Received 8-17-09

Supreme Court of Utah

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Justice

August 12, 2009

Robert A. Burton, Esq.
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Re: Lawyer Advertising

Dear Bob:

Thank you for taking the time to meet with us last week. The Utah Supreme Court would like its Advisory Committee on the Rules of Professional Conduct to undertake a review of the lawyer advertising rules and to recommend any amendments it finds advisable. The Court is particularly concerned about lawyer advertising that unfairly maligns the court system as a whole.

Thank you and the committee for its valuable assistance.

Sincerely,

Christine M. Durham
Chief Justice

cc: Nate Alder, Esq.

Rule 1.10. Imputation of Conflicts of Interest: General Rule.

(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 the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(b)(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(b)(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(c)(1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom, and

(c)(2) written notice is promptly given to any affected former client.

(d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

(Amended effective November 1, 2005.)

Comment. —

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2] - [4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with

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the firm, which would violate Rule
over, the firm may not represent
where the matter is the same or s
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lawyer currently in the firm has ma
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[5a] The Utah rule differs fro
Model Rule in allowing lawyers
under Rule 1.9 to be screened fro
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the conditions of paragraph (c) are
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[5b] Requirements for screenin
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[5c] Notice, including a descri
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given as soon as practicable after

Appearance of impropriety.
—Effect.
—Standard criticized.
Applicability.
Prior representations.
—Factually related matters.
—Measures to prevent disqualifi
—Test for disqualification.
Cited.

Appearance of impropriety.

—Effect.

The mere appearance of impr
sufficient to overturn defendant's
criminal defendant is not auton
tled to a reversal of his convicti
cause of an apparent violation
professional conduct. State v. La
487 (Utah Ct. App. 1992), aff'd,
(Utah 1993).

—Standard criticized.

Following the adoption of the
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attorney disqualification. In fa
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the "appearance of impropriety"
question-begging because the te
ety" remains undefined in the C
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Group W., Inc., 147 Bankr. 586 (
rev'd on other grounds, 999 F.2d
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Applicability.

The scope of this rule does not

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interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[5a] The Utah rule differs from the ABA Model Rule in allowing lawyers disqualified under Rule 1.9 to be screened from participation in a matter under certain circumstances. If the conditions of paragraph (c) are met, imputation is removed, and consent to the new representation is not required. Lawyers should be aware, however, that courts may impose more stringent conditions in ruling upon motions to disqualify a lawyer from pending litigation.

[5b] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(2) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5c] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, should be given as soon as practicable after the need for screening becomes apparent.

[6] Rule 1.10(d) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[8] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

NOTES TO DECISIONS

Appearance of impropriety.
—Effect.
—Standard criticized.
Applicability.
Prior representations.
—Factually related matters.
—Measures to prevent disqualification.
—Test for disqualification.
Cited.

Appearance of impropriety.

—Effect.

The mere appearance of impropriety is not sufficient to overturn defendant's conviction; a criminal defendant is not automatically entitled to a reversal of his conviction merely because of an apparent violation of a rule of professional conduct. State v. Larsen, 828 P.2d 487 (Utah Ct. App. 1992), aff'd, 865 P.2d 1355 (Utah 1993).

—Standard criticized.

Following the adoption of the Rules of Professional Conduct, the "appearance of impropriety" standard has been criticized as a basis for attorney disqualification. In fact, the official comment to this rule formerly suggested that the "appearance of impropriety" standard was question-begging because the term "impropriety" remains undefined in the Code of Professional Responsibility. SLC Ltd. V v. Bradford Group W., Inc., 147 Bankr. 586 (D. Utah 1992), rev'd on other grounds, 999 F.2d 464 (10th Cir. 1993).

Applicability.

The scope of this rule does not comfortably fit in the context of a public prosecution office and appears to be intended for private law firms. Bullock v. Carver, 910 F. Supp. 551 (D. Utah 1995).

County attorney who had been employed by Attorney General's office was not disqualified from representing inmate's habeas corpus case alleging ineffective assistance of counsel even though she had been section chief over current member of Attorney General's staff who had represented inmate while in private practice; the two attorneys were not positioned so that one had any supervision or control over the other and there had been no contact or communication between the lawyers regarding the case. Bullock v. Carver, 910 F. Supp. 551 (D. Utah 1995).

Attorneys affiliated with a county public defenders' association did not practice together "as a firm," and there was no conflict of interest between the attorney who represented defendant at his trial and the attorney handling his appeal. State v. Marvin, 964 P.2d 313 (Utah 1998).

Prior representations.

—Factually related matters.

When an attorney's previous representation of a criminal defendant was limited to legal matters unrelated to the securities or criminal charges against him, there was no substantial factual relationship between the former and present matters and the attorney's subsequent employment with the Attorney General did not mandate disqualification. State v. Larsen, 828

Discipline & Disability

Matty Branch - Rule 1.10 (0.00/3.50)

From: Gary Sackett <GSackett@joneswaldo.com>
To: <bobb@burtonlumber.com>
Date: 7/13/2009 10:20 AM
Subject: Rule 1.10 (0.00/3.50)
CC: "Matty Branch" <mattyb@email.utcourts.gov>
Attachments: ABA mod to 1-10.pdf

Bob: You may recall that we (and the Court) adopted a screening procedure under Rule 1.10 for lawyers moving from one firm to another that the ABA had not adopted. In February of this year, the ABA adopted a screening option, and it has now proposed a technical amendment to make it clear that screening only applied to situations where a lawyer moves from one employer to another. See attached. I'm not sure it warrants a meeting by itself, but to consider whether the Utah rule should be modified to conform, perhaps it might be included on the next agenda when other items have accumulated.
--Gary

News

Model Rules

Modest Change Is Proposed to Clarify Screening Provision in Model Rule 1.10

The ABA's model rule on imputation of conflicts of interest should be amended to make clear that the screening provision added in February applies only when lawyers move from one private law firm or corporation to another, the ABA's ethics committee has proposed.

The suggested amendment, along with another small change to Model Rule 1.10, has been submitted for consideration by the ABA's policy-making House of Delegates at the bar group's annual meeting in August. (*See box.*) The measure is sponsored by the ABA Section of Litigation and the Standing Committee on Professionalism as well as the Standing Committee on Ethics and Professional Responsibility.

The ABA reworked Model Rule 1.10 at this year's Midyear Meeting to permit firms' use of screens to avoid imputed disqualification. So long as certain procedural requirements are met, a screened lawyer's colleagues may represent clients in matters that the lawyer would be prohibited from handling under the rule on former-client conflicts. See 25 Law. Man. Prof. Conduct 88.

Only if Lawyer Changes Firm. The report explaining the most recent proposed changes notes that, in opening remarks to the ABA delegates in February, ethics committee chair Robert H. Mundheim stated that the screening provision "addresses only the situation in which a lawyer moves from private practice or corporate practice to another private practice or corporate practice."

According to the report, however, several commentators have noted that the language the ABA approved in February could be interpreted to allow screening even in situations in which the lawyer never left the firm in which he acquired the conflict. Such an interpretation was never intended, the report states.

Therefore, the report explains, to ensure that the rule unambiguously permits screening only in situations where a lawyer moves from one firm or company to another, the sponsors are proposing that the words "and arises out of the disqualified lawyer's association with a prior firm" be added to the screening provision.

In addition, the recommendation and report propose that the phrase "prohibited lawyer" in paragraph (a)(1) of Model Rule 1.10 be changed, for the sake of consistency, to read "disqualified lawyer." The phrase "disqualified lawyer," which is used elsewhere in Rule 1.10, more precisely describes a lawyer who is prohibited from undertaking a representation, the report states.

Not Expected to Reopen Debate. In an interview with BNA, Mundheim said the proposed addition of the words "and arises out of the disqualified lawyer's association with a prior firm" is intended to make "crystal clear" what he said in presenting the screening provision to the delegates in February—that is, that screening is permitted only where a lawyer changes firms. Mundheim is of counsel to Shearman & Sterling in New York.

Proposed Changes to Model Screening Rule

The ABA is being asked to amend Model Rule 1.10 to add the words shown below in italics and delete the word shown below in brackets:

"Rule 1.10 Imputation of Conflicts of Interest: General Rule

"(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 upon a personal interest of the [prohibited] *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

"[certain other conditions are met]."

According to Mundheim, the ethics committee originally believed that insertion of the "arises from" clause and the switch from "prohibited" to "disqualified" lawyer could be implemented after the February vote as a housekeeping matter without seeking further approval from the delegates. But after learning that it is necessary to bring these points before the delegates for their consideration, the ethics committee drafted the necessary report and recommendation, he said.

Mundheim emphasized that the Litigation Section and the professionalism committee, which opposed the screening provision in February, are co-sponsoring the recommended amendments along with the ethics committee. All three sponsors "hope and expect that it will not reopen the debate on screening," and hope that the proposed changes will move through speedily on the delegates' "consent calendar," he said.

BY JOAN C. ROGERS

The report and recommendation for amending Model Rule 1.10 are described in Report #109 on the ABA's Web site, http://www.abanet.org/leadership/2009/annual/pdfs/execsum.pdf.

MOPC ISSN 0740-4050

ABA RULE 1.10 V. UTAH RULE 1.10

Rule 1.10 Imputation ~~[of]~~Of Conflicts ~~[of]~~Of Interest: General Rule

(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 ~~[prohibited]~~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.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:~~[~~

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and~~[~~

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.~~[~~

~~(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:~~

~~(1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom, and~~

~~(2) written notice is promptly given to any affected former client.~~

~~(d)~~

(c) A disqualification prescribed by this ~~[Rule]~~rule may be waived by the affected client under the conditions stated in Rule 1.7.

(~~[e]~~d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.