

**THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK  
COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS**

**FORMAL OPINION 2007 - 2**

**TOPICS:** Secondment of law firm attorneys; association with a law firm.

**DIGEST:** A law firm may second a lawyer to a host organization without subjecting the law firm to the imputation of conflicts under DR 5-105(D) if, during the secondment, the lawyer does not remain “associated” with the firm. The seconded lawyer will not remain associated with the firm if any ongoing relationship between them is narrowly limited, and if the lawyer is securely and effectively screened from the confidences and secrets of the firm’s clients. Both during the secondment and afterward, the seconded lawyer and his or her employer should be mindful of the lawyer’s former-client conflicts under DR 5-108.

**CODE:** DR 4-101; DR 5-104; DR 5-105; DR 5-108.

**QUESTION**

Under what circumstances may a law firm “second” a lawyer to a host organization without subjecting the law firm to the imputation of conflicts under DR 5-105(D)?

**DISCUSSION**

Originally a British military term meaning “[t]o remove (an officer) temporarily from his regiment or corps, for employment on the staff, or in some other extra-regimental appointment,”<sup>1</sup> in legal circles, secondment has come to describe the practice under which a lawyer from a law firm temporarily acts as inside counsel for a host organization, such as a client, a governmental agency, or a charity.<sup>2</sup> Secondments provide mutual benefit: the law firm benefits because the secondment strengthens the firm’s relationship with the host organization, the host organization benefits because the seconded lawyer provides needed assistance, and the seconded lawyer benefits because he or she gains an insider’s perspective into the business of the host and similar organizations.

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<sup>1</sup> *Oxford English Dictionary Online* (2006)

<sup>2</sup> The term “host organization” refers to the entity to which the secondment is made.

A secondment may take many forms, depending, for example, on whether (a) the seconded lawyer has access to the confidences and secrets of the firm's clients or of the host organization; (b) the host organization or the firm compensates the seconded lawyer; (c) the firm is compensated for making the secondment; and (d) the secondment is a partial one, in which the seconded lawyer devotes only a portion of the lawyer's time to the host organization. The many forms that a secondment may take naturally have different ethical implications, to which we now turn.

**I. Ethical Issues Arising from a Seconded Lawyer's Continuing Association with the Law Firm**

Under DR 5-105(D), lawyers associated in a law firm cannot knowingly accept or continue employment when any one of them would be prohibited from doing so because of a conflict of interest:

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 under DR 5-101(A), DR 5-105(A) or (B), DR 5-108 (A) or (B) or DR 9-101(B) except as otherwise provided therein.<sup>3</sup>

We discuss below the meaning of being "associated" with a law firm. As a threshold matter, under DR 5-105, when the seconded lawyer remains associated with the firm, conflicts may abound. For example, DR 5-105(A)-(B) prohibit the seconded lawyer who remains associated with the law firm from representing the host organization in litigated and transactional matters against the interests of a current client of the law firm, and DR 5-108

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<sup>3</sup> Model Rule 1.10(a) of the Model Rules of Professional Conduct is substantially the same:

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.

prohibits that seconded lawyer from acting adversely to the interests of a former client of the law firm in substantially related matters.

Another significant source of potential conflicts in this context arises from the possibility that the seconded lawyer may learn confidential information from the host organization that is imputed to the law firm under DR 5-105(D) and that is material to one of the firm's other clients. For example, the seconded lawyer may learn that the host organization has been approached on a confidential basis to extend critical working-capital financing to Corporation Y. At the same time, the firm may represent Client Z that intends to launch a hostile bid for Corporation Y. Through its continuing association with the seconded attorney, the law firm would be considered to possess information that "is so material to the second representation," *i.e.*, of Client Z, that the law firm would be representing "differing interests," so as to create a conflict under DR 5-105, "in the sense that the representation of one client cannot be accomplished without violating the rights of another." See ABCNY Formal Op. 2005-2. Similarly, "continued employment [could] mean violating . . . the requirement of DR 4-101(B)(3) that a lawyer may not use a confidence or secret for the advantage of another client." Id. Accordingly, because obtaining the informed consent of both Client Z and the host organization would require each to make disclosures to the other that neither is likely to agree to make, the law firm and the seconded attorney would be precluded from continuing to represent either one.

Moreover, when the seconded lawyer is associated with both the law firm and the host organization, the conflicts of the law firm become the conflicts of the host organization, and vice versa.<sup>4</sup> See N.Y. State 793 (2006) (when a lawyer is "of counsel" to two law firms, the

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<sup>4</sup> Under the Code, a law firm is defined to include the legal department of a corporation. *Code, Definitions.*

lawyer is ordinarily associated with both, and thus the conflicts of the one firm are imputed to the other). Thus, DR 5-105 would prohibit, for example, all the attorneys in the host organization's law department from acting adversely to any client of the firm.

This analysis leads to the conclusion that a secondment should be structured so that the seconded lawyer is not associated with the law firm during the secondment. The key to achieving this lies in the meaning of being associated with a law firm.

## II. Being "Associated" with a Law Firm

The test for determining whether a lawyer is associated with a law firm has been addressed in two ethics opinions, ABA Op. 88-356 (1988) and N.Y. State 715 (1999), and in a recent opinion by the United States Court of Appeals for the Second Circuit, Hempstead Video, Inc. v. Village of Valley Stream, 409 F.3d 127 (2d Cir. 2005). As noted in N.Y. State 715 (1999), "[t]he Code does not define the term associated." The two ethics opinions, both of which addressed whether a temporary lawyer is associated with a law firm, concluded that "[t]he question whether a temporary lawyer is associated with a firm at any time must be determined by a functional analysis of the facts and circumstances involved in the relationship between the temporary lawyer and the firm consistent with the purposes for the Rule." ABA Op. 88-356 (1988); see also N.Y. State 715 (1999) (association "depends upon the nature of the relationship").

In Hempstead Video, Inc., the Court of Appeals for the Second Circuit addressed whether the conflicts of an attorney acting "of counsel" to a law firm should be imputed to the firm. The Court of Appeals rejected any per se rule, and instead held that the "substance of the relationship" and the "procedures in place" should be examined in determining whether an

association exists:

[T]he better approach for deciding whether to impute an “of counsel” attorney’s conflict to his firm for purposes of ordering disqualification in a suit in federal court is to examine the substance of the relationship under review and the procedures in place. The closer and broader the affiliation of an “of counsel” attorney with the firm, and the greater the likelihood that operating procedures adopted may permit one to become privy, whether intentionally or unintentionally, to the pertinent client confidences of the other, the more appropriate will be a rebuttable imputation of the conflict of one to the other. Conversely, the more narrowly limited the relationship between the “of counsel” attorney and the firm, and the more secure and effective the isolation of nonshared matters, the less appropriate imputation will be.

409 F.3d at 135. The Court of Appeals concluded on the facts presented that conflicts should not be imputed to the law firm because the relationship between the lawyer and the law firm was “narrowly limited,” “attenuated,” and “remote.” Id. at 136.

Under these authorities, the touchstones for determining association are the nature of the lawyer’s relationship with the law firm and whether the lawyer has access to the confidences and secrets of the law firm’s clients. Hempstead Video, Inc., 409 F. 3d at 135-36. See also N.Y. State 715 (1999) (when an attorney “has general access to the files of all clients of the firm and regularly participates in discussions of their affairs, then he or she should be deemed ‘associated’ with the firm”). Relatedly, whether an attorney “should be deemed to have access to the confidences and secrets of [the] clients of [a] firm depends upon the circumstances, including whether the firm has a system for restricting access to client files and for restricting informal discussions of client matters.” Id. “The more narrowly limited the relationship between the . . . attorney and the firm, and the more secure and effective the isolation of nonshared matters, the less appropriate imputation will be.” Hempstead Video, 409 F. 3d at 135. The firm may use formal means, including ethical screens, to deny access to those confidences and secrets. Id. at

134 (“Whether 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”);<sup>5</sup> N.Y. State 715 (1999) (“if the firm has adopted procedures to ensure that the . . . Lawyer is privy only to information about clients he or she actually serves, then, in most cases, the . . . Lawyer should not be deemed to be ‘associated’ with the firm for purposes of vicarious disqualification”) (citing ABA Op. 88-356 for the proposition that an employing firm should “screen each temporary lawyer from all information relating to clients for which the temporary lawyer does no work”).

We therefore conclude that when (i) any ongoing relationship between the seconded lawyer and the law firm is narrowly limited, including that the seconded lawyer works solely under the direction of the host organization, and (ii) the seconded lawyer is securely and effectively screened from the confidences and secrets of the law firm’s clients, the seconded lawyer should not be considered associated with the law firm, and conflicts should not be imputed to the law firm. Our conclusion is not altered by the mere fact, for example, that the seconded lawyer (a) is expected to return to the firm at the end of the secondment, (b) retains the lawyer’s “class rank” at the firm, (c) retains the lawyer’s benefits under the firm’s pension plan, or (d) can send and receive e-mails through the firm’s e-mail servers (but without access to confidences and secrets of the firm’s clients).

On the other hand, when the seconded lawyer spends some of the lawyer’s time at the host organization and the balance at the law firm, working for other clients of the firm (a “partial secondment”), the seconded lawyer remains associated with the firm. See ABCNY Formal Op. 1996-8, ABA Op. 90-357 (1990).

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<sup>5</sup> See ABCNY 2006-2 for a discussion of the factors that courts analyze in determining whether a screen is effective.

### III. The Law Firm's Continuing Supervision of the Seconded Lawyer

We now consider whether the seconded lawyer remains associated with the law firm if the law firm continues to supervise the seconded lawyer in connection with the seconded lawyer's representation of the host organization.

In approaching this question, we are mindful of the recent admonitions of the Court of Appeals for the Second Circuit in Hempstead Video, Inc., in which the Court rejected any per se rule in determining the analogous question whether an "of counsel" attorney was associated with a law firm, and held:

*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." Silver Chrysler [Plymouth, Inc. v. Chrysler Motors Corp.], 518 F.2d 751, 753 n. 3 (1975)] (quoting United States v. Standard Oil Co., 136 F.Supp. 345, 367 (S.D.N.Y.1955)).

409 F.3d at 135. The Court of Appeals underscored that:

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.

Id. at 135-36.

We consider first the circumstance when the host organization requests the law firm to continue to supervise the seconded lawyer in concluding a representation of the host organization that the seconded lawyer began while at the law firm. In this limited, transitional circumstance, we do not believe either that any additional conflicts would be imputed to the law firm, or that the seconded lawyer would remain associated with the firm. First, the law firm has been representing the host organization all along in the matter, so the law firm continuing to work on the matter does not by itself create any additional conflict. Second, there is little difference between the law firm continuing to supervise the seconded lawyer in this

circumstance, and the host organization engaging the law firm to complete that representation and to work with the seconded lawyer as a representative of the host organization. To conclude either that additional conflicts would be imputed or that the seconded lawyer would remain associated with the law firm would elevate form over substance and create an unjustifiable rift between the host organization on the one hand and the seconded lawyer and the law firm on the other, undermining the host organization's right to the counsel of its choice. Levine v. Levine, 56 N.Y.2d 42, 451 N.Y.S.2d (1982) (recognizing, in the context of law-firm conflicts, that the right to counsel is a fundamental right).

But these considerations are entitled to less weight if the law firm supervises the seconded lawyer in connection with one or more new representations of the host organization. Moreover, even one significant new representation in which the law firm supervises the seconded lawyer could result in the sort of close and regular relationship between the seconded lawyer and the law firm that would likely result in conflicts being imputed and the lawyer being considered associated with the firm. Hempstead Video, Inc., *supra*.

Finally, if the law firm supervises the seconded lawyer in connection with the seconded lawyer's representing other clients of the law firm, this would be a partial secondment, and, as discussed above, conflicts would be imputed to the law firm.

#### **IV. The Effect of Different Compensation Arrangements on the Determination of Association and the Imputation of Conflicts**

We next consider whether, if the firm continues to pay the seconded lawyer during the secondment, or if the host organization pays the firm for the secondment, the seconded lawyer remains associated with the firm, or conflicts are otherwise imputed to the firm. If the law firm pays the seconded lawyer during the secondment, this alone does not result in the imputation of conflicts to the firm, or make the lawyer associated with the firm, so long as the



seconded lawyer's professional judgment is not directed by the firm and the lawyer lacks access to the confidences and secrets of the firm's clients. Cf. DR 5-107(B) (with the consent of the client, a lawyer may accept compensation for legal services from one other than the client, but shall not permit a person who pays the lawyer "to direct or regulate his or her professional judgment in rendering such legal services, or to cause the lawyer to compromise the lawyer's duty to maintain the confidences and secrets of the client . . ."). It is advisable in this situation to record in writing that the firm will not be directing the professional judgment of the seconded lawyer.<sup>6</sup>

For the same reasons, this analysis is not altered if the host organization pays the firm for the secondment.<sup>7</sup> We hasten to point out that when the host organization pays the firm for the secondment, the firm must satisfy the requirements of DR 5-104, which provides in part that when a lawyer seeks to do business with a client, and if the client expects the lawyer to exercise professional judgment in order to protect the client in the transaction, the transaction must be fairly described "in writing to the client in a manner that can be reasonably understood by the client." In addition, the lawyer must recommend that the client consult with independent counsel in connection with the arrangement, and the client must consent in writing. In all these cases, a written contract clearly explaining the terms of the secondment is essential.

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<sup>6</sup> Best practices also dictate that the law firm's procedures to screen the seconded lawyer be in writing. See ABCNY 2006-2.

<sup>7</sup> In effect, the firm would be acting as a placement agency for the seconded lawyer, as if the seconded lawyer were a contract lawyer. See ABA Op. 88-356 (1988). There is no reason why the firm, like a placement agency, cannot temporarily place its lawyers with host organizations and charge for that service. The fee is justified because the firm not only loses its ability to bill the lawyer's time during the secondment, but the firm may also be paying the lawyer during the secondment.

## V. Avoiding Conflicts with Former Clients

Even assuming that the secondment is structured so that the seconded lawyer is not associated with the firm, the seconded lawyer must, of course, still conform to DR 5-108. Thus, while at the host organization, the seconded lawyer is prohibited from undertaking a representation in a matter that is substantially related to a matter that the lawyer worked on at the firm, if the new representation would be adverse to the interests of the former client at the firm. It also bears reminding that if the seconded lawyer is associated with the legal department of the host organization, no lawyer in that legal department may act adversely to the interests of the seconded lawyer's former clients on substantially related matters, without the former clients' consent.<sup>8</sup> See DR 5-105(D). Of course, the seconded lawyer may continue to work on matters in which the lawyer previously represented the host organization while associated with the firm.

If the lawyer returns to the firm when the secondment ends, the firm may be conflicted if the firm seeks to represent, or currently represents, a client whose interests are materially adverse to the host organization. Most often, the host organization is already a client of the firm. Therefore, it would be unlikely that the firm would act adversely to the host organization, except with its consent, or if the firm has ceased to represent the host organization. But conflicts may arise even when the host organization is a current client because of the returning lawyer's access to confidential information while seconded. In the example discussed above, the seconded lawyer learned that the host organization had been approached to extend critical financing to an acquisition target of Client Z. Even if the seconded lawyer was not associated with the firm during the secondment, when the seconded lawyer returns to the firm, if

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<sup>8</sup> See ABCNY 2003-03 for a discussion of avoiding conflicts with former clients of "laterals," such as the seconded lawyer. The host organization should establish appropriate safeguards, such as a conflicts database, to ensure that conflicts with the seconded lawyer's former clients are avoided.

that information is still material to Client Z, the provisions of DR 5-105(D) will nonetheless apply, and the firm may then be disqualified from representing Client Z unless informed consent can be obtained.

Furthermore, if the host organization is a former client of the law firm when the seconded lawyer returns, the law firm may be precluded from accepting an engagement in which the firm would be adverse to the host organization if that representation is substantially related to the formerly seconded lawyer's representation of the host organization.<sup>9</sup>

### CONCLUSION

A lawyer may be seconded to a host organization without thereby subjecting the law firm to the imputation of conflicts under DR 5-105(D) if, during the secondment, the lawyer does not remain associated with the firm. The seconded lawyer will no longer be associated with the firm if any ongoing relationship between the two is narrowly limited and if the lawyer is securely and effectively screened so that the lawyer does not have access to the confidences and secrets of the firm's clients. If the seconded lawyer splits the lawyer's time between the host organization and the firm, the lawyer will be associated with both the firm and the host organization, and the conflicts of one will be imputed to the other. If the law firm supervises the seconded lawyer in concluding a representation for the host organization that the seconded lawyer began while at the firm, additional conflicts should not be imputed to the firm and the lawyer should not be considered associated with the firm, again if the lawyer is securely and effectively screened. Neither the firm paying the seconded lawyer nor the host organization paying the firm for the seconded lawyer's services affects the determination whether the lawyer is associated with the firm during the secondment. Both during the secondment and afterward,

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<sup>9</sup> It is thus advisable for the seconded lawyer to keep a record of the matters on which he or she worked while seconded, to the extent feasible.

the seconded lawyer and his or her employer should be mindful of the lawyer's former-client conflicts under DR 5-108.