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WHITE-COLLAR CRIME

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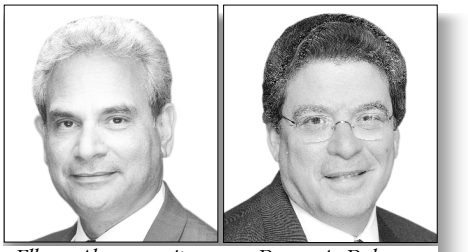
Conflicts Analysis in a New Age

The increasing complexity and far-flung nature of criminal and regulatory investigations, requiring representation of numerous organizations and individuals, continues to raise issues affecting the attorney-client relationship and the adversarial process.

Recent developments have caused re-examination of the policies and principles underlying the attorney-client privilege and work-product doctrine. Application of modern analysis has likewise suggested a reconsideration of the manner in which purported conflicts of interest are evaluated. This analysis, often arising in a civil context, is no less applicable in a criminal or administrative setting.

New York Disciplinary Rule (DR) 5-105 states: "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."[1] The theory is that "associated" attorneys share client confidences. The question arises: Who is an "associated" attorney? Given the ever-increasing number of flexible work arrangements between firms and the attorneys they employ, whether as "counsel" or contract attorneys,[2] lawyers should be aware of the nuances of this rule.



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The U.S. Court of Appeals for the Second Circuit recently addressed this issue directly in *Hempstead Video, Inc. v. Incorporated Village of Valley Stream*.[3] This decision is significant for two reasons. First, in contradiction to ethics opinions rendered by the New York State Bar Association and the American Bar Association, the court held that "of counsel" attorneys are not always deemed "associated" to the firm with which they work. Second, the court was clear in its rejection of any implication that internal screening efforts made by law firms to prevent the sharing of client confidences are worthless. Rather, the decision embraces a fact-sensitive, functional approach to the determination of disqualification motions made on the basis of attorney conflicts.

History of the Case

In *Hempstead Video*, the law firm of Jaspan Schlesinger Hoffmann LLP (the Jaspan firm) represented the Village of Valley Stream in a lawsuit brought by Hempstead Video in 1994. In that action, Hempstead Video claimed that the Village selectively enforced its mercantile permit requirement in violation of the Equal Protection Clause of the Fourteenth Amendment. These claims were resolved between the parties in a settlement agreement entered in 1996 that required Hempstead Video to maintain business operations that were "substantially the same as its current business operations." The settlement agreement further prohibited Hempstead Video from having "enclosed viewing rooms." In 2003, the Village of Valley Stream received information that Hempstead Video had installed several booths for the viewing of pornographic material, which it believed to be in direct violation of the terms of the settlement agreement. After unsuccessfully attempting to negotiate the resolution of this matter with Hempstead Video, Valley Stream brought an order to show cause, arguing that the video store's breach of the settlement agreement resulted in the forfeiture of its rights under the agreement and left the Village free to prosecute under its adult use ordinance.[4]

The magistrate judge held an evidentiary hearing on this matter in August 2003 and took the matter under advisement. Before a decision was issued, in November 2003, Hempstead Video moved to disqualify the Village's counsel, the Jaspan firm. The disqualification motion was based on the Jaspan firm's relationship with William Englander, a 70-year-old, semi-retired attorney. For a period of more than 20 years, Mr. Englander had represented the owner of Hempstead Video and his multiple businesses in unrelated labor matters. At the time the motion was made, Mr. Englander's representation of the store's owner was continuing in at least one Equal Employment Opportunity Commission (EEOC) matter. Furthermore, the EEOC

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matter involved a former employee of Hempstead Video who was now a key witness for the Village of Valley Stream.

Mr. Englander had been a long-time tenant of the Jaspan firm, leasing space from them while maintaining his own private practice. During the pendency of the order to show cause brought by the Village against Hempstead Video, Mr. Englander agreed to become "of counsel" to the Jaspan firm. Under the terms of this arrangement, Mr. Englander transferred several clients to the law firm, not including Hempstead Video or its owner, which he continued to represent in his individual capacity. Hempstead Video argued that Mr. Englander's conflict in representing both the video store and the Village should be imputed to the Jaspan firm and, accordingly, that the Jaspan firm should be disqualified.[5]

In rejecting the argument for disqualification, the magistrate judge concluded that Mr. Englander had represented Hempstead Video and its owner in his capacity as a solo practitioner and was only "loosely" affiliated with the Jaspan firm, stating that the relationship was "too attenuated to merit imputation of the conflict of interest."[6] Hempstead Video appealed.

Second Circuit's Decision

The Second Circuit affirmed the magistrate judge's decision in a majority opinion written by Senior Judge Pierre Leval. Judge Leval began his review of the issue by noting the court's authority to disqualify attorneys through its inherent power to "preserve the integrity of the adversary process." He noted, however, that this authority had to be balanced with "'a client's right freely to choose his counsel.'"

Although the court acknowledged that an attorney's conflicts ordinarily are imputed to his firm based on the presumption that "associated" attorneys share client confidences, it rejected the notion that such a presumption is irrebuttable. Rather, the Second Circuit joined those courts following a "strong trend" toward allowing the presumption of confidence sharing within a firm to be rebutted.

Two-Step Analysis

Focusing on this presumption, the court set forth the two-step conflicts analysis under Disciplinary Rule 5-105. First, the court must make a determination of whether an attorney is "associated" with the firm. If not, then no presumption of confidence sharing arises and the firm will not be disqualified. If the attorney is found to be "associated" with the firm, the rebuttable presumption arises that the attorney and the firm share client confidences, which leads to the second step in the analysis. In this step, the court must determine whether the presumption has been rebutted.

The implementation of screening efforts by firms to avoid the sharing of confidential client information continues to have value.

Applying this framework to the situation with Mr. Englander and the Jaspan firm did not prove to be so clear cut, however. Citing a 1999 Opinion of the New York State Bar Association's Committee on Professional Ethics, the court stated that "[w]hether an attorney is associated with a firm for purposes of conflict imputation depends in part on the existence and extent of screening between the attorney and the firm." With these considerations, the court examined Mr. Englander's "of counsel" relationship with the Jaspan firm.

Ultimately, in agreement with the Magistrate Judge below, the court concluded that Mr. Englander's relationship with the Jaspan firm "was too attenuated and too remote from the matter in question" to "associate" Mr. Englander with the Jaspan firm. In examining this relationship, the Second Circuit refused to adopt a per se rule imputing conflicts between all "of counsel" attorneys and their firms. In so holding, the Second Circuit adopted a position contrary to not only two other federal courts, but also to recent ethics opinions issued by both the New York State Bar Association and the American Bar Association.[7] Rejecting these opinions, the court stated that "[a] per se rule has the virtue of clarity, but in achieving clarity, it ignores the caution that "[w]hen dealing with ethical principles, …we cannot paint with broad strokes. The lines are fine and must be so marked."[8]

Accordingly, the court adopted a functional approach to disqualification motions involving "of counsel" attorneys which better addressed the disparate nature and substance of such positions.[9] The application of this approach allows a deliberating court to consider the breadth of the attorney's affiliation with the firm and extent to which matters are shared between the attorney and the firm: "Imputation is not always necessary to preserve high standards of professional conduct. Furthermore, imputation might well interfere with a party's entitlement to choose counsel and create opportunities for abusive disqualification motions."

With respect to the instant disqualification motion, the court noted that Mr. Englander became "of counsel" to the Jaspan firm for the limited purpose of providing transitional services for a select number of clients, but continued to represent all other clients, including Hempstead Video and its owner, as an independent attorney. In addition, the Jaspan firm had no access to the confidences of Mr. Englander's clients by virtue of the fact that Mr. Englander maintained separate client files and never discussed these cases with anyone at the Jaspan firm. Accordingly, the court concluded that Mr. Englander was not "associated" with the Jaspan firm for purposes of the disqualification motion and that his conflict should not be imputed to the firm.[10]

To fully close the circle on the disqualification issue, however, the court went on to rule that even if Mr. Englander were "associated" with the Jaspan firm, the facts surrounding his somewhat-limited relationship with the firm served to rebut the presumption that Mr. Englander shared client confidences with the firm. In so finding, the court noted the screens put in place between the Jaspan firm and those

clients that Mr. Englander represented in an individual capacity. The screening procedures included the maintenance of separate files by Mr. Englander and an agreement between Mr. Englander and the Jaspan firm not to discuss their respective clients once the potential conflict was discovered.

The court's reliance on these screening procedures was especially pointed given recent inferences by district courts in this circuit that the court "may categorically reject the efficacy of isolation efforts as protection against taint." According to Judge Leval, this implication was a "mistaken reading of our precedents." Rather, the court instructed deliberating courts to consider the practices and structures put in place by a firm to protect client confidences, commonly referred to as "Chinese walls" or information screens, and whether they are sufficient to avoid disqualification.[11]

The 'Fund of Funds' Case

The court then examined its prior cases from which the mistaken inference had been drawn. In *Fund of Funds, Ltd. v. Arthur Andersen & Co.*,[12] a securities fraud action brought by a mutual fund against the auditor, Arthur Andersen, a disqualification motion was brought by the auditor to disqualify the law firm representing plaintiff, Milgrim Thomajan & Jacobs. The basis of the motion was that a separate law firm, Morgan Lewis & Bockius, which generally served as Arthur Andersen's outside counsel, had been retained by the plaintiff to investigate matters which led to the filing of a number of securities fraud actions by the mutual fund, including the instant suit. Furthermore, Morgan Lewis had participated in the selection of Milgrim Thomajan as plaintiff's counsel to prosecute those actions. Accordingly, the Second Circuit imputed the conflict belonging to Morgan Lewis to Milgrim Thomajan and disqualified that firm.

A footnote in the *Fund of Funds* decision made reference to an argument advanced by plaintiff's counsel at the trial court level, that Morgan Lewis had built an information screen within its firm between those working on the investigation being conducted for the mutual funds and those working on matters for Arthur Andersen and, thus, that no confidential information was disclosed. The Second Circuit noted that the district court had rejected this argument and that it was "incline[d] to agree" with this position.[13] In *Hempstead Video,* the court stated that this vague statement should not be interpreted as a "categorical rejection of quarantine or isolation as an efficacious protection against taint" because it was dictum in a footnote referring to an argument not made on appeal and was "so brief and imprecise that it is difficult to interpret."[14]

The other case relied upon by district courts to imply a rejection by the Second Circuit of the ability of screens such as Chinese walls to protect client confidences and guard against disqualification motions was *Cheng v. GAF Corp.*[15]

In *Cheng,* the plaintiff who filed an employment discrimination lawsuit was represented by Legal Services for the Elderly Poor (LSEP), a small office of four to six attorneys. Defendant was represented by the law firm Epstein, Becker, which was at the time a small firm of approximately 20 attorneys. While the case was in the discovery phase, one of LSEP's senior attorneys, who had not worked on the *Cheng* matter, was hired by Epstein, Becker. On this basis, plaintiff filed a motion to disqualify Epstein, Becker from representing the defendant in the case. The district court accepted Epstein, Becker's argument that the newly hired lawyer was sufficiently screened from revealing client confidences because he worked in a different department of the firm and had not discussed the case with anyone at the firm, and denied plaintiff's disqualification motion. On appeal, the Second Circuit reversed, finding that the trial court's assessment of the "risk of disclosure of confidential information [as] negligible" was incorrect.[16]

However, as set forth by the court in *Hempstead Video,* this decision did not suggest a broad, categorical rejection of screening, but rejected its efficacy in *Cheng* based on the unique facts of that case. The *Hempstead Video* court stated, "We see no reason why, in appropriate cases and on convincing facts, isolation— whether it results from the intentional construction of a 'Chinese wall,' or from de facto separation that effectively protects against any sharing of confidential information—cannot adequately protect against taint."[17] Such was the case with Mr. Englander and his "of counsel" relationship with the Jaspan firm.

Conclusion

The Second Circuit's *Hempstead Video* decision is instructional in a number of ways. First, absent clear evidence that a client's confidences were shared with other firm lawyers, it is unlikely that a disqualification motion will succeed in those situations where an attorney is in a nontraditional employment relationship with a firm. Second, the implementation of screening efforts by firms to avoid the sharing of confidential client information continues to have value and remains a substantial factor in the consideration of disqualification motions in the Second Circuit.

1. N.Y. Comp. Codes R. & Regs. Tit. 22, §1200.24(d).
2. See Jones, Leigh, "More Firms Using Temp Attorneys," *The National Law Journal*, Oct. 10, 2005.
3. 409 F3d 127 (2nd Cir. 2005).
4. 409 F3d. at 128-129.
5. Id. at 130.
6. Id. at 131.
7. See New York State Bar Ass'n Comm. On Prof'l Ethics, Op. 773 (2004); ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 90-357 (1990).
8. 409 F3d at 135 (internal citations omitted).
9. The court was not alone in its application of a functional approach to disqualification motions. Rather, it adopted a position similar to the one used by federal courts in the Northern and Southern Districts of New York and the Southern District of Georgia. See id. at 136.
10. Id.
11. Id.at 137-138 (referring to *Young v. Cent. Square Cent. Sch. Dist.*, 213 FSupp2d 202 (NDNY 2002); *Mitchell v. Metro. Life Ins. Co.*, No. 01 Civ. 2112, 2002 WL 441194 (SDNY March 21, 2002)).
12. 567 F2d 225 (2d Cir. 1977).
13. Id. at 229, n.10.
14. 409 F3d at 137-138.
15. 631 F2d 1052 (2d Cir. 1980).
16. Id. at 1057-58.
17. 409 F3d at 138.