



**New York State Bar Association  
Committee on Professional Ethics**

Opinion 1085 (2/16/2016)

**Topic:** Conflict checks

**Digest:** When a firm is aware of parties adverse to a prospective client but has only incomplete identifying information for those parties, such as street names, it may be necessary for the firm's conflict check to go beyond checking its written records of engagements, by consulting its lawyers who may have represented those adverse parties. A lawyer's duty to avoid conflicts is not limited to the requirement of an adequate conflict-checking system. Thus when a lawyer acquires new information about adverse parties during the course of a representation, it may be advisable, even though not required by the rule on conflict-checking systems, for the lawyer to perform a new conflict check based on that new information.

**Rule:** 1.0(h), 1.7(a), 1.9(a), 1.10(a), (e) & (g), 5.1(a)

**FACTS**

1. The inquirer is a law student permitted to practice, pursuant to court order, under the supervision of a law school clinic (the "Clinic"). The Clinic represents a person who was convicted of a crime (the "Client"), and the Clinic wishes to seek post-conviction relief on the ground that the Client was a victim of human trafficking. To that end, the Clinic has gathered information on the alleged traffickers, but has not been able to determine their legal names; the information is limited to their "street names" and general areas of residence.
2. The inquirer believes that the Client's alleged traffickers potentially constitute "adverse parties," because they may be adversely affected by (and potentially subjected to further prosecution based on) the Clinic's motion for post-conviction relief. Consequently, the inquirer believes it is necessary to include the alleged traffickers in a conflict check.
3. The inquirer also notes that the issue of street names "may arise in other situations where a party's legal name is not available," such as when attorneys represent parties in cases involving drugs, gangs, or organized crime, and other groups where the use of street names is common.

**QUESTION**

4. In representing the Client, is it sufficient to run a conflict check with the "street names" of human traffickers who are potentially adverse parties and to repeat the check if the inquirer later discovers more information about the traffickers?

## OPINION

5. The inquiry appears motivated by concern that certain kinds of conflicts of interest could arise without being detected by the Clinic's existing conflict-checking procedures. In particular, the Clinic might currently be representing, or might have represented in the past, an alleged human trafficker of the Client. If so, the Clinic may have a record of that alleged trafficker's legal name but not informal identifiers such as the trafficker's street names. The interests of the Client and the alleged trafficker are likely to be sharply adverse. Thus, if the Clinic is currently representing the alleged trafficker, even in an unrelated matter, that would give rise to a conflict.<sup>1</sup> And a conflict would arise even from a past representation of the alleged trafficker in a matter that was the same as or substantially related to the matter in which the Clinic will be representing the new Client.<sup>2</sup>

6. The New York Rules of Professional Conduct (the "Rules") limit the ability of a lawyer to represent a client when the lawyer has a conflict of interest. The Rules also impose two requirements of affirmative measures to help detect potential conflicts before a lawyer or law firm accepts a new engagement, or as soon as possible thereafter. Those requirements are imposed on a "law firm," and that term would include the Clinic. *See* Rule 1.0(h) (defining "law firm" to include "lawyers employed in a qualified legal assistance organization") and Cmts. [2] & [4] (explaining definition of "firm"); N.Y. State 794 ¶ 2 (2006) (interpreting predecessor provisions to the Rules and opining that "[s]o long as the clinic's students work in a common space and have shared access to physical files, the entire legal clinic, including the project in question, is a law firm" within the meaning of the Code of Professional Responsibility).

7. The two affirmative requirements for detecting conflicts are set forth in Rule 1.10(e). First, a law firm "shall make a written record of its engagements, at or near the time of each new engagement."

8. Second, a law firm "shall implement and maintain a system by which proposed engagements are checked against current and previous engagements" upon any of four triggering events. The triggering events occur when "(1) the firm agrees to represent a new client; (2) the

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<sup>1</sup>*See* Rule 1.7(a)(1) (unless the conflict is properly waived, a lawyer shall not represent a client if a reasonable lawyer would conclude that "the representation will involve the lawyer in representing differing interests"); Rule 1.7, Cmt. [6] ("The duty to avoid the representation of differing interest prohibits, among other things, undertaking representation adverse to a current client without that client's informed consent.").

<sup>2</sup>*See* Rule 1.9(a) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.").

firm agrees to represent an existing client in a new matter; (3) the firm hires or associates with another lawyer; or (4) an additional party is named or appears in a pending matter.”

9. Under Rule 1.10(g), if a violation of Rule 1.10(e) by a law firm is a substantial factor in causing a violation Rule 1.10 (a)<sup>3</sup> by a lawyer in the firm, the law firm, as well as the individual lawyer, is responsible for the violation of Rule 1.10(a).

10. The purpose of the system required by Rule 1.10(e) is to “render effective assistance to lawyers in the firm in avoiding conflicts of interest,” and the system “must be adequate to detect conflicts that will or reasonably may arise” upon any of the four triggering events. Rule 1.10, Cmt. [9].

11. The required records of engagements must be in written form, but in some cases, the lawyer performing the conflict check may have reason to believe that the written records are insufficient to allow an adequate check. Thus, for a conflict-checking system to be effective, it “may also need to supplement written information with recourse to the memory of the firm’s lawyers through in-person, telephonic, or electronic communications.” Rule 1.10, Cmt. [9B]. “At a minimum ... a firm must record information that will enable the firm to identify (i) each client that the firm represents, (ii) *each party in a litigated, transactional or other matter whose interests are materially adverse to the firm’s clients*, and (iii) the general nature of each matter.” Rule 1.10, Cmt. [9C] (emphasis added).

12. A law firm must check for conflicts before initially agreeing to represent a new client in a matter (and before agreeing to represent an existing client in a new matter). The firm may also need to check for conflicts after agreeing to represent a client if relevant new information is obtained in the course of the representation. We analyze both these requirements in turn.

#### Checking for conflicts before accepting a new matter

13. First, before agreeing to represent a new client, a firm must check that proposed engagement against current and previous engagements. If the firm discovers current or previous clients whose interests may be adverse, the firm may have to conduct further inquiry into the nature of the possibly conflicting representations to determine whether a conflict really exists and, if so, whether the conflict is waivable.

14. Checking the proposed engagement against current and previous engagements must include a check against the written records of such engagements that Rule 1.10(e) requires the firm to maintain. The firm should check the names of all known materially adverse parties. When the materially adverse parties are known only by street name, then the effectiveness of the

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<sup>3</sup> “While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein.”

check against written records will depend on whether the records include the street names of current and previous clients. As noted in paragraph 20 below, there is a question as to whether a firm's conflict checking system should contain not only the legal names but also the street names of current and previous clients. But the inquiry at hand concerns the conflict check that the firm needs to undertake when considering representation of the particular new client at issue here.

15. Determining the required scope of a conflicts check turns on whether the check against written records is sufficient by itself, or whether the check against written records must be supplemented with other information (such as recourse to the memory of the firm's lawyers, or to client files not reflected in the firm's standard conflict-checking database). We believe that the answer depends on circumstances. Law firms and lawyers checking for conflicts are not routinely required to go beyond checking the written records in their conflict-checking system. If there is no reason to believe that the firm has ever represented clients with interests materially adverse to those of the prospective client, then there may be no need to supplement the check of written records. For example, the firm may know it has never represented a human trafficker. On the other hand, a lawyer or law firm checking for conflicts in a particular case could be aware of facts raising a substantial prospect that current or prior engagements might involve clients with materially adverse interests. In that case, for the conflict-checking system to be effective, the law firm should make reasonable efforts to contact lawyers and students who were involved in those current or prior engagements to inquire about street names of potentially adverse parties. But such further inquiry may not be feasible if, for example, those involved in prior engagements were students who no longer attend the school, for whom the school has no forwarding addresses.

#### Checking for conflicts after accepting a new matter

16. The second part of the analysis is about whether the Clinic, having a conflict system that contains only legal names of clients and having already agreed to represent the Client, has any continuing conflict-checking obligations if relevant new information is obtained in the course of the representation, or if information already in the Clinic's possession unexpectedly turns out to be useful in the matter.

17. This question does not appear to involve any of the four events that trigger a requirement to check for conflicts. The acquisition of new information during the course of a representation is not one of those events. See Roy Simon, *Simon's New York Rules of Professional Conduct Annotated* 728 (Thomson Reuters, 2016 ed.) (stating that the Rule "does not require law firms to devise a system for detecting conflicts that arise between two or more current clients *after* engagements are accepted," even though "individual lawyers remain responsible for any improper conflicts even if the conflicts arise during a representation").

18. Nor would a new conflict check be necessitated by the plan to use the new information in a motion for post-conviction relief. It is true that a triggering event occurs when a lawyer names an additional party or when an additional party otherwise appears in a pending matter. But when

a lawyer files motion papers in the Client’s post-conviction proceedings alleging that an identified person is a human trafficker, the lawyer is not naming that person as a party, and it does not mean that the person has appeared.

### Helpful practices in checking for conflicts

19. While acquiring new information such as the legal names of the alleged human traffickers does not trigger a Rule 1.10(e) requirement to perform a new conflicts check, it may nevertheless be advisable for the Clinic to do so. Performing a new conflict check may help the assigned lawyers comply with their ethical duty to avoid conflicts. *See* Rule 1.10, Cmt. [9A] (“a lawyer who knows or should know of a conflict in a matter that the lawyer is handling remains individually responsible for the violation of these rules, whether or not the firm’s conflict-checking system has identified the conflict”). It may also be an appropriate way for the Clinic to discharge its own responsibility to help those lawyers avoid such conflicts. *See* Rule 5.1(a) (“A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules.”); Roy Simon, *Simon’s New York Rules of Professional Conduct Annotated* 728 (Thomson Reuters, 2016 ed.) (opining that in light of underlying conflict rules, a law firm system ought “to continue monitoring possible conflicts that arise during a representation,” and that a firm’s records should “ideally” include the names of all adverse parties “who become involved in the matter as it actually develops”).

20. Finally, we note that steps may be taken to minimize the kinds of potential problems that motivated the inquiry. As set forth above, a law firm is required to “make a written record of its engagements, at or near the time of each new engagement,” and part of that requirement is to record information that will enable the firm to identify “each client that the firm represents.” At the time of new engagements, the firm could seek to learn and record not only legal names but also more informal identifiers such as street names. The more names the Clinic has recorded for its clients, the more effective its conflict-checking system is likely to be. We were not asked, and we do not address, whether Rule 1.10(e) requires a law firm to obtain and record informal identifiers in addition to legal names. But it is fair to say that including such information in the records of engagements may be of substantial assistance in checking for conflicts in a law firm whose matters sometimes involve human traffickers, gang members, or others who use street names.

## **CONCLUSION**

21. When a firm is aware of parties adverse to a prospective client but has only incomplete identifying information for those parties, such as street names, it may be necessary, depending on circumstances, for the firm’s conflict check to go beyond checking its written records of engagements, by consulting its lawyers who may have represented those adverse parties.

22. A lawyer’s duty to avoid conflicts is not limited to the requirement of an adequate conflict-checking system. Thus when a lawyer acquires new information about adverse parties

during the course of a representation, it may be advisable, even though not required by the rule on conflict-checking systems, for the lawyer to perform a new conflict check based on that new information.

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