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DEAR FORUM,

I am a matrimonial attorney and represent a very wealthy client that is going through a messy divorce. We just received a motion to disqualify our firm because my client's spouse is represented by an attorney who previously worked at our firm and met briefly with our client's spouse years ago while an associate at our firm. No one currently at our firm has any recollection of meeting or communicating with our client's spouse and we don't have any of the spouse's records. Our client is furious with the spouse because a few other law firms were conflicted out from representing our client before we were engaged because the spouse evidently consulted with a number of prominent divorce attorneys in the area before finally engaging our former associate. Although our client's spouse likely won't admit to it, it seems like the consultations with so many prominent attorneys in this relatively niche high end divorce legal field was intended to prejudice our client.

Do we have a basis to oppose the disqualification motion? Are there any actions we should be taking to demonstrate to the court that our firm should not be disqualified? Are there any other factors we should be considering to protect our client's right to choose counsel?

Very truly yours,
Carmela S.

DEAR CARMELA S.,

Your situation reminds us of a popular *Sopranos* episode where Tony Soprano goes out of his way to conflict out lawyers who might possibly represent his wife. *The Sopranos*: "Whitecaps" (HBO television broadcast Dec. 8, 2002). Answering your question requires a close look at numerous sections of the New York Rules of Professional Conduct RPC) in addition to well-established legal precedent in New York State.

At the outset, it is important to note that although your client's spouse met with your firm only briefly, attorneys owe certain duties to prospective clients under the RPC.

A prospective client is defined in RPC 1.18(a) as "[a] person who consults with a lawyer about the possibility of forming a client lawyer relationship with respect to a matter . . . ." With regard to the confidential information that the prospective client has communicated to the attorney, Rule 1.18(b) states: "even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client." Rule 1.9 does not identify the specific duties owed to prospective clients. It tells us that: "a lawyer who has formerly represented a client in a matter shall not 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 unless the former client gives informed consent, confirmed in writing." *See* Vincent J. Syracuse & Matthew R. Maron, Attorney Professionalism Forum, N.Y. St. B.J., June 2012, Vol. 84, No. 5.

In essence, the duties owed to a prospective client under the RPC are similar to those owed to a former client. What this means is that even though your client's spouse may have only briefly met with the former attorney at your firm years ago, your firm has an obligation to protect any confidential information it may have received.

RPC 1.18(c) further provides:

> [a] lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d) [of Rule 1.18].

Pursuant to RPC 1.18(d), where an attorney who has received disqualifying information is still employed at the firm, it is permissible for a firm to represent a conflicted client if:

> (1) both the affected client and the prospective client have given informed consent, confirmed in writing; or (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (ii) written notice is promptly given to the prospective client.

RPC 1.18(e) creates an important exception that seems to be applicable to your situation. Pursuant to RPC 1.18(e), a person is not deemed a prospective client if the person "communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter." *See* Vincent J. Syracuse & Matthew R. Maron, Attorney Professionalism Forum, N.Y. St. B.J., February 2013, Vol. 85, No. 2. Accordingly, if you can establish that your client's spouse intended to provide your firm with confidential information so that he/she could subsequently seek to have you and your firm disqualified from representing his/her spouse in the event either of them filed for divorce, then your former client is not entitled to the protection given to prospective clients under RPC 1.18.

The catch is that in the absence of adequate evidence establishing that your client's spouse provided attorneys at your firm with confidential information for the *sole* purpose of disqualifying your firm from representing his spouse, you will need to demonstrate that you do not have conflict that prevents representation of your client. RPC 1.10 governs the imputation of conflicts of interest. RPC 1.10(b) provides "when a lawyer has terminated an association with a firm, the firm is prohibited from thereafter representing a person with interests that the firm knows or reasonably should know are materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm if the firm or any lawyer remaining in the firm has information protected by Rule 1.6 or Rule 1.9(c) that is material to the matter." *Id.*

Nevertheless, the devil is in the details and application of RPC 1.10(b) is not always clear. The general rule in New York is that a party seeking to disqualify his or her adversary's counsel on the basis of having been previously represented by that counsel must establish that: (1) an attorney-client relationship existed; (2) the matters involved are substantially related; and (3) the interests of the present and former client are materially adverse. *Dudhia v. Agarwal*, 66 Misc. 3d 206 (Sup. Ct. 2019), *citing In re Janczewski*, 169 A.D.3d 795 (2d Dep't 2019).

Where all three prongs have been established, there is a presumption of disqualification. The question then becomes whether the presumption is rebuttable or irrebuttable which, in turn, is based on whether the appropriate applicable standard is "imputed" disqualification or "per se" disqualification.

Dudhia v. Agarwal offers a thorough analysis of the two relevant standards on a disqualification motion, and addresses facts close to yours. In *Dudhia*, the court explained that under the "per se" disqualification standard, even the mere appearance of a conflict occasioned by a client having met just briefly with a lawyer in a professional setting may be enough to create an irrebuttable presumption in favor of disqualifying that lawyer's firm from representing an adverse party under any circumstance. *Id.* However, the court opined that the per se rule of disqualification – the more traditional approach – is "unnecessarily preclusive because it disqualifies all members of a law firm indiscriminately, whether or not they share knowledge of former client's confidences and secrets . . . . [and] conflicts with public policies favoring client choice and restricts an attorney's ability to practice." *Id.* at 206.

Conversely, the "imputed" disqualification standard creates a rebuttable presumption in favor of disqualification. Under the "imputed" standard, courts will analyze whether members of the firm have actual knowledge of a former client's confidences and have taken all steps necessary to reasonably assure the former client that his or her expectations of confidentiality have been protected. In other words, the imputed disqualification standard requires the court to engage in a more fact specific analysis.

The *Dudhia* court reasoned that imputed disqualification was the appropriate standard in cases where the "principally involved" attorney had left the law firm whose disqualification is sought. *Id.* at 206. Where the attorney who was principally involved in the prior representation has left the firm, the presumption of disqualification may be rebutted by the non-movant by providing facts establishing that the law firm's remaining attorneys do not possess confidences or secrets of the former client. *See St. Barnabas Hosp. v. New York City Health & Hosps. Corp.*, 7 A.D.3d 83 (1st Dep't 2004).

Applying the imputed disqualification standard, the court held that a law firm that briefly represented a wife in a divorce action should not be disqualified from representing the husband where the law firm demonstrated that there was no reasonable risk that the firm possessed

confidential information relevant to the matter. *Id.* In doing so, the court rejected the movant's argument that only large firms are entitled to the benefit of the rebuttable presumption that comes with imputed disqualification, reasoning there was neither legal authority nor compelling rationale to support such a bright line demarcation.

Therefore, the simple answer to your first question whether you have a basis for opposing the disqualification motion is yes. Based on the holding in *Dudhia*, we believe that you have a strong argument that the imputed disqualification standard, and not the per se disqualification standard, applies to your case. You can rebut the presumption of disqualification with proof that your firm or anyone currently employed there does not possesses confidential information that is significant or material that could be prejudicial to plaintiff in this litigation. *Dudhia*, 66 Misc. 3d at 206. To this end, you should demonstrate to the court that your firm has conducted an internal investigation and concluded that none of the attorneys at the firm remembers the consultation or has retained confidential information about your client's spouse.

Additionally, there are other actions you may take to demonstrate to the court that your firm should not be disqualified. For example, if another attorney who is still employed by your firm was present at the meeting with this former client or has any confidential information about the former client, you may avoid disqualification by putting in place "adequate screening" measures around the lawyer who is personally disqualified so that that lawyer cannot share any confidential information with the rest of the firm or react to any confidential information from the firm. *See* Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 630 (2019 ed.); *see also Dudhia*, 66 Misc. 3d at 206.

RPC 1.0(t) defines "screening" as the "isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or the firm is obligated to protect." The purpose of screening is to ensure that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 631. Similarly, other lawyers in the firm who are working on the matter should promptly be informed that the screening is in place and they may not communicate with the personally disqualified lawyer with respect to the matter. *Id.*

In deciding whether screening procedures will be effective to avoid imputed disqualification, a firm must consider factors such as how the size, practices and organization of the firm will affect the likelihood that any confidential information acquired about the matter can be protected. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 633 citing RPC 1.18 Comment [7B]. If the firm is large and organized into separate departments, or maintains offices in multiple locations, or for any reason the structure of the firm facilitates preventing the sharing of information with lawyers not participating in the particular matter, it is more likely that the requirements of RPC 1.18 will be met and imputed disqualification will be avoided. The size of a firm may be significant and small firms may need to exercise additional precautions and vigilance to maintain effective screening. *Id.* Moreover, in order to be effective, screening measures must be implemented as soon as practicable after a lawyer or law firm knows or reasonably should know that there is a need for screening and written notice should be promptly provided to the prospective client. *Id.* at 631.

While New York's version of Rule 1.10 has no provision allowing screening to overcome a client or former client's involvement in a matter, New York courts nevertheless honor screens and allow them to stave off disqualification in certain circumstances. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 632. For example, the Court of Appeals in the leading New York case involving disqualification held that the party seeking to avoid disqualification must prove that any information acquired by the disqualified lawyer is not material to the litigation. In that factual scenario, with the presumption rebutted, the court held that putting in place ethical wall around the disqualified lawyer was sufficient to avoid firm disqualification. *Kassis v. Teacher's Ins. & Annuity Ass'n*, 93 N.Y.2d 611 (1999). In accordance with the requirements set forth in *Kassis*, rebutting the presumption of disqualification requires the firm to employ "adequate screen measures" to eliminate any access or involvement of the potentially conflicted attorney.

We recommend that your firm take several steps to establish a solid and successful screen in the event your firm's investigation determines that an attorney currently at your firm was present at the initial meeting with your client's spouse or possibly obtained confidential information about the spouse. *Id.* at 618; *see also* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 631.

First, your firm should send a memorandum to the disqualified attorney as soon as the firm learns about the conflict of interest. *Id.* This memo should advise the personally disqualified attorney not to discuss the matter with anyone else at the firm in any manner. Next, the firm should send the same screening memorandum to the appropriate attorneys and staff members in the firm. *Id.* Determining the appropriate personnel depends on the size of your firm. In a small firm, the memorandum

should be sent to all attorneys and staff members. In a large firm, the memorandum should be sent to all attorneys and staff who are likely to communicate with or come into contact with the disqualified lawyer. *Id.* The screening memo shall advise recipients of three points: (1) not to discuss the matter in the presence of the disqualified attorney; (2) not to show or let the disqualified attorney have access to any documents related to the matter; and (3) not to communicate with the disqualified attorney about the screened-off matter in any fashion. *Id.*

Additionally, the screening memo should be sent to all new attorneys and staff members who join the firm while the screen remains in place if the newcomers are likely to communicate with or come into contact with the disqualified lawyer. Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 632. If your firm maintains paper files with respect to the matter in question, it should place all related files in a designated area, ideally, outside the firm's central file room. *Id.* The paper files should clearly identify that they are protected and shall not be accessible to the disqualified attorney or shown to them. *Id.* It is best practice to keep such files under lock and key, although courts generally understand this is not always practical. *Id.* Electronic and digital files should be protected by a password that is known only to computer personnel and those in the firm working on the screened matter. *Id.* In satisfaction of this requirement, ensure that your firm walls off the rest of the firm and has had their computer servers searched by a forensic expert to confirm that no relevant emails or related files remain on the firm's on-site servers. Your firm should also take all steps necessary to insure that any archives that may be located on off-site servers cannot be accessed by the disqualified attorney. *Kassis*, 93 N.Y.2d at 617. Finally, to the extent possible, the disqualified attorney's office should be as far as practical from the offices of the attorneys working on the matter. *Id.*

You are correct in thinking that your client's right to choose counsel of its choice is an important factor to highlight in your opposition to the disqualification motion. It is a factor that the court certainly will consider and weigh alongside the other factors discussed. Indeed, in resolving issues of disqualification, courts will typically employ a delicate balance between the interests of the client, who desires to retain an attorney of his or her choice, against the interests of the opposing party to be free from any risk of opposition by an attorney who had been privy to that litigant's confidence. *See* RPC 1.10(b) Comment [4A]; *see also Dudhia*, 66 Misc. 3d at 206. The commentary to Rule 1.10(b), instructs that it is critical that the courts consider "public policies favoring client choice." For this reason, New York courts have routinely denied motions to disqualify firms where, among other considerations, the former client's purpose in contacting multiple experienced matrimonial attorneys was to disqualify them from handling his wife's defense of the action. *See, e.g., Bernacki v. Bernacki*, 47 Misc.3d 316 (Sup. Ct., N.Y. Co. 2015).

In conclusion, based on the limited facts we have, we believe there are several solid arguments that can be made to show that disqualification is unwarranted here.

Sincerely,
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

DEAR FORUM,

I am an attorney practicing in the arena of civil litigation arena. I am currently representing a client who I am consistently at odds with. It seems that no matter what I do the client refuses to follow my advice. For example, the client has sent numerous emails to opposing counsel regarding issues in the case despite my insistent instruction not to do so. What's more is that the client refuses to follow my trial strategy and insists that I decline all reasonable extension requests from the adversary. Unfortunately, I feel as if our attorney-client relationship has broken down beyond repair requiring me to withdraw as counsel. Am I permitted to do so under the circumstances I have described? If so, what are my professional responsibilities? Do I have any ethical obligations to the client and/or the court in the process?

Very truly yours,

Tami Terminated