list engagements undertaken for each client (perhaps in chronological order) under each client name. Regarding adverse parties, a firm should probably maintain a list, cross-referenced to the client and matter in which the adverse parties were involved. But a law firm may use any method that makes it possible for the firm to check the records in a timely fashion, and the type and organization of the records may depend largely on, among other things, the software and search engine employed to create and check the records.

5. What records must a law firm keep?

Unfortunately, DR 5-105(e) is silent about the type of records that a firm must maintain. It says only that the records are to provide "effective assistance" to lawyers within the firm in avoiding new engagements that would create a conflict of interest based on other current engagements or previous engagements. We therefore now address what records we think DR 5-105(e) requires.

The nature of the records needed to render effective assistance to lawyers in the conflict clearing process will vary depending on the size, structure, history, and nature of the law practice at issue. An example of a law firm near one end of the spectrum is a solo practitioner, concentrating solely in plaintiffs' personal injury matters, who has just begun to practice law. Such a law firm has relatively few clients and former clients and may need only the simplest written records to jog the lawyer's memory sufficiently to recognize and avoid conflicts. Toward the other end of the spectrum, presenting different and more complex problems, is an established law firm with hundreds of lawyers practicing in multiple domestic and foreign offices. Such a firm typically has thousands or tens of thousands of clients and former clients, many of them large corporate clients with affiliates and subsidiaries and with names that may have changed over time. In such a firm, fairly complex records will be needed to check effectively for conflicts. Somewhere in the middle of the spectrum are law firms with five or ten or twenty lawyers that have been in business for a decade or more. The nature of the records needed to check for conflicts in these mid-sized firms will depend on many factors.

As an initial matter, we note that several options are theoretically open regarding recordkeeping requirements. One option is a standard recordkeeping requirement specifying in detail the precise data that all firms must keep. We reject that option because it would ignore the substantial differences among firms. An alternative option is to adopt a variable recordkeeping requirement so that the nature of the required records depends on the size and nature of the law firm, its practice, and its lawyers. We adopt that option because a variable requirement takes into account the differences among firms and recognizes that firms may have to change the nature of their records as they grow and change. However, this Committee is not capable of specifying in detail the nature of the records that each type and size of firm must keep. Rather, we specify in general terms only the rock-bottom minimum records that we think all law firms must keep, no matter how small or specialized. But we caution that as law firms grow larger and more complex, they will find it increasingly difficult to fulfill their conflict checking duties unless they keep more than the minimum records that we believe are mandated by DR 5-105(e) (We address additional desirable information that might be maintained toward the end of the opinion, when we discuss systems for checking particular types of conflicts.)

Against this background, and for the reasons given below, the Committee believes that the following records are the minimum that any lawyer or private law firm must keep in order to comply with DR 5-105(e):

1. **Client names.** The full and precise name of each client the firm currently represents.

2. **Adverse party names.** The precise names of parties involved in a matter whose interests are materially adverse to each party the firm represents.

3. **Description of engagement.** A brief description of each engagement or prospective engagement.

With this basic information at hand, a law firm should be able to detect most potential conflicts involving clients or former clients before accepting any proposed new engagement. With less information in its records, many conflicts could not be detected. For example, without the client information, the remaining firm data would be useless in assisting lawyers in avoiding conflicts. Without adverse party information, a firm could not determine whether it was already acting adversely to the interests of a person or entity it later might seek to represent. Without a brief description of each engagement, a law firm could not judge whether a proposed new engagement would create conflicts with former clients. Of course, after identifying a potential conflict, a law firm may need to conduct factual and legal investigation to determine whether a prohibited conflict actually exists or is likely to develop. But the basic information outlined above should render effective assistance to most firms in putting them on notice that possible conflicts exist and that further study may be required.

We have not interpreted DR 5-105(e) to require records of the financial, business, property, or personal interests that may create conflicts under DR 5-101(a). Personal conflicts are not current or previous "engagements," so they are not within the scope of DR 5-105(e). We do not address whether any other provision of the Code requires a law firm to check for conflicts arising under DR 5-101.

Regarding records of prior engagements, we note that since March 4, 2002, a new court rule entitled "Written Letter of Engagement" (22 N.Y.C.R.R. Part 1215) has required all New York lawyers to provide written letters of engagement to clients in every matter where fees are expected to be \$3,000 or more unless the client has previously paid the attorney for services "of the same general kind" or the matter is a domestic relations matter (in which case a written retainer agreement is required — see 22 N.Y.C.R.R. § 1400.3). For firms that do not have many repeat clients, such as firms that handle personal injury work, the written engagement letters required by Part 1215 will, in the normal course, identify the client and describe the nature of the representation in enough detail to satisfy the basic recordkeeping requirements we have set out above. (The firm will either have to record adverse parties separately or add that information to the engagement letters, however.) More elaborate engagement letters may also define who is not the client (e.g., "The firm does not represent any of the client's affiliates or subsidiaries" or "The firm represents you but not your spouse even though you and your spouse own your home as joint tenants"). Indexing or cataloging engagement letters may be one way to keep records of prior engagements at or near the time of the engagements. But engagement letters will not provide information about each new engagement if firms do not issue new engagement letters to clients who have previously paid for legal services of the same general kind, or for clients whose matters were never expected to generate \$3,000 or more in legal fees.

While much additional information could be maintained to assist in the conflicts research process, it is difficult to argue that DR 5-105(e) requires information beyond the basic information necessary to put lawyers on notice that a potential problem exists. What law firms do with that basic information—what “system” they use to check for conflicts—is a separate and more difficult question, to which we now turn.

Policies and Systems for Checking for Possible Conflicts

In addition to mandating that law firms keep records, DR 5-105(e) requires every law firm to have “a policy implementing a system by which proposed engagements are checked against current and previous engagements,” again with the stated aim of rendering “effective assistance to lawyers within the firm in complying with” DR 5-105(e)’s purpose to avoid conflicts arising from current or previous engagements.

1. What is a “system”?

An initial question is: What is a “system” within the meaning of DR 5-105(e)? The wording of DR 5-105(e) is curious: While the rule requires law firms to maintain “records of prior engagements,” it does not expressly require the law firm to check those records when checking proposed engagements for conflicts. Rather, DR 5-105(e) simply requires a law firm to establish a policy and system “by which proposed engagements are checked against current and prior engagements . . .” (We do not believe that the word “policy” adds anything significant to the word “system,” so we focus only on the meaning of the word “system.”) Taken literally, a “system” for checking proposed engagements against current and previous engagements would not necessarily require checking the written records. No doubt some solo practitioners use a “system” of consulting their memories alone, and some small law firms (and perhaps even some mid-sized law firms) use a “system” of talking to a partner with a good memory or asking around the firm (orally or via email or memo) to find out whether anyone knows of a conflict with a proposed engagement.

This Committee does not believe that any of those relatively informal methods of checking for conflicts would qualify as a “system” within the meaning of DR 5-105(e). Rather, we think DR 5-105(e) requires that a “system” of checking for conflicts within the meaning of DR 5-105(e) must include systematically consulting the “records” that must be kept to satisfy the opening clause of the rule. Less formal methods of checking for conflicts may of course be used (and may have to be used) to supplement a systematic check against those records, but we think it would be pointless to require a law firm to maintain written “records” but not require the law firm to consult those records as part of its conflict checking “system.”

2. Essential elements of a “system.”

We have just said that a “system” must include systematically consulting the “records” required by DR 5-105(e). What else must a system include to meet the requirements of DR 5-105(e)?

Because law firms vary in size, structure, practice areas, and history, the systems that will provide "effective assistance" in checking for conflicts within the meaning of DR 5-105(e) will depend on many factors. Sole practitioners and very small firms (five lawyers or less, all practicing in a single location) may not need to do much more than check their records and consult with other lawyers in the firm about any questions triggered by the records. As firms grow larger and build up a larger base of prior engagements, and as their practices grow more diverse, law firms may need to install software systems to check the records for conflicts rather than checking the records in a rudimentary fashion. See *Pennwalt Corp. v. Plough, Inc.*, 85 F.R.D. 264 (D. Del. 1980) (law firms should make maximum use of technology to aid in avoiding conflicts). Some firms will be able to use commercial software programs "off-the-rack," but other firms, especially those with larger or more complex practices, may need to seek technical assistance to tailor the software program to the firm's particular needs.

If consulting the records leads to missing too many potential conflicts, and thus is not providing "effective assistance" to the firm in ferreting out conflicts with current and previous engagements, the firm will need to supplement the records check. Small firms may be able to do this through personal communications among key partners (or all partners) at the firm, either in writing or orally. Larger firms, especially those with more than one office, may need to supplement their records with email, formal written memos circulated throughout the firm, or other communication methods—electronic and traditional—designed to reach lawyers who may have relevant information about possible conflicts.

Many law firms (perhaps most firms) will be able to satisfy DR 5-105(e) by implementing a system that checks only the basic information that the rule requires (client names, adverse party names, and brief description of each engagement), supplemented by other types of communications and records checks to resolve any questions and detect certain types of conflicts not readily discoverable through a records check alone. In larger or more complex practices, however, an effective system will depend not only on a check of the records database but also on the ability of lawyers in the firm to communicate with others in the firm who have relevant information, to gain access to the firm's client files or other information regarding particular engagements, and to obtain more information readily upon request.

We believe that most firms afford access to information relevant to client engagements (except to the extent certain files have been screened off from particular lawyers). We also believe that virtually all large firms make it easy for a lawyer in the firm to communicate with other lawyers in the firm by email or other means. The more difficult question is the third element: What other information must be readily available upon request to supplement the basic records that all firms must keep? We turn to that complex question.

Systems for Checking Particular Types of Conflicts

In this section we discuss special considerations that may affect the system a law firm uses to check for conflicts arising under DR 5-105 and DR 5-108. We note, however, that we believe that the fact that a law firm is disqualified from a matter under these (or any other) rules does not necessarily mean that the law firm violated DR 5-105(e), and, furthermore, that keeping records required by DR 5-105(e) is not, in and of itself, a defense to a disqualification motion under DR 5-105, DR 5-108, or any other rules.

1. Conflicts with current clients.

The law is well established in New York that a law firm may not oppose a current client in any matter—even a totally unrelated matter—unless the law firm satisfies the “disinterested lawyer” test and obtains the informed consent of each client affected by the conflict. See, e.g., DR 5-105; *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976). Moreover, whenever two or more of a law firm’s current clients are involved in the same litigation or transaction, even on the same side, the potential for conflict – and for a violation of DR 5-105(d) – is present. The records that include the names of all current clients, plus information available to the person checking the proposed engagement for conflicts, should usually be sufficient. That information will ordinarily be enough to alert the firm to investigate potential conflicts that arise when a law firm is opposing a current client, or when more than one current client is involved in the same transaction or litigation. However, concurrent client conflicts come in so many varieties that no single system of checking for conflicts will detect them all. We therefore address here some special situations that illustrate the practice-specific nature of conflict-checking systems.

(a) Corporate family conflicts.

When a law firm desires to oppose an entity that belongs to a current client’s corporate family (e.g., an affiliate, subsidiary, parent, or sister corporation of a current corporate client), a concurrent client conflict may arise. Whether such a conflict is disqualifying will depend on many factors, including the relationship between the two corporations and the relationship between the work the law firm is doing for the current client and the work the law firm wishes to undertake in opposition to the client’s corporate family member. See, e.g., *Discotrade Ltd. v. Wyeth-Ayerst Int’l, Inc.*, 200 F. Supp. 2d 355 (S.D.N.Y. 2002) (granting motion to disqualify); *JPMorgan Chase Bank v. Liberty Mutual Ins. Co.*, 189 F. Supp. 2d 20 (S.D.N.Y. 2002) (granting motion to disqualify); *Brooklyn Navy Yard Cogeneration Partners L.P. v. PMNC*, 254 A.D.2d 447, 679 N.Y.S.2d 312 (2d Dep’t 1998) (denying motion to disqualify); see generally ABA Formal Opinion No. 95-390 (1995) (no automatic disqualification when a law firm opposes a corporate client’s affiliate); N.Y. County Opinion 684 (1991), 1991 WL 755940 (attorney may, under certain circumstances, accept employment in a matter adverse to a subsidiary of a corporate client if the adverse action would not materially affect the corporate client’s interests).

We would not require a law firm to maintain records showing every corporate affiliate of every current client. However, if a law firm frequently represents corporations that belong to large corporate families, then the firm should have some system for alerting the firm to potential conflicts with the members of the corporate client’s family. One

possibility is to explore the corporate family tree of proposed new adversaries to determine whether the adversary is related to other current clients of the firm. This search may require the law firm to maintain its own database of corporate family members; or the firm may decide to use a commercial service for that purpose; or the firm may directly ask its current clients. If the firm discovers a potential conflict with a corporate family member, the firm can conduct the appropriate research to determine whether the current client's consent is necessary. Not all law firms need such a system, but some kind of system will be necessary to render effective conflict-checking assistance to firms whose clients have many affiliates, subsidiaries, and other corporate relatives. (The same research will often be required to determine whether a proposed engagement will create a conflict with a former client – see the discussion of former client conflicts below.)

(b) Corporate constituents.

When a law firm represents an entity, DR 5-109(a) provides that the law firm “is the lawyer for the organization and not for any of the constituents.” The first sentence of EC 5-18 of the Code is even more explicit: “A lawyer employed or retained by a corporation or similar entity owes allegiance to the entity and not to a shareholder, director, officer, employee, representative, or other person connected with the entity.”

Nevertheless, especially when a law firm represents a small or closely held corporation with few shareholders, or when the law firm appears on behalf of individual officers or employees but bills the corporate client for the legal services, an attorney-client relationship does or may develop—intentionally or unintentionally—between the law firm and one or more individual constituents of the entity. See, e.g., *Rosman v. Shapiro*, 653 F. Supp. 1441 (S.D.N.Y. 1987) (50% shareholder of a closely held corporation was a client of law firm that represented the corporation); *Cooke v. Laidlaw, Adams & Peck, Inc.*, 126 A.D.2d 453, 510 N.Y.S.2d 597 (1st Dep’t 1987) (corporate officer was considered client of law firm that represented corporation because law firm appeared on behalf of officer in an SEC proceeding). Accordingly, a law firm that represents corporate clients may need a system for determining whether the law firm has an attorney-client relationship with individual constituents of a client organization and, if so, should add the names of those clients to its records database.

(c) Trade association members.

A law firm that represents a trade association ordinarily represents only the trade association and not the members of the trade association. However, an attorney-client relationship between the law firm and a member may arise if a member provides the law firm with confidential information. In that instance, the law firm will be restricted in its freedom to oppose the member. See, e.g., *Glueck v. Jonathan Logan, Inc.*, 653 F.2d 746 (2d Cir. 1981) (trade association member may be a “vicarious” client); *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978) (a client is no longer merely a person who walks through the door); ABA Formal Opinion 92-365 (1992) (whether a lawyer for a trade association also represents members of the association is a question of fact). If a law firm represents a trade association, its conflict-checking system should enable attorneys to determine whether members of the trade association are also clients. If so, the law firm should add the member's name to the records identifying the firm's clients.

2. Conflicts with former clients.

(a) The law firm's own former clients.

Under DR 5-108(a) (entitled "Conflict of Interest—Former Client"), except with the consent of a former client after full disclosure, or in compliance with the special provisions of DR 9-101(b) for former public servants, 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." In short, absent the former client's informed consent, or absent an information screen and other procedures mandated by DR 9-101(b) for conflicts involving former public servants, a lawyer may not oppose a former client in the same or a substantially related matter.

Because conflicts with former clients are common, we think every law firm must have a system for discovering such conflicts. If the law firm consistently maintains its database of clients and former clients, then checking each proposed engagement against that list should be adequate. If a probable adverse party turns out to be one of the firm's former clients, the firm will know that it should look further into the situation to see whether the former client's consent is required.

Unfortunately, it will not always be clear whether a particular person is a current client or a former client. See, e.g., *Oxford Sys. Inc. v. CellPro, Inc.* 45 F. Supp. 2d 1055 (W.D. Wash. 1999); *SWS Financial Fund A v. Salomon Bros., Inc.*, 790 F. Supp. 1392 (N.D. Ill. 1992); *Lama Holding Co. v. Shearman & Sterling*, 758 F. Supp. 159 (S.D.N.Y. 1991). This is not the place for a comprehensive discussion of the factors that will enable a law firm to distinguish between current clients and former clients, or to tell when a current client has become a former client.

However, to provide effective assistance to the firm in avoiding conflicts with current clients, a law firm's conflict-checking system should include some means of determining whether a client remains a current client or has become a former client.

(b) The former clients of laterals.

When a lawyer moves from one private law firm to another private law firm, the clients that the lawyer personally represented at his or her prior law firm are potential sources of conflict for the new law firm. See, e.g., *Kassis v. Teachers Ins. and Annuity Ass'n*, 93 N.Y.2d 611, 695 N.Y.S. 2d 515 (1999) (disqualifying a firm that hired a lawyer who had actively worked on litigation in which the old and new firms were opposing counsel, where the litigation was still pending when the lawyer changed firms); N.Y. State Opinion 723 (1999) (discussing the DR 5-108); (N.Y. State Opinion 720 (1999), 1999 WL 692571, at *2 ("[W]e believe that the intent of [DR 5-105(e)] can only be effected if a firm adds to its system information about the representations of lawyers who join the firm"). Under DR 5-108(b), absent the former client's informed consent, a law firm that hires a lateral may be disqualified from acting adversely to a client of the lateral's former law firm in a matter substantially related to the former firm's representation of that client if the lateral, while at the former firm, "acquired information protected by DR 4-101(b)

that is material to the matter," even if the lateral never personally represented the client in question at the former firm.

Accordingly, since DR 5-105(e) specifically applies only to prior engagements of the law firm itself, if a law firm hires lawyers laterally from other law firms, the hiring firm should include in its conflict-checking system a means for determining which clients the lateral lawyer personally represented while at his or her former firm. At the same time, while it is not required under DR 5-505(e), it would be prudent for the firm to consider what, if any, other steps it might take with regard to other matters about which the lateral lawyer acquired protected information while at the former firm. In either event, the information from the lateral's former firm should be obtained only insofar as it is possible to do so in a manner that is consistent with the lateral's obligations to his or her former firm and its clients. See, e.g., N.Y. State Opinion 720 (1999) 1999 WL 692571 (discussing lateral's duties to protect former clients' confidences and secrets, as well as contractual or fiduciary restrictions the lateral may be subject to regarding the disclosure of information proprietary to the lawyer's former firm).

Types of Conflicts Not Addressed in This Opinion

The subject of conflicts of interest is vast, and we have discussed only a small portion of the field. There are many other areas that we have not discussed but that law firms may have to consider when checking for conflicts pursuant to DR 5-105(e). These include (a) conflicts arising in class actions; (b) conflicts that arise when lawyers in a firm invest in client ventures (either directly or in lieu of fees – see ABCNY Opinion 2000-3 (2000), 2000 WL 33769162; (c) conflicts that arise when lawyers in the firm serve on a client's Board of Directors; (d) conflicts that arise in connection with an insurance triangle; (e) conflicts with nonlawyers (such as paralegals and secretaries), especially those who have previously worked at another law firm (including the legal department of a corporate adversary); (f) conflicts arising from the use of temporary lawyers who concurrently work or have in the past worked at other law firms; (g) conflicts that arise when lawyers represent or are represented by other lawyers; (h) conflicts that arise when a current client is an adverse witness; (i) conflicts involving former public servants; and (j) the special conflict issues that may arise in connection with beauty contests or other business development activities. Each firm should survey the extent to which these special varieties of conflicts are pertinent to the firm's practice and should adopt measures to detect and deal with them.

Conclusion

Under DR 5-105(e) of the New York Code of Professional Responsibility, all law firms must keep records and must have policies and systems in place to check for conflicts of interest to the extent necessary to render effective assistance to the lawyers in the firm in complying with New York's rule on imputed conflicts, DR 5-105(d). The records each firm must keep, and the policies and systems each firm must implement, will depend on each law firm's particular nature, structure, practice, history, personnel, and other factors. However, all law firms must keep certain minimum written or electronic records of each

new or prospective engagement and must consult those records when checking proposed new engagements for conflicts of interest.

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