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TO THE FORUM:

I recently started supervising students in a law school clinic that assists indigent individuals. We provide a number of services including evening programs where people can seek quick legal advice, and they are often referred to other specialized not-for-profit groups that can further assist them. For certain individuals, however, we expect to represent them in court and in other administrative proceedings. I was so enthusiastic about this new position that I reached out to a few of my colleagues at law firms and other not-for-profit organizations that I thought could help educate my law students and provide competent pro bono advice to our clients. They were excited to help.

But when I started to arrange our engagement letters, I realized that this was not going to be as easy as I anticipated. Do I need to run conflict checks with my colleague's law firms? Do I need to run conflict checks with the not-for-profit groups with which we are working? Are the conflict checks limited to the clients involved in the matters where we are acting as co-counsel, or do we have to run conflicts checks against all of our respective clients? The law school has a few different clinics that focus on different areas of law and clients. Do we have to run conflicts checks against all of the clients in each of the clinics? If we meet with someone in a drop-in session for a short period of time, is there a conflict if we later end up representing someone adverse? If there is a conflict, would it be imputed to any of the other firms or not-for-profits? Are there any other issues I should be concerned about?

Sincerely,
Ed U. Katz

DEAR ED U. KATZ:

Your desire to supervise the law school clinic is truly noble. All lawyers should admire your commitment to public service and your efforts to mentor law students as they begin their careers. The New York Rules of Professional Conduct (RPC) strongly encourage lawyers to engage in pro bono service. *See* NYSBA Comm. on Prof'l Ethics, Op. 1141 (2017). RPC 6.1 states that lawyers should aspire to provide at least 50 hours of pro bono legal services each year to poor individuals. *See* RPC 6.1(a)(1). Your efforts will hopefully instill a lifelong commitment by these law students to public service. As you aptly point out, however, your law school clinic program implicates numerous RPC that should be considered when establishing your conflicts of interest protocol.

As a general matter, the RPC treat law clinics as law firms. *See* NYSBA Comm. on Prof'l Ethics, Op. 794 (2006). The RPC defines a "firm" or "law firm" to include "a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization." RPC 1.0(h). A "qualified legal assistance organization" is defined as "an office or organization of one of the four types listed in Rule 7.2(b)(1)–(4) that meets all of the requirements thereof." RPC 1.0(p). A legal aid office "operated or sponsored by a duly accredited law school," such as the clinic you describe in your inquiry, is included within RPC 7.2(b)(1)(i). *See* RPC 7.2(b)(1)(i). Therefore, unless the RPC state otherwise, the same Rules that govern law firms also apply to legal aid offices operated by an accredited law school. *See* NYSBA Comm. on Prof'l Ethics, Op. 1141 (2017); NYSBA Comm. on Prof'l Ethics, Op. 794 (2006).

CONFLICTS OF INTEREST PROCEDURES FOR LIMITED LEGAL SERVICES PROGRAMS

The clinic that you are describing would offer different types of services, including quick legal advice programs and more involved representations. A lawyer's obligations with regard to conflict checks differ based upon the scope of services performed. First, we will address the appropriate conflict checking procedure for when a law school clinic is providing "quick legal advice" at an event or evening program.

RPC 6.5 is intended to relax the conflict of interest Rules when lawyers participate in short-term limited legal services programs. *See* Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 1630 (2016 ed.). "Short-term limited legal services" are defined as "services providing legal advice or representation free of charge . . . with no expectation that the assistance will continue beyond what is necessary to complete an initial consultation, representation or court appearance." RPC 6.5(c). RPC 6.5 applies to a lawyer who provides short-term limited legal services as part of a legal service organization, court-sponsored program, government agency, bar association or various non-profit organizations. *See* RPC 6.5 Comment [1].

In the type of pro bono legal services covered by RPC 6.5, a client-lawyer relationship is established, but there is no expectation that the lawyer will continue with the representation beyond the limited consultation provided. *See id.* In these types of programs, it is not usually feasible to conduct a traditional conflict check prior to performing the legal services. *See id.* Accordingly, for these short-term limited legal services, RPC 6.5 only requires compliance with RPC 1.7, 1.8 and 1.9 (the primary Rules governing conflicts of interest with current and former clients) if the attorney knows that the representation of the client poses a conflict under the RPC for the lawyer providing the advice. *See* RPC 6.5 Comment [3]; *see also* Simon, *Simon's New York Rules of Professional Conduct Annotated,* at 1633. Said simply, the usual conflict of interest Rules do not apply unless the lawyer has "actual knowledge" that the representation of the client involves a conflict of interest for that lawyer or an associated lawyer. *See* NYSBA Comm. on Prof'l Ethics, Op. 1012 (2014). Without actual knowledge of a conflict, the lawyer need not perform any further conflicts analysis. *See id.* If the representation expands to provide ongoing legal services to the client after commencing the short-term limited representation under RPC 6.5, however, the lawyer must then comply with RPC 1.7, 1.9(a) and 1.10 and conduct a full conflict check. *See* RPC 6.5 Comment [5].

RPC 6.5 also limits the application of the conflict imputation provisions of RPC 1.10 in pro bono legal service programs. *See* RPC 6.5(a)(2). RPC 1.10(a) states, "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 . . . ." RPC 1.10(a). The New York State Bar Association (NYSBA) Committee on Professional Ethics has opined that applying this "rigid imputation" Rule in the RPC 6.5 context could unduly burden a law firm or lawyer and deter them from participating in these limited services legal programs. *See* NYSBA Comm. on Prof'l

Ethics, Op. 1012 (2014). Therefore, if a new client seeks to retain a clinic volunteer lawyer's firm in a matter that is the "same or substantially related" to a matter on which the volunteer lawyer represented a clinic client, and there is a known conflict between the interests of the new client and the clinic client, RPC 1.10(a) will not preclude any *other member* of the volunteer lawyer's firm from representing the new client. *See id.* RPC 1.9(a), however, will preclude the volunteer lawyer from representing the new client directly absent a proper waiver from the clinic client for whom the volunteer lawyer already provided legal services and shared a lawyer-client relationship. *See id.*

A lawyer who provides legal services under RPC 6.5 must also be sure to obtain the client's informed consent concerning the limited scope of the representation. *See* RPC 6.5 Comment [2]. If a short-term representation relationship is not reasonable under the circumstances, the lawyer is permitted to offer advice, but must also advise as to the client's need for further assistance of counsel. *See id.*

CONFLICTS OF INTEREST PROCEDURES FOR EXPANDED REPRESENTATION

The conflict of interest rules for expanded representation matters differ from those for limited representation under RPC 6.5. When the nature of the representation is expanded, RPC 6.5 is no longer applicable and lawyers are required to follow more traditional conflicts of interest principles.

In order to encourage participation in leadership positions in not-for-profit organizations, RPC 6.3 allows lawyers to serve as "directors, officers or members" of these organizations without creating conflicts of interests that could disqualify them or their law firms from other matters. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated,* at 1611. RPC 6.3 permits a lawyer to serve "as a director, officer or member of a not-for-profit legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests that differ from those of a client of the lawyer or the lawyer's firm." RPC 6.3.

The law school clinic is a not-for-profit organization as contemplated by RPC 6.3; however, this Rule only applies to lawyers serving as a "director, officer, or member" and does not apply to other lawyers only representing clients through the organization. *See* NYSBA Comm. on Prof'l Ethics, Op. 794 (2006); *see also* Simon, *Simon's New York Rules of Professional Conduct Annotated,* at 1612. RPC 6.3(a) makes a clear distinction between lawyers who administer the organization, make policy, or teach and the lawyers who actually provide legal services. *See* RPC 6.3(a). RPC 6.3 is logical because the lawyers maintaining leadership positions in these organizations are not establishing client-lawyer relationships with those individuals served by the organization. RPC 6.3 Comment [1]. If a director, officer or member of a not-for-profit organization were to also establish a client-lawyer relationship as part of their work with the organization, however, it is likely that RPC 6.3 would not be applicable in that instance. *See* RPC 6.3. RPC 1.10 therefore remains in full force and effect for those lawyers actually providing legal services through a not-for-profit legal services organization. *See id.; see also* Simon, *Simon's New York Rules of Professional Conduct Annotated,* at 1614. Accordingly, we will turn to conflict issues for attorneys in expanded pro bono representations who are not solely acting in the capacity of a director, officer, or member of the not-for-profit legal services organization.

As discussed above, RPC 1.10 imputes conflicts to lawyers associated in the same law firm. The RPC do not define the word "associated." *See* NYSBA Comm. on Prof'l Ethics, Op. 1141 (2017). The NYSBA Committee on Professional Ethics has opined that "to be 'associated in a firm' means to be a member of, employed by, 'of counsel' to, or 'affiliated' with the law firm, in each instance reflecting a close and continuing relationship with the firm to warrant imputation of the conflicts of any one lawyer in the firm to the other lawyers there." *See id.* (citations omitted). The term "co-counsel" means "attorneys or firms jointly representing a client or clients with respect to a particular litigation or transaction. The relationship is episodic rather than enduring. Exchange of confidential information between co-counsel is a necessary incident to serving the interests of their mutual client(s)." *See id.* The primary concern when considering whether there should be imputation for conflicts purposes between co-counsel is the protection of confidential information under RPC 1.6. *See id.* When considering whether to "merge" two entities for the purposes of all conflicts, such as the clinic or any not-for-profit organization with which the clinic elects to work, it must be considered whether these entities will share any personnel, finances, office space, access to client files, and whether there is a substantial overlap of clients. *See id.*

In a 2006 NYSBA Committee on Professional Ethics opinion, the Committee addressed an inquiry concerning a law school legal clinic and imputation of conflicts of interest for different clinic programs and the lawyers that assisted the clinic. *See* NYSBA Comm. on Prof'l Ethics, Op. 794 (2006). The clinic had recently established a new project called the "Consumer Project" that would engage the law school clinic in representing clients harmed by improper commercial practices. *See id.* The two New York lawyers hired to assist the Consumer

Project were also employed at private law firms. *See id.* The Committee found that the measures taken by the clinic to prevent cross-imputation of conflicts between the clinic's non-Consumer Project matters to the law firms and the law firms' representations of other matters in the clinic were insufficient primarily because of the shared work spaces utilized and the storing of all client files in a common area. *See id.* The Committee reasoned that two or more lawyers carrying out conflicting assignments in close proximity and sharing common space could affect the lawyer's exercise of independent judgment, and this proximity required that the legal clinic (including the Consumer Project) be treated as a single law firm for conflict purposes. *See id.* The Committee also noted that that there was a palpable danger that client confidences and secrets would be divulged through the use of common staff and/or files. *See id.*, citing ABA Inf. 1474 (1982). If client confidences are at risk, the Committee opined, it is appropriate to treat the "association" of entities as a law firm for purposes of RPC 1.10 or to find that clients with adverse interests can't be represented. *See* NYSBA Comm. on Prof'l Ethics, Op. 794 (2006), citing *Commonwealth v. Alison,* 434 Mass. 670, 691 (2001). The Committee also stated that as long as the legal clinic students worked in the same space and had access to shared physical files, the entire clinic's staff, including the lawyers who supervised the students, are a law firm within the meaning of the RPC and therefore the conflicts of all the personnel are imputed to all the lawyers at the clinic, and vice versa. *See* NYSBA Comm. on Prof'l Ethics, Op. 794 (2006).

From the facts that you have given us, it does not appear that any of the relevant factors that would require imputation of conflicts between the law school clinic and the not-for-profit organizations with which you intend to work are present. Serving as "co-counsel" does not mean that a law firm is "associated in" the same firm as a legal services organization for purposes of imputation under RPC 1.10. When your clinic works with a legal service organization or law firm as "co-counsel" in a particular matter, the RPC require only that the clinic and legal services organization (or law firm) clear conflicts, individually and separately, only for the matters where they serve together as co-counsel (as long as none of the factors implicating association noted above – such as shared files and close working proximity – apply). *See* NYSBA Comm. on Prof'l Ethics, Op. 1141 (2017). For example, law firms often retain local counsel when litigating in foreign jurisdictions without having each other's conflicts imputed. *See id.*, citing ALI, Restatement of the Law Governing Lawyers (Third), §123, Cmt. c(iii).

Accordingly, after reading the various opinions cited above, we suggest that you institute proper measures to maintain client confidences between clinic clients and those of the not-for-profit organization by keeping the office spaces of the clinic and any other organization who serves as co-counsel separate and by maintaining files (electronic or otherwise) separate from any organization with whom you work as co-counsel.

Sincerely,
The Forum by
Vincent J. Syracuse, Esq.
(Syracuse@thsh.com)
Carl F. Regelmann, Esq.
(Regelmann@thsh.com)
Alexandra Kamenetsky Shea, Esq.
(Shea@thsh.com)
Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

My adversary in a case is representing himself pro se, but his briefs are very sophisticated and appear to have been ghostwritten by an attorney. I asked him whether an attorney helped him with it and he just changed the subject. I am frustrated because I feel like the judge is sympathetic to him because he is pro se, but I suspect that his legal arguments are actually being crafted by an attorney. I think that this puts me at a big disadvantage. Since he is not a lawyer, I know that he is not bound by the Rules of Professional Conduct. If he is getting help from a lawyer, are there rules that are being violated and is there anything that I can do?

This issue got me thinking about the ease in which anyone can just "cut and paste" briefs, opinions, and articles into their own submissions without attribution. For all I know, maybe my pro se adversary isn't really working with an attorney and just found good briefs by other attorneys that were publicly available. In the "old days," firms had banks of old briefs to work from, but with public e-filing access to literally thousands of briefs from the comfort of home, anyone can access briefs on any subject matter easily. Are there any limitations on where to draw the line on plagiarizing briefs? I admit, I am guilty of occasionally taking good citations and arguments from briefs I find online, but I always check the citations and craft the arguments around my client's specific cases. But should I be concerned I am lifting from briefs too liberally? I recently had an insurance carrier tell me it wouldn't pay for my research time unless I used its legal research firm, which includes a bank of briefs. I am fine using the briefs from this service, but should I be concerned that I am signing my name to a brief that was largely written by someone I don't know?

Sincerely,
Jacob Marley