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Compliance with Local Rules will Prevent an Individual Attorney's Conflict from Imputing to the Entire Firm in a Bankruptcy Proceeding

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Introduction

The modern practice of law involves a substantial amount of job mobility. As attorneys move firms, they often bring conflicts of interest along with them. Generally, an attorney's conflict will prevent the attorney's firm from engaging in representation. However, properly enacted ethical screens can rebut the presumption that a conflicted attorney has shared confidential information with his or her firm, and therefore allows the firm to continue representation.

As more attorneys make lateral moves, it has become increasingly common for an attorney to move from a firm representing one side of an active dispute to a firm representing the other. Thus, courts have been asked to determine if firms can properly screen attorneys coming from the opposition's firm during an active proceeding. When this question arises due to an attorney's conflict within a bankruptcy proceeding, bankruptcy courts must look to title 11 of the United States Code (the "Bankruptcy Code") in conjunction with local rules.

This article analyzes the imputation of attorney conflicts in two steps. Part I discusses sections 327(a) and 101(41) and whether the Bankruptcy Code requires an attorney's conflict to impute to the entire firm. Part II explains how motions to disqualify require looking to a court's

local rules and the prevalence the of the American Bar Association's Model Rules of Professional Conduct ("Model Rules") in federal courts.

Discussion

I. The Bankruptcy Code Does Not Statutorily Require an Attorney's Conflict to Impute to the Entire Firm

The Bankruptcy Code sets out requirements for the employment of professionals. The Bankruptcy Code allows "the trustee, with the court's approval, [to] employ one or more attorneys . . . that are disinterested persons . . . ."[1] The Bankruptcy Code includes "individual[s], partnership[s], and corporations[s] within the definition of persons.[2] Therefore, a direct reading of sections 327(a) and 101(41) means that an interested individual, partnership, or corporation is barred from representation. On its face, this statutory scheme does not answer whether an interested individual attorney's conflict would impute to the entire firm.

In answering this question, courts have not read a conflict imputation requirement into sections 327(a) and 101(41). In *Vergos v. Timber Creek, Inc.*, the court pointed out that the Bankruptcy Code made no further indication that conflicts are meant to impute from an individual to a firm.[3] Yet, Congress has directly implemented this mechanism in the past, including in Rule 5002 of the Federal Rules of Bankruptcy Procedure.[4] Had Congress wished to create a *per se* imputation rule in this context, it would have explicitly said so. Other courts have agreed.[5]

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[1] 11 U.S.C. § 327(a) (2018).
[2] *Id.* § 101(41).
[3] 200 B.R. 624, 627 (W.D. Tenn. 1996).
[4] *Id.* (discussing Rule 5002's "prohibition of appointing relatives of the bankruptcy judge").
[5] *See In re* Creative Restaurant Management, Inc., 139 B.R. 902 (Bankr. W.D. Mo.1992) ("[T]he Bankruptcy Code contains no requirement that an entire law firm is *per se* ineligible for employment due to one of its members having previously served as an officer of the debtor."); *see also In re* Capen Wholesale, Inc., 184 B.R. 547, 551 (N.D. Ill.1995) ("Although [the attorney] clearly is disqualified . . . under section 327(a), nothing in the Code . . . suggests that other lawyers at his firm must be viewed identically.").

Courts that have found that an individual conflict must *per se* impute to the entire firm have done so because of non-bankruptcy law. For example, the bankruptcy court for the district of Connecticut found that "the disqualification of any attorney pursuant to Code § 327(a) causes every attorney in that attorney's firm to be disqualified as well."[6] However, in support of its finding that "[i]t is not uncommon for attorneys to be indirectly disqualified from representing a client when they are associated with other attorneys who are directly disqualified[,]" the court cites Disciplinary Rule 5–105(D) of the Model Code of Professional Responsibility.[7] Rule 5-105(D) provided that "no partner or associate or other lawyer affiliated [with a disqualified lawyer] or his firm" may engage in representation.[8]

The *In re Wells* court's analysis merged section 327(a) with Rule 5-105(D). Section 327(a) provided the basis for attorney disqualification while Rule 5-105(D) provided the mechanism for the conflict to impute to the attorney's firm. The Bankruptcy Code, without more, contains no requirement that an attorney's conflict impute to the attorney's entire firm.

II. The ABA Model Rules Provide a Starting Point for Considering a Court's Local Rules

A standard motion to disqualify analysis must start with the court's local rules.[9] While this requires an individualized consideration of the court's local rules and case law, some overarching trends provide helpful insight.

The American Bar Association's Model Rules of Professional Conduct ("Model Rules") are widely adopted across jurisdictions.[10] Further, because "[f[ederal district courts generally

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[6] *In re* Wells Benrus Corp., 48 B.R. 196, 198–99 (Bankr. D. Conn. 1985).
[7] *See id.* at 198–99.
[8] *Id.* at 198–99, n.5 *(quoting* MODEL CODE OF PRO. RESP. DR 5-105 (AM. BAR ASS'N 1976)).
[9] Kennedy v. MindPrint (*In re* ProEdcuation Intern., Inc.), 587 F.3d 296, 299 (5th Cir. 2009).
[10] *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *ABA Model Rules of Professional Conduct* (2005), https://www.eeoc.gov/regional-attorneys-manual/c-aba-model-rules-professional-conduct; see also *Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ (last updated Mar. 28, 2018).

have adopted the lawyer code of the jurisdiction in which the court sits," the application of the ABA Model Rules is prevalent in federal courts.[11] Therefore, an analysis of the Model Rules is applicable in most bankruptcy courts.

In interpreting the Model Rules, the ABA itself provides some insight. The ABA intentionally took a more tentative approach to attorney disqualification, amending Rule 1.10 to allow attorneys to implement ethical screens as opposed to a *per se* rule that a conflict would impute to the entire firm.[12] When a lawyer is prohibited from representing a client due to a conflict, Rule 1.10(a)(2) prohibits any other lawyer at the firm from representing the client "*unless*: (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; (ii) written notice is promptly given to any affected former client . . .; and (iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client . . . ."[13] In creating the amended Rule, the ABA explained that it "should rarely be necessary to impute [a] transferring lawyer's disqualification to all of her new lawyer colleagues in order to meet the former client's concerns."[14]

The Third Circuit confirmed the ABA's approach within the context of a bankruptcy proceeding in *Maxus Liquidating Trust v. YPF S.A.* (*In re Maxus Energy Corp.*).[15] In interpreting Rule 1.10, *supra*, the Court read the word "unless" as signaling a condition subsequent; so long as the firm complies with the conditions following "unless," the attorney's conflict will not impute to the entire firm.[16] Further, the court declined to apply an additional "exceptional circumstances" exception or a multifactored test, declaring that "[b]oth those approaches ignore

[11] *Id.* (quoting Restatement (Third) of The Law Governing Lawyers § 1 cmt. *b* (2000)).
[12] *See* Standing Comm. on Ethics & Pro. Resp., Am. Bar Ass'n, *Resolution 109*, (Adopted Feb. 16, 2009), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility1/final_report_adopted109.pdf.
[13] *See* MODEL RULES OF PRO. CONDUCT r. 1.10(a)(2)(i–iii) (AM. BAR ASS'N 2009) (emphasis added).
[14] Standing Comm. on Ethics & Pro. Resp., *supra* note 12, at 10–11.
[15] *See* 49 F.4th 223 (3d Cir. 2022).
[16] *Id.* at 229.

the ordinary meaning of Model Rule 1.10(a)(2) . . . ."[17] In relying exclusively on the Rule 1.10(a)(2) ethical screen conditions and refusing to embed additional requirements, the court aligned with the original intent of the ABA. A properly enacted ethical screen is enough to prevent an attorney's conflict from imputing to the entire firm under the Model Rules.

Other circuits have also weighed in on attorney conflicts outside of the bankruptcy context. Still, those circuits have accepted the concept of ethical screens, recognizing "the modern realities of legal practice must be considered when balancing the interests involved with motions for vicarious disqualification of counsel."[18]

In general, the strength of an ethical screen is entirely fact dependent.[19] Further, "[e]thical walls have been rejected because of not being adequately comprehensive, being ineffective, improperly implemented or otherwise presenting a meaningful risk of breach."[20] Even in circuits where ethical screens are supported by case law, a motion to disqualify will likely still involve a fact-intensive analysis.

Conclusion

When considering whether an attorney's conflict must impute to the entire firm in a bankruptcy proceeding, the analysis must start with the Bankruptcy Code. Sections 327(a) and 101(41), without more, do not require a conflict to impute to the firm. A court's local rules, however, may require a section 327(a) conflict to impute to the firm. While each court implements its own rules, the ABA's Model Rules of Professional Conduct are widespread in

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[17] *Id.* ("The Bankruptcy Court suggested an ''exceptional circumstances'' exception to Model Rule 1.10(a)(2) . . .. The Bankruptcy Court also analyzed the case under a multifactored test from an unpublished district court opinion . . .. Both those approaches ignore the ordinary meaning of Model Rule 1.10(a)(2), which does not create an ''exceptional circumstances'' standard or incorporate a multifactored test with no basis in the rule's text.").
[18] *See, e.g.*, Vergos v. Timber Creek, Inc., 200 B.R. 624, 628 (W.D. Tenn. 1996) (citing Manning v. Waring, Cox, James, Sklar and Allen, 849 F.2d 222 (6th Cir. 1988)); *see also* Hempstead Video, Inc. v. Inc. Vill. of Valley Stream, 409 F.3d 127, 137–39 (2d Cir. 2005).
[19] RONALD E. MALLEN, 2 LEGAL MALPRACTICE § 18:59 (2023 ed.) ("There is no comprehensive model ethical screen, because whether a screening mechanism can be effective depends on the circumstances.").
[20] *Id.*

federal courts. When amending the Model Rules, the ABA purposefully implemented liberal rules allowing an ethical screen to rebut a presumption of an attorney conflict imputing to the firm. The Third Circuit confirmed this approach in the context of a bankruptcy proceeding. Even in bankruptcy courts whose local rules support ethical screens, the effectiveness of the screen is extremely fact dependent. Courts must consider the circumstances of each case, and there is thus no prevailing *per se* acceptable screen or factor test. Attorneys need to be meticulous in ensuring that they comply with all requirements of the local rules.