



## Alerts

### Court Disqualifies Firm, Despite Screening of Conflicted Lawyer, Because of Firm's Size

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*Lawyers for the Profession® Alert*

*Filippi v. Elmont Union Free School Dist. Bd. of Educ.*, \_\_\_ F. Supp. 2d \_\_\_, 2010 WL 2695329 (E.D.N.Y., 2010)

#### Brief Summary

The U.S. District Court for the Eastern District of New York disqualified a law firm from representing a plaintiff because one of the firm's associates was a member of defendant board of education. The court combined elements of Rules 1.7 and 1.9 of the New York State Rules of Professional Conduct in holding that a non-waivable conflict existed. Additionally, although the firm had screened the associate from the matter, the court held that the screening procedures were inadequate given the firm's small size.

#### Complete Summary

In this employment discrimination action, the U.S. District Court for the Eastern District of New York disqualified plaintiff's law firm because one of the firm's associates was a member of defendant board of education. The associate/board member had joined the firm shortly after plaintiff — via the firm — sent a letter to the board regarding plaintiff's grievances, but before plaintiff filed her complaint. The board orally approved of the associate joining the firm, and the associate was screened from plaintiff's matter. But when plaintiff initiated suit, the board moved to disqualify the firm.

The court disqualified the firm based on its representation of "differing interests" under Rule 1.7(a)(1) of the of the New York State Rules of Professional Conduct (RPC). As a threshold matter, the court noted that RPC 1.7 applied because the associate had a fiduciary relationship with the board and presumably was privy to the board's confidential information, including confidences related to the present matter.

Although the court applied RPC 1.7, it opted to adopt the more lenient standard from RPC 1.9 (former client conflicts) for determining the existence of a conflict because the firm was not engaged in the type of traditional concurrent legal representation normally governed by Rule 1.7. The court held that there was a "substantial relationship" between plaintiff's lawsuit and the associate's involvement on the board because the associate was a board member when plaintiff's claims arose, and because the associate was likely privy to the board's relevant confidential information.

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The court further held that the associate's conflict was imputed to the firm despite the firm's attempt to screen her from the matter. The court noted that there is a rebuttable presumption that client confidences are shared within a firm, and that this presumption is much stronger within a small firm. "Even the appearance of impropriety is of particular concern with regards to screening procedures in a small firm, and in a firm as small as [this] firm — which only has six lawyers, the appearance of impropriety due to concerns about the efficacy of screening procedures is heightened. . . ." The court held that the firm's screening procedures — which included informing all employees of the associate's screen, preventing the associate from physically accessing plaintiff's files, and barring the associate from receiving any portion of plaintiff's fees — were inadequate to overcome this presumption. The court further imputed the associate's conflict to a lawyer who was "of counsel" to the firm because the lawyer had an extremely close affiliation with the firm and received 95 percent of his work from the firm.

Finally, the court held that this conflict was not waived for two alternative reasons. First, under RPC 1.7(b)(3) the conflict essentially involved an "assertion of a claim by one client against another client" because the associate stood on both sides of the litigation. Such conflicts cannot be waived. Second, even if the conflict was waivable, under RPC 1.7(b)(4) the board's oral consent to the conflict was inadequate because it was not informed and not in writing.

The court also held that disqualification was proper under RPC 1.11, which prevents a lawyer from representing a client in a matter in which the lawyer participated personally and substantially as a public officer.

### **Significance of Opinion**

This opinion forges a novel conflict of interest standard based on both RPC 1.7 and 1.9. It further highlights the extremely high screening standard that some courts may impose on small firms.

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