

A firm by any other name is just as conflicted: quasi-law firms and imputed conflicts of interest

Law firm defined

The Indiana Supreme Court recently decided an important case that sheds some light on the definition of a law firm. First, some background: Rule of Professional Conduct 1.0(c) defines a law firm as “a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.”

Comment [3] is instructive in pointing out that whether a firm exists turns on the facts: “[T]wo practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests they are a firm, they should be regarded as a firm for purposes of the Rules.” In other words, reasonable public perception should control, not the niceties of nontransparent internal financial arrangements.

Why it’s important to know

Whether lawyers who practice in close proximity to each other constitute a law firm can be important for many reasons – conflicts of interest, for example. When lawyers are in a firm, with minor exceptions, a conflict of one lawyer is imputed to all other lawyers in the firm. This means every lawyer in the firm has the same conflict. Rule 1.10(a) states this general principle.

Confidentiality duties are also impli-

cated. Rule 1.6(a) generally prohibits revealing any information related to client representation absent client consent. There is no explicit provision in Rule 1.6 that extends client confidentiality obligations to all lawyers in a firm. But the very concept of a law firm includes the notion that a client of any firm lawyer is a client of every other lawyer in the firm and confidentiality duties follow. Moreover, even if client information is not disclosed, Rule 1.8(b) prohibits making use of client information to a client’s disadvantage. That prohibition is explicitly imputed to all lawyers in a firm by Rule 1.8(k). Even when clients become former clients, confidentiality duties persist. Rule 1.9(a). Those duties are also imputed to all other lawyers in a firm. Rule 1.9(c).

Lawyers shouldn’t find anything controversial in this. Client confidentiality is the mother’s milk of legal ethics. We were raised on it. But when lawyers gather together in loose associations that don’t resemble traditional law firms (let’s call them quasi-firms), when should they be viewed as law firms for professional-responsibility purposes, and when not? That’s a more complicated, even controversial, question.

If it quacks like a duck, it’s a duck

Matter of Sexson, 613 N.E.2d 841 (Ind. 1993), took a look at this question. Sexson and several other lawyers, including Thompson, shared office space. They were a quasi-firm. By this I mean they had banded together to share the overhead costs of running their law practices, but did not share income. They shared a secretary, used common letterhead, and shared three telephone lines. Their internal

offices were unlocked and often open. Conversations could be heard within the office space, and file cabinets of all lawyers were readily visible to visiting clients.

Thompson was handling a personal injury claim for a husband and wife. During the course of the case, husband sued wife for divorce, using an independent lawyer. Sexson became the wife’s lawyer in the divorce case. The wife’s mother worked as a shared secretary in the quasi-firm. Thompson settled the personal injury case. Shortly thereafter, Sexson filed a contempt petition in the divorce case, seeking an order, which he obtained *ex parte*, preventing the husband from negotiating his settlement check – apparently the husband was behind on child or spousal support payments. When the husband arrived at the office to pick up his settlement check, Sexson – probably tipped off by the wife’s mother (the record isn’t clear) – served him with the restraining order for the first time.

The question posed was one of imputed conflict of interest. Without client consent, Thompson could not have represented wife against husband in the divorce while simultaneously representing husband in the personal injury matter. The principle of imputation meant that neither could any other lawyer in the same law firm as Thompson. If Sexson was in Thompson’s firm, he had a conflict of interest. If he wasn’t, he didn’t.

Highlighting the several factors described above, the Court concluded that it was reasonable for the husband to assume that Thompson and Sexson were in the same firm and not unreasonable for him to be dismayed to be greeted at his own lawyer’s office by another lawyer in the firm brandishing a restraining



Donald R. Lundberg
Executive Secretary
Indiana Supreme Court
Disciplinary Commission
Indianapolis, Ind.

order on behalf of his opposing party in other litigation.

A public defender's office

Skip forward to 2009. In the Putnam County courthouse, there was space with a sign above the door that said "Office of the Public Defender." The two part-time public defenders who work there shared letterhead and a single office telephone line. Within the rather cramped office were some doorless, work spaces. One was used by the circuit court PD, and another was used by the superior court PD. The PD's office was not a real entity with its own budget. Instead, it was a collaboration between the two courts in the county. As a budgetary matter, the circuit court PD was paid from circuit court funds, and the superior court PD was paid from superior court funds. There was support staff, including an office manager, but support staff members were actually employees of the courts, not the PD's office. The office manager maintained a combined filing system of cases from both courts located in the common area of the office, but doled out circuit court files only to the circuit court PD and superior court files only to the superior court PD. In light of *Sexson*, consider whether this office should be treated as a law firm for imputing conflicts of interest.

Representing a killer

The circuit court PD briefly represented a guy in a battery-causing-death case dubbed AB by the court. Let's instead call him the Killer, since he was ultimately convicted of bludgeoning his girlfriend's 2-year-old son to death. The Killer promptly hired private counsel. But the circuit court PD also represented the Killer in a CHINS case involving the welfare of the Killer's own child.

The superior court PD was appointed to represent another guy in a minor superior court criminal case. Let's call him the Misdemeanant. The Killer's and the Misdemeanant's cases had nothing to do with each other – yet. By coincidence, the Killer and the Misdemeanant were placed in the same jail cell. While there, the Killer revealed to the Misdemeanant the location of the previously undiscovered object he used to bludgeon the little boy. Being an upstanding misdemeanor, he slipped a note to the sheriff, which stated he had information on the Killer's case, but wanted to talk to his lawyer first.

The superior court PD was dispatched to the jail to counsel with the Misdemeanant, after which he was returned to his cell. Returning to the PD's office, the superior court PD, a relatively inexperienced lawyer, sought the circuit court PD's advice on how to handle the situation. The circuit court PD gave some brief advice, then promptly called the Killer's private counsel to tell him that the Killer was blabbing

about his case to someone in the jail. Private counsel called the jail to alert the Killer that he was talking to a snitch, whom the Killer correctly inferred was the Misdemeanant. Fortunately, the Misdemeanant was pulled from the cell before any harm ensued.

Imputed conflicts and confidentiality

Let's be clear: The circuit court PD could have represented both the Killer and the Misdemeanant up until the time the Misdemeanant became a material witness against the Killer. Once the circuit court PD discovered the adversity of the two clients, he would have been immediately conflicted and could have taken no further action on behalf of either client except to withdraw from both representations. So, for example, calling the Killer's private counsel would have been an act of extreme disloyalty to the Misdemeanant to the point of potentially placing his life in danger.

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If the superior and circuit court PDs are in a firm, the result is the same. The imputed conflict would bind the circuit court PD every bit as much as if he had directly represented both clients. If PDs aren't in the same firm, the circuit court PD would not be precluded from revealing this information to his client through his client's agent, the private attorney.

Given what was at stake here, though, counsel might well have been guided in how to do this by language from Comment [7] to Rule 1.4: "In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication."

Not everything that quacks is a duck

This was the factual and legal set up in *Matter of Recker*, 907 N.E.2d 968 (Ind. 2009). In *Recker*, the majority held that the PDs were not in the same firm, therefore conflicts of interest were not imputed. The different outcome from *Sexson* appears to have been driven by the fact that the PDs had no control over their working circumstances, but accepted them as they were provided by their respective employing courts. The Court pointed out the diverse ways of delivering public defender services in Indiana, suggesting that the outcome of its analysis of Putnam County might not be the same for other counties.

Justice Sullivan registered a strong dissent. He opined that the majority did not focus enough on a reasonable client's, as compare to a reasonable lawyer's, perspective of the office arrangement. "I submit that any client, whether telephoning one of these lawyers, receiving a letter from one of these lawyers, or going to an appointment with one of these lawyers in the Public Defender's Office, would reasonably conclude that these lawyers both presented themselves to the public in a way that suggested that they were a firm and also conducted themselves as a firm." *Id.* at 230.

Squaring the circle

So how do we reconcile *Sexson* and *Recker*? Within the public defender community, I'm not sure how one would do that. It clearly depends on the facts. A formally organized public defender system with its own budget and board of directors would likely have a difficult time arguing that it is not a law firm. And of this I am fairly certain: Unlike the Putnam County PDs, private lawyers have complete control over the circumstances of their

working relationships. A lawyer in a private quasi-firm will not, under circumstances similar to *Recker*, have available the safe harbor of claiming to be the victim of working conditions over which he or she has no control.

Anticipating law firm status

The *Recker* majority ended with some sage advice that perhaps bridges the gap with the dissent going forward: “Regardless of whether public defenders in a particular county are considered to be members of a firm, it is imperative that they consider the implications their relationship have on their professional duties to their clients. If the attorneys are deemed to be members of a firm, avoiding improper conflicts of interest must be given a high priority. If the attorneys are considered to be practicing independently, they must take care not to share improperly confidential information about their clients with each other. Attorneys sharing office space as public defenders or in other settings may benefit from consulting with each other about legal issues, but this can be done ethically only after first determining that the interests of both attorneys’ clients are not compromised.” *Id.* at 229.

At bottom, that captures the fundamental problem that existed in Putnam County at the time of these events. A system was put in place without the key actors carefully examining the nature and implications of what they had created. Had all of the stakeholders reached a common understanding that the PD’s office was not a law firm (or was – their choice) and thoughtfully implemented policies and practice standards consistent with that shared understanding, the close call of a worst case conflict-of-interest scenario could have been avoided. 📌