ETHICS -- IT'S LEGAL, BUT IS IT RIGHT?

A. Applying the State Bar Code of Ethics to Your Case

The Lawyer's Code of Professional Responsibility (the "Code of Professional Responsibility") applies to lawyers practicing in the State of New York. A convenient pamphlet containing the most recent version of the Code of Professional Responsibility may be obtained from the New York State Bar Association (1-800-582-2452), which is located at One Elk Street, Albany, New York, 12207. The Disciplinary Rules of the Code of Professional Responsibility -- often referred to as "DR"s -- have been promulgated as joint rules of the Appellate Division of the Supreme Court, and the DRs are set forth in Part 1200 of Title 22 of the New York Codes, Rules and Regulations ("N.Y.C.R.R."). Moreover, the Code of Professional Responsibility is published with annotations in McKinneys' Consolidated Laws of New York, Annotated, Volume 29, Judiciary Law, as an Appendix.

The Appellate Division, Second Department, has defined "professional misconduct" as follows:

> Any attorney who fails to conduct himself, either professionally or personally, in conformity with the standards of conduct imposed upon members of the bar as conditions for the privilege to practice law, and any attorney who violates any provision of the rules of this court governing the conduct of attorneys, or any disciplinary rule of the Code of Professional Responsibility adopted jointly by the Appellate Divisions of the Supreme Court . . . or any canon of the Canons of Professional Ethics adopted by the New York State Bar Association, or any other rule or announced standard of this court governing the conduct of attorneys, shall be deemed to be guilty of professional misconduct with the meaning of subdivision (2) of section 90 of the Judiciary Law.

22 N.Y.C.R.R. § 691.2.

Effective March 4, 2002, attorneys are required to have written letters of engagement, as provided in the following joint rule of the Appellate Divisions of the Supreme Court:

> (a) Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall

> provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter (i) if otherwise impracticable or (ii) if the scope of services to be provided cannot be determined at the time of the commencement of representation. For purposes of this rule, where an entity (such as an insurance carrier) engages an attorney to represent a third party, the term "client" shall mean the entity that engages the attorney. Where there is a significant change in the scope of services or the fee to be charged, an updated letter of engagement shall be provided to the client. (b) The letter of engagement shall address the following matters:
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> (1) Explanation of the scope of the legal services to be provided;
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> (2) Explanation of attorneys' fees to be charged, expenses and billing practices; and, where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of the Rules of the Chief Administrator.
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> (c) Instead of providing the client with a written letter of engagement, an attorney may comply with the provisions of subdivision (a) by entering into a signed written retainer agreement with the client, before or within a reasonable time after commencing the representation, provided that the agreement addresses the matters set forth in subdivision (b).

22 N.Y.C.R.R. § 1215.1. Written engagement letters are not required when (i) the fee to be charged to the client is expected to be less than $3,000.00, (ii) the attorneys' services are of the same general kind as previously rendered to and paid for by the client, (iii) the representation is in connection with a domestic relations matter subject to Part 1400 of Title 22 N.Y.C.R.R., or (iv) the attorney is admitted to practice in another jurisdiction and does not maintain an office in the State of New York or when no material portion of the services are to be rendered in New York. 22 N.Y.C.R.R. § 1215.2.

For information regarding the new mandatory fee dispute program, go to **http://www.courts.state.ny.us/feegov/**.

B. Conflicts of Interest

The most frequent issues arising under the Code of Professional Responsibility are conflicts of interest.

1. Simultaneous Representation

Section 1200.24 of Title 22 of the N.Y.C.R.R. provides as follows:

> A. A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or likely is to be adversely affected by the acceptance of the proffered employment, or if it would likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105 [1200.24](C)).
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> B. A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyers' representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105 [1200.24](C)).
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> C. In the situations covered by DR 5-105 [1200.24] (A) and (B), a lawyer may represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representations and the advantages and risks involved.

22 N.Y.C.R.R. § 1200.24(A)-(C) (emphasis added). If a lawyer has a conflict of interest under either DR 5-105 [22 N.Y.C.R.R. § 1200.20)], or DR-105(A) [22 N.Y.C.R.R. § 1200.24(A)], or DR-105(B) [22 N.Y.C.R.R. § 1200.24(B)], or DR 5-108 (A) or (B) [22 N.Y.C.R.R. § 1200.27(A) or (B)], or DR 9-101 [22 N.Y.C.R.R. § 1200.45], then none of the lawyers in that firm may knowingly accept or continue the employment prohibited under those rules. See 22 N.Y.C.R.R. § 1200.24(D).

2. Former Clients

Similarly, section 1200.27(a)(1) of Title 22 of the N.Y.C.R.R. provides as follows:

> Except with the consent of a former client after full

> disclosure a lawyer who has represented the former client in a matter shall not:
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> 1. 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.

22 N.Y.C.R.R. § 1200.27(a)(1) [DR 5-108(A)(1)] (emphasis added).

In Solow v. W.R. Grace & Co., 83 N.Y.2d 303, 610 N.Y.S.2d 128 (1994), the New York Court of Appeals established the following principles regarding disqualification of counsel: "A party seeking to disqualify an attorney or a law firm, must establish (1) the existence of a prior attorney-client relationship and (2) that the former and current representations are both adverse and substantially related." 83 N.Y.2d at 308, 610 N.Y.S.2d at 130; see also Tekni-Plex, Inc. v. Meyner & Landis, 89 N.Y.2d 123, 131, 651 N.Y.S.2d 954, 958 (1996) ("Under DR 5-108(A)(1), a party seeking disqualification of its adversary's lawyer must prove: (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse."). If all of these elements have been met, then there is an irrebuttable presumption that both the lawyer and his or her current law firm should be disqualified. Solow, 83 N.Y.2d at 306, 610 N.Y.S.2d at 129; Tekni-Plex, 89 N.Y.2d at 131, 651 N.Y.S.2d at 958 ("Satisfaction of these three criteria by the moving party gives rise to an irrebuttable presumption of disqualification."); see also Cardinale v. Golinello, 43 N.Y.2d 288, 401 N.Y.S.2d 191 (1977) (affirming disqualification of plaintiff's law firm because member previously had represented defendants). As the Court of Appeals further explained in Solow: "If an attorney has represented a client in an earlier matter and then attempts to represent another in a substantially related matter which is adverse to the interests of the former client, the presumption of disqualification is irrebuttable." 83 N.Y.2d at 313, 610 N.Y.S.2d at 133; Tekni-Plex, 89 N.Y.2d at 131, 651 N.Y.S.2d at 958.

The New York Court of Appeals recently summarized the rationale for the "irrebuttable disqualification" rule in Tekni-Plex, Inc. v. Meyner & Landis, 89 N.Y.2d 123, 651 N.Y.S.2d 954 (1996):

> This rule of disqualification fully protects a client's secrets and confidences by preventing even the possibility that they will subsequently be used against the client in related

> litigation. This prophylactic measure thus frees clients from apprehension that information imparted in confidence might later be used to their detriment, which, in turn, "fosters the open dialogue between lawyer and client that is deemed essential to effective representation."
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> By mandating disqualification irrespective of any actual detriment -- that is, "even when there may not, in fact, be any conflict of interest" -- the rule also avoids any suggestion of impropriety on the part of the attorney. This not only preserves the client's expectation of loyalty but also promotes public confidence in the integrity of the Bar. Finally, the bright line rule provides a clear test that is easy to apply, thereby allowing self-enforcement among members of the Bar.

89 N.Y.2d at 131, 651 N.Y.S.2d at 958 (citations omitted) (emphasis added) (quoting Spectrum Sys. Int'l Corp. v. Chemical Bank, 78 N.Y.2d 371, 377, 575 N.Y.S.2d 809, 813 (1991)).

Disqualification due to conflict of interests is not uncommon. See, e.g., Dolgoff v. Projectavision, Inc., 235 A.D.2d 311, 653 N.Y.S.2d 111 (1st Dep't 1997) (affirming disqualification because defense counsel previously represented plaintiff on matters substantially related to instant action); Guiliano v. Carlisle, 211 A.D.2d 757, 621 N.Y.S.2d 685 (2d Dep't 1995) (affirming disqualification attorney who previously represented corporation in which plaintiffs were minority shareholders); Staten Island Hosp. v. Alliance Brokerage Corp., 166 A.D.2d 574, 560 N.Y.S.2d 859 (2d Dep't 1990) (affirming disqualification of attorney who represented plaintiff "for about six weeks with respect to the subject matter of this lawsuit and subsequently represented defendants"); In re Hof, 102 A.D.2d 591, 478 N.Y.S.2d 39 (2d Dep't 1984) (reversing denial of motion by estate's administratrix to disqualify co-administrator's counsel, who had previously represented both parties, because there was conflict of interest and attorney might be called as witness); see also Nassau County Bar Ass'n Ethics Opn. 98-10 (copy in Appendix); Ass'n of Bar of City of New York Formal Opn. Number 2001-2 (Apr. 17, 2001) (copy in Appendix).

C. Lawyer Liability

In Swift v. Choe, 242 A.D.2d 188, 674 N.Y.S.2d 17 (1st Dep't 1998), the Appellate Division, First Department excoriated an attorney who represented parties with

competing interests in a real estate transaction. Even though the attorney had obtained from the parties a waiver of the conflicts of interest, the attorney was still subject to malpractice claims, as explained by the Court:

> We emphasize that it is not an alleged violation of the disciplinary rules that forms the basis of the malpractice claim, although some of the conduct constituting a violation of a disciplinary rule may also constitute evidence of malpractice. In support of the attorney-malpractice claim, plaintiff asserts that defendants violated the duty of care owed to clients by failing to provide necessary and appropriate advice to [plaintiff] as an individual client, with respect to the ramifications of going through with the deal. Particularly in view of the unusual risks this transaction offered to the [other party], any attorney representing [plaintiff] . . . was under an obligation to make sure he understood exactly what those risks were. The question of whether defendants satisfied that obligation must be answered by the finder of fact.

242 A.D.2d at 194, 674 N.Y.S.2d at 21. Other authorities cover this subject as well. See, e.g., Conflicts of Interests: Attorneys Representing Parties with Adverse Interests in the Same Commercial Transaction, 14 Geo. J. Legal Ethics 945 (2001); Malpractice: Liability of Attorney Representing Conflicting Interests, 28 A.L.R.2d 389 (1969).