New York State Bar Association
Committee on Professional Ethics
Opinion 1012 (7/30/2014)

Topic: Conflicts arising from limited-services pro bono representation

Digest: A lawyer who represents a client in a limited pro bono legal services program owes a continuing duty of confidentiality to that client, and is precluded from later representing a materially adverse client in the same or a substantially related matter if the lawyer has actual knowledge of the unwaived conflict, but conflicts arising from participation in such a program are not imputed to others in the lawyer's firm.

Rules: 1.6, 1.7, 1.9, 1.10, 5.1, 6.5

FACTS

1. The inquirer is the managing attorney of a county bar association legal services project. The bar association sponsors a legal services corporation that runs a limited pro bono legal services program (the "Program"). A lawyer who volunteers in such a program (a "Participating Lawyer") renders advice to individual clients (the "Program Clients") in a clinic setting on subjects such as landlord/tenant, domestic violence, family court and pro se federal court matters. The services are completed in one evening and often involve referral to another agency to assist the Program Client. After that evening, the Participating Lawyer does not provide any additional services to, or have any continuing relationship with, the Program Client.

2. Participating Lawyers typically volunteer their services three to four times per year. The Program advises the Program Clients that the services are limited to addressing one problem and that the lawyer rendering the limited service will not provide any further services to the client. The rights and responsibilities of the Program and the Program Client, including the limited nature of the representation, are set forth in a written agreement signed by the Program and the Program Client, and the Program retains that written agreement.

QUESTIONS

3. If a lawyer has represented a client in a limited pro bono legal services program, may that same lawyer later represent another client with interests materially adverse to the Program Client in the same or a substantially related matter?

4. If a lawyer in a firm has represented a client in a limited pro bono legal services program, may another lawyer associated in the same firm represent a client with interests materially adverse to the Program Client in the same or a substantially related matter?

OPINION

5. The inquiry is governed by Rule 6.5 of the New York Rules of Professional Conduct (the "Rules"). That rule's precursor, ABA Model Rule 6.5, was adopted in 2002 based on a proposal by the ABA Ethics 2000 Commission. The ABA proposal addressed conflict-checking requirements in the context of providing short-term limited representation under the auspices of a volunteer legal services project operated by a local bar association. The concern underlying the ABA rule was that "strict application of the conflict-of-interest rules may be deterring lawyers from serving as

volunteers in programs in which clients are provided short-term limited legal services." Report of the ABA Ethics 2000 Commission, quoted in *Simon's New York Rules of Professional Conduct Annotated* 1314 (2013 ed.). In New York, prior to the adoption of Rule 6.5 in 2007, Rule 1.10(e) required a lawyer advising a client in a limited-services program to do a firm-wide conflicts check even though such programs "are normally operated under circumstances in which it is not feasible for a lawyer to utilize the conflict-checking system required by Rule 1.10(e)" before providing the limited kinds of services that such programs provide. Rule 6.5, Cmt. [1].

6. New York adopted a version of Rule 6.5 in 2007, using language slightly different from the ABA Model Rule. The current New York Rule 6.5 applies to a lawyer who provides short-term limited legal services under the auspices of a program sponsored by a bar association or certain other kinds of entities.

7. Rule 6.5 provides in part that such a lawyer is required to comply with certain conflicts rules – namely, Rules 1.7, 1.8 and 1.9 – "only if the lawyer has *actual knowledge* at the time of commencement of representation that the representation of the client involves a conflict of interest." Rule 6.5(a)(1) (emphasis added). It also provides that the lawyer is required to comply with the imputation provisions in Rule 1.10 "only if the lawyer has *actual knowledge* at the time of commencement of representation that another lawyer associated with the lawyer in a law firm is affected by Rules 1.7, 1.8 and 1.9." Rule 6.5(a)(2) (emphasis added). However, Rule 6.5 ceases to apply "if during the course of the representation, the lawyer providing the services becomes aware of the existence of a conflict of interest precluding continued representation." Rule 6.5(e).

8. Rule 6.5 is written from the perspective of the individual Participating Lawyer and addresses what the lawyer must consider when undertaking a limited-services assignment. It makes the usual conflicts rules inapplicable unless the Participating Lawyer has "actual knowledge" that the representation of the client involves a conflict of interest. In the absence of such actual knowledge, the lawyer does not need to make any further conflicts inquiry and may provide the short-term services.

9. The reason for relaxing the conflicts rules in this context is that "a lawyer who is representing a client in the circumstances addressed by [Rule 6.5] ordinarily is not able to check systematically for conflicts of interest." Rule 6.5, Cmt. [3]; *see* Rule 6.5, Cmt. [1], quoted in paragraph 5 *supra*. Thus the clear implication of Rule 6.5 is that a Participating Lawyer may undertake a limited-services representation without first consulting the conflict-checking system required by Rule 1.10(e). Moreover, while Rule 6.5 does not explicitly address what is required by Rule 1.10(e), we think it is within the fair import of the approach taken in Rule 6.5 that a limited-services representation does not require the Participating Lawyer or that lawyer's firm to enter the limited-services relationship into the firm's conflict-checking system.

A. **Do the Usual Conflict Rules Apply to a Participating Lawyer?**

10. The first question is whether the relaxed conflicts rules that apply to the Participating Lawyer *during* the provision of the short-term limited legal services also apply if a conflict between a Program Client and another client or prospective client arises (or is discovered) *after* the short-term representation has ended. Suppose, for example, that after the Participating Lawyer has finished rendering services in a certain matter to a short-term Program Client, a prospective client seeks to retain the Participating Lawyer in the same or a substantially similar matter, and the prospective client's interests in the matter are materially adverse to those of the Program Client. Does Rule 6.5 continue to apply? If not, then the lawyer would be subject to the more exacting conflict provisions that ordinarily apply.

11. We believe that Rule 6.5 continues to relax the conflict rules in this situation until there is

actual knowledge of a conflict. Our conclusion is based on the Rule's broad language, its policy of facilitating participation in limited legal services programs, and the lack of any provision explicitly terminating its application at the conclusion of the short-term representation. *See* Rule 6.5(b) (providing that except when conflict is imputed based on actual knowledge, Rules 1.7 and 1.9 "are inapplicable to a representation governed by this Rule").

12. Thus, when a prospective client seeks to retain the Participating Lawyer, and unknown to the Participating Lawyer there is a potential conflict arising from the lawyer's participation in the Program, the Participating Lawyer remains subject only to the relaxed conflict provisions of Rule 6.5(a)-(b). In other words, if the Participating Lawyer does not have "actual knowledge" of a conflict with the Program Client, then the Participating Lawyer may undertake the new representation.

13. However, if at any time the Participating Lawyer comes to have actual knowledge that the prospective client is seeking representation in a matter that is the same as or substantially related to a matter on which the Participating Lawyer represented a Program Client, and that the interests of the two are materially adverse, then the relaxed conflict provisions of Rule 6.5(a)-(b) cease to apply. *See* Rule 6.5(e). At that point, the regular conflicts rules apply as usual, and the Participating Lawyer may not represent the prospective client absent the former Program Client's informed consent confirmed in writing. *See* Rule 1.9(a).

B. **Are the Participating Lawyer's Conflicts Imputed to the Firm?**

14. In the second question, the inquirer asks whether Rule 1.10(a), which imputes a lawyer's conflicts under certain rules to others associated in the same firm, would prohibit another member of the Participating Lawyer's firm from representing a client who has interests materially adverse to the Program Client in the same or a substantially similar matter.

15. In analyzing this question, we are again guided by the Rule's broad language and its policy of facilitating participation in short-term legal services programs. For such programs, Rule 6.5 not only limits the application of underlying conflict provisions such as Rules 1.7 and 1.9, but also – at least as to a Participating Lawyer – limits the application of the imputation provisions of Rule 1.10. *See* *See*Rule 6.5(a)(2). We believe that just as applying a rigid imputation rule to a Participating Lawyer could unduly burden a firm's participation in such programs, so could undue burdens result from applying a rigid imputation rule to other lawyers in the Participating Lawyer's firm. And the rules do not by their terms explicitly mandate such imputation to other lawyers in the firm.

16. Thus, if a new client seeks to retain the Participating Lawyer's firm in a matter that is the same as or substantially related to a matter on which the Participating Lawyer represented a Program Client, and there is known material adversity between the interests of the two, then Rule 1.10(a) will not preclude other members of the firm from representing the new client, even though Rule 1.9(a) will preclude the Participating Lawyer from doing so absent proper waiver. The same reasoning applies if the firm discovers that it is *already* representing a client in a matter that is the same as or substantially related to a matter on which the Participating Lawyer represented a Program Client, and that there is material adversity between the interests of the two. In that case too, the Participating Lawyer's conflict would not be imputed to other members of the firm, and those other members could continue the representation.

17. Nothing about the limited nature of the Program modifies the Participating Lawyer's duties of confidentiality to the Program Client. Thus, even when the Participating Lawyer or another lawyer in the firm may and does represent another client with materially adverse interests in a substantially related matter, the Participating Lawyer may not reveal confidential information of the former Program Client, or use confidential information of the former Program Client to that former client's

disadvantage, except as permitted by Rule 1.9(c).

18. The ethical obligations arising from participating in the Program extend beyond the Participating Lawyer. All lawyers with management responsibility in the firm, and the firm itself, are required to make reasonable efforts to ensure that the lawyers in the firm conform to ethical obligations. *See* Rule 5.1(a), (b). Here, those obligations include (i) the Participating Lawyer's duty of confidentiality to the Program Client and (ii) the Participating Lawyer's duty to refrain from representing a client materially adverse to the Program Client when the Participating Lawyer actually knows of a conflict prohibiting such representation.

CONCLUSION

19. A lawyer who has represented a client in a limited pro bono legal services program is prohibited from subsequently representing a materially adverse client in the same or a substantially related matter only if the lawyer has actual knowledge of the conflict. Even if the lawyer has actual knowledge of such a conflict, however, the conflict is not imputed to others in the lawyer's firm. Whether or not anyone in the firm represents a client adverse to the limited-services client, the lawyer who represented the limited-services client remains bound by confidentiality obligations to that client.

20-14

[1]"Short-term limited legal services" is defined to mean "services providing legal advice or representation free of charge as part of a program described in [Rule 6.5(a)] with no expectation that the assistance will continue beyond what is necessary to complete an initial consultation, representation or court appearance." Rule 6.5(c).

[2]For example, if, at the outset of the consultation, the lawyer actually knows that the short-term representation would conflict with a current client under Rule 1.7 or with a former client under Rule 1.9, then the lawyer generally may not provide the short-term limited legal services. Likewise, if the lawyer obtains such actual knowledge during the course of the consultation, then the lawyer may not continue to provide the services.

[3]If Rule 6.5 did not apply, the lawyer would be subject to the provisions in Rule 1.9 that govern conflicts relating to former clients. *See* Rule 6.5, Cmt. [1] (noting that in advice-only clinics and pro se counseling programs, "a client-lawyer relationship is established"); Rule 6.5, Cmt. [2] (stating that except as provided in Rule 6.5, the limited representation is subject to all the Rules, and citing as an example Rule 1.9(c), which applies to former clients). *But seeSimon's New York Rules of Professional Conduct Annotated* 1321 (2013 ed.) (arguing that limited-service clients should enjoy only the protections accorded prospective clients under Rule 1.18 rather than the broader protections accorded former clients under Rule 1.9).

[4]Of course it would still be necessary to consult the firm conflict-checking system to check for possible conflicts with current firm clients, and with former clients other than Program Clients. Rule 6.5 relaxes the requirement of using a conflict-checking system only with respect to short-term clients under that Rule; with respect to other former clients and current ones, Rules 1.7, 1.9 and 1.10(e) apply as usual.

[5]So long as a possible conflict remains governed by Rule 6.5 – which means that the application of that Rule has not been negated by actual knowledge under Rule 6.5(a) and (e) – then the possible conflict is not governed by Rule 1.7 or 1.9, and the literal terms of Rule 1.10(a) therefore do not

impute any conflict. Rule 6.5 ceases to apply when the Participating Lawyer comes to have actual knowledge of a conflict, but the Rules do not explicitly provide in that case that Rule 1.10 springs back to apply to other lawyers in the firm. *Cf.* Rule 6.5(a)(2) (providing that in case of actual knowledge *the Participating Lawyer* shall comply with Rule 1.10); Rule 6.5, Cmt. [5] (Rule 1.10 does "become applicable" if the Participating Lawyer later undertakes to represent the Program Client "on an ongoing basis," meaning beyond the confines of the short-term program).

[6]We have addressed only the situation in which the conflict is known to the firm. It is also possible, especially since conflict-checking systems are not required to include short-term clients, see paragraph 9 *supra*, that the firm would not discover the conflict. But in that case there would be no argument for imputation. *See* Rule 1.10(a) (providing that lawyers shall not "knowingly" represent a client whom an associated lawyer could not represent due to certain kinds of conflicts).

[7]Of course Rule 6.5 affects only those conflicts that could arise as a result of a lawyer's participation in a short-term limited legal services program. If other lawyers in the firm have any direct or imputed conflicts arising from any other source, then Rule 6.5 would not alter their obligation to follow the normal rules governing conflicts of interest.

[8]Confidentiality duties are defined by Rule 1.6 during the short time of the representation in the Program, and thereafter are defined by Rule 1.9(c). *See* Rule 6.5(d) (short-term limited legal services representation "shall be subject to the provisions of Rule 1.6"); Rule 6.5, Cmt. [2] (except as provided in Rule 6.5, all rules of legal ethics, "including Rule[ ] 1.6 and Rule 1.9(c), are applicable to the limited representation"). We decline to follow the alternative suggestion, see note 3*supra*, that confidentiality duties should be only those that apply to prospective clients under Rule 1.18.