OF TYPHOID MARY, CHINESE WALLS, ETC.

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Reprinted from *Bench & Bar of Minnesota* (April 1988)

An "imputed conflict" is a conflict of interest that is attributed to a lawyer from another lawyer or (less commonly) from a fiduciary-client. "Imputed disqualification" means that an entire law firm is disqualified from representation because of the conflict of one attorney who is or was associated with the firm. Each of the labels named in the title has been used to describe an analytical aspect of imputed conflicts.Ftn 1 The law of imputed conflicts is complex and varied.Ftn 2 This article discusses several selected developments in Minnesota and elsewhere: 1) imputation of the conflict of a fiduciary-client; 2) imputation in the government law office; 3) modification of the Minnesota advocate-witness imputation rule, Rule 3.7, and 4) the imputed disqualification rule, Rule 1.10.

Imputed Fiduciary-Client Conflicts. A Minnesota disciplinary case and an Arizona malpractice case indicate that attorneys may bear responsibility for actions taken by fiduciary-clients which involve conflict or harm to the ward, conservatee, or other beneficiary. In *Fickett v. Superior Court,* 558 P.2d 988 (Ariz. 1976), a guardian misappropriated substantial funds from a ward. Fickett was the guardian's lawyer, but did not know of the misconduct. A successor guardian sued Fickett for negligence. The court affirmed denial of Fickett's summary judgment motion, holding:

> [W]hen an attorney undertakes to represent the guardian of an incompetent, he assumes a relationship not only with the guardian but also with the ward. If [the lawyer] knew or should have known that the guardian was acting adversely to his ward's interests, the possibility of frustrating the whole purpose of the guardianship became foreseeable as did the possibility of injury to the ward. In fact, we conceive that the ward's interests overshadow those of the guardian.

The guardian's duty to the ward was in some sense imputed to Fickett, presumably because Fickett was representing the guardian not in the guardian's personal capacity, but in his fiduciary capacity.

A somewhat similar analysis supported the charges of unprofessional conduct against a Minnesota attorney who was recently reprimanded by the Minnesota Supreme Court.Ftn 3 The mother of an adult man was appointed that man's conservator. She and her husband faced foreclosure proceedings on commercial land. With the lawyer's assistance, the land was sold to the conservatee for over $300,000. The sale was accomplished without court approval. The sale clearly served the interests of the conservator and was in conflict with the conservatee's interest. Since the attorney's duty was to represent the conservator in her capacity as an officer of the court and fiduciary, and he assisted her breach of that duty, he violated a probate court rule against representing conflicting interests and prejudiced the administration of justice in the probate court.

While neither of these cases involves disqualification or imputation of a conflict in the ordinary sense, they illustrate how a fiduciary client's duties can become the attorney's.

Government Law Office. *Humphrey v. McLaren*, 402 N.W.2d 535 (Minn. 1987) decided a crucial question for determining disqualifications in a government law office. *McLaren* at 543 held that "… a government legal department is not a 'firm' under Rule 1.10 [Rules of Professional Conduct] (conflict of interest)." Rule 1.10 is titled "Imputed disqualification general rule." A former government employee, defending an action by the agency (PERA) which previously employed him, brought a disqualification motion against both the attorney who had represented PERA and, vicariously, against the entire attorney general's staff. The motion was based on Rule 1.10 and Rule 3.7 (the advocate-witness rule — discussed below). Rule 1.10 disqualifies an entire "firm" for certain of the conflicts of any one of the attorneys in the firm. Generally speaking, and in contrast to the situation confronting all nongovernmental lawyers, the conflicts of one lawyer in a government office are not imputed to other lawyers in the office. Although *McLaren* distinguished among different types of government law offices for analytical purposes, for purposes of imputing conflicts, no government law office, large or small, appears to be subject to the imputed disqualification general rule. This reading of the Rules of Professional Conduct harmonizes with the majority of courts' and commentators' previous views.

Amendment of the Advocate-Witness Rule. From September 1, 1985, until July 16, 1987, Rule 3.7, Rules of Professional Conduct, provided in part, "A lawyer shall not act as an advocate at trial in which the lawyer or a lawyer in the firm is likely to be a necessary witness, [with certain exceptions]…." The Minnesota Supreme Court, upon petition of the Minnesota State Bar (MSBA), has deleted the words of imputation: "or a lawyer in the firm."Ftn 4 The amendment brings the Minnesota rules into line with the local federal district court rules and the ABA Model Rules. With certain exceptions noted in Rule 3.7, a lawyer still may not individually act as both advocate and witness in a matter. Note, however, that Probate Court Rule 5 still provides:

> No attorney or member of the same firm shall appear as an attorney or in any manner represent any party to a contested proceeding where such attorney also appears as a witness.

General Imputed Disqualification Rule. Rules 1.7-1.12 are the conflict of interest Rules of Professional Conduct. Rule 1.10(a) imputes certain of these conflicts from one affected lawyer to others in the firm, thereby disqualifying the entire firm. Imputation of conflicts under Rule 1.10 does *not* depend on a second lawyer in the firm misusing confidential information. Rule 1.10(a) presumes that a Chinese Wall is insufficient either to prevent intrafirm sharing of information or to assure clients of confidentiality. Conflicts between current clients and conflicts with former clients are the most important conflicts imputed to a law firm. Some other conflicts — including Rule 1.8(a), the conflict arising from a lawyer entering into a business transaction with a client — are not imputed. An imputed disqualification "may be waived by the affected client," under Rule 1.10(d).

Rule 1.10(b) and (c) prescribe the conditions, respectively, for disqualification when a lawyer becomes associated with a new firm or terminates an association with a firm. A key concept in these rules is whether the incoming lawyer, or the firm from which an outgoing lawyer departs, actually has confidential information regarding the client in question. In employment change situations the possession of confidential information is not automatically presumed, as it is in other imputation situations.

Before the Rules were adopted, the Minnesota Supreme Court extensively analyzed the policy

considerations involved in disqualifying a successor firm. *Jenson v. Touche Ross & Co.*, 335 N.W.2d 720 (Minn. 1983). Although the Court recognized that imputed disqualification may be necessary to protect client confidences or expectations of loyalty, the Court also noted "that disqualification separates the client from his chosen counsel, causes delay, and may subject both the client and the disqualified lawyer to significant and economic hardship." Based on substantial equities, *Jenson* allowed the lawyer's new firm to avoid disqualification by constructing a Chinese Wall. The Court found it fair and realistic to believe the lawyer could be directed not to talk with his new partners about a case in which his old and new firms took opposing sides.

While the rules of imputed conflicts may seem technical and arcane, they are meant to address important and everyday policy concerns: When is it realistic to believe that lawyers in a firm will not talk to each other about sensitive subjects? Should government law offices be treated like private firms for purposes of imputing conflicts? Should lawyers with fiduciaries as clients be particularly careful to represent the client as a fiduciary?

Dealing with imputed conflicts in a firm requires first that the conflicts be identified. In some systematic way the firm has to know its clients and its conflicts. Rule 5.1(a), requires "a lawyer and a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."

If the subject of imputation becomes too complex, one can always try to remember that normally a Chinese Wall is not enough to keep Typhoid Mary from an illicit relationship, triangular or otherwise.

NOTES

[1] *Hazard, "Triangular Lawyer Relationships: An Exploratory Analysis," 1* Geo L.J. Leg. Ethics *15 (1987). Hazard analyzes the lawyer-guardian-ward triangle and the lawyer-corporation-office triangle. "Typhoid Mary" refers to the taint a lawyer brings to a firm which is disqualified by imputation. A "Chinese Wall' refers to a barrier a firm may be able to construct to prevent Typhoid Mary from infecting others.*

[2] See *C. Wolfram*, Modern Legal Ethics, *391-409 (West Publishing Co., 1986) for a more comprehensive discussion.*

[3] In re Brown, *414 N.W.2d 410 (Minn. 1987).*

[4] In the Matter of the Petition of the Minnesota State Bar Association, a Corporation, with Regard to Rule 3.7 of the Minnesota Rules of Professional Conduct, *No. C8-84-1650 unpublished order (Minn. Sup. Ct. July 16, 1987).*