

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Advisory Opinion 1990/91-11
Conflict of Interest: Client Gift to a Relative
of a Firm Associate (Prohibited Transactions)
May 9, 1991

RULE REFERENCES:

- *Rule 1.7(b)(2)
- *Rule 1.8(c)
- *Rule 1.10(a)
- *Rule 1.10(d)

SUBJECTS:

- *Adverse Effect on Professional Judgment
- *Attorney-Client Relationship
- *Conflict of Interest
- *Consent
- *Consultation
- *Disqualification
- *Harsh Reality Test
- *Independent Judgment
- *Law Firms
- *Relatives
- *Wills

ANNOTATIONS:

A lawyer is prohibited from preparing an instrument giving the lawyer or the lawyer's relative any substantial gift from a client, including a testamentary gift. (Rule 1.8(c)).

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(c), 1.9, or 2.2. (Rule 1.10(a)).

Imputed disqualification may be waived by an affected client only after consultation and with knowledge of the consequences. (Rule 1.10(d); Rule 1.7(b)(2)).

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibility to another client or to a third person, or by the lawyer's own interests unless the client consents after consultation and with knowledge of the consequences. (Rule 1.7(b)(2)).

Under the "harsh reality" test, a lawyer should contemplate the following: if a disinterested lawyer were to look back at the inception of the representation once something goes wrong, would that lawyer seriously

question the wisdom of the first attorney's requesting the client's consent to the representation or question whether there had been a full disclosure to the client prior to obtaining the consent, NH Op 1988-89/24. (Rule 1.7(b)(2)).

FACTS:

A client of a partner in a law firm has expressed a desire to make a substantial gift of money (during their lifetime) to the mother of an associate employed by the firm. The firm has given legal advice to the client in regard to the gift. The firm has a power of attorney from the client and manages all the client's affairs. We assume for purposes of this inquiry that the client is legally competent and is able to make all necessary decisions. The firm will probably draw the check for the client to give the friend. The mother's acquaintance with the client predates the representation by the partner of the client. The mother performs some services for the elderly client.

QUESTION:

If the partner plays any part in the transfer/gift, is there a violation of Rules 1.8(c) and 1.10 of the Rules of Professional Conduct?

RESPONSE:

1. Conflict of Interest Rule 1.8(c)

Rule 1.8(c) does prohibit the lawyer in preparing an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee. A check is considered a negotiable instrument. In this case, the person who receives the gift is not related to the lawyer preparing the instrument but rather to one of the lawyer's associates.

2. Imputed Disqualification Rule 1.10(a)

Rule 1.10(a), which covers Imputed Disqualification, provides that "(w)hile 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(c), 1.9 or 2.2."

3. Imputed Disqualifications Rule 1.10(d)

Rule 1.10(d), provides that a disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7(b)(2).

4. Conflict of Interest Rule 1.7(b)(2)

N. H. ETHICS OPINIONS ANNOTATED

The imputed disqualification may be waived under Rule 1.10(d) provided that the provisions of Rule 1.7(b)(2) are met. The attorney in the present case may be in a conflict situation by assisting a client in gifting money to the mother of an associate. However, the attorney is not prohibited per se from the representation of the client provided the attorney can meet the conditions of Rule 1.7(b)(2), a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibility to another client or to a third person, or by the lawyer's own interests unless the client consents after consultation and with knowledge of the consequences.

5. Additional Consideration in a Conflict Situation

In N.H. Op. 88-9/24, the Ethics Committee applied the "harsh reality" test. Under this test a lawyer should contemplate the following: if a disinterested lawyer were to look back at the inception of this representation once something goes wrong, would that lawyer seriously question the wisdom of the first attorney's requesting the client's consent to this representation or question whether there had been full disclosure to the client prior to obtaining the consent.

CONCLUSION:

A reading of Rules 1.8(c), 1.10(a) and 1.10(d) together would not absolutely prohibit a lawyer from writing a check of a substantial gift from a client to the mother of another lawyer in the same firm, provided that the imputed disqualification was waived by the client under the provisions of Rule 1.7(b)(2) following a careful application of the "harsh reality" test. In this instance, such factors as the client's age, lucidity and ability to appreciate the consequences of the actions, including the ramifications of the waiver of disqualification rights, should be carefully considered by the attorney pondering representation.