2008

Using Ethics Codes to Reinforce Lessons of Statutory Interpretation

Edward R. Becker
University of Michigan Law School, tbecker@umich.edu

Featured Articles

Using Ethics Codes to Reinforce Lessons of Statutory Interpretation

Ted Becker,
University of Michigan Law School

To increase my students' exposure to statutory interpretation, I assign them early in the second semester to argue a motion to disqualify counsel based on imputed disqualification under Michigan's ethics rules.[1] Interpreting ethics rules involves many of the same "pure" statutory interpretation techniques I introduced the previous semester, and the students appear to easily make any needed translations. This exercise also helps prepare students to interpret other quasi-legislative authorities like court or evidentiary rules, administrative codes, and municipal ordinances.[2]

The assignment hinges on whether a firm timely screened a new associate to ensure that she did not reveal confidential client information obtained during a summer clerkship at a different employer in a matter in which her new firm represents an adverse party. Michigan explicitly allows screens of attorneys moving from firm to firm if certain conditions are met.[3]

We begin by walking through the language of the rule phrase by phrase to determine whether the firm is presumptively disqualified. Students must think about what it means to "become associated" with a firm and about the definition of a "substantially related matter." The language forces them to follow a cascade of cross-references to other provisions to devise some tentative solutions.

Students must then formulate arguments about the timing question. To help them along, I raise a common interpretative issue: Did the drafters intend a bright-line rule that parties can easily follow, or a more open-ended but less predictable approach? I also emphasize that even a supposedly clear bright-line test might not be all that "bright" when applied to a particular set of facts.

Next, we identify whether either side can viably argue that such a bright-line test exists:

- Michigan does not explicitly provide that a screen must be imposed within a set time (such as one day or one week) after a new attorney joins a firm or any other specific triggering event. Michigan does not even include a vague reference that screens must be "timely." Is there a "plain meaning" of the absence of any specific timing requirement?
- The rules also provide that after a screen is implemented, the firm must "promptly" notify an appropriate tribunal. This suggests that the drafters knew how to impose a timing requirement when the mood struck them, so doesn't the lack of any similar requirement for the screen itself further suggest that no such requirement exists?
- Or does the interpretative argument run the other way? The preface to the screening requirement is phrased in the present tense (the firm "is disqualified . . . unless"); so does this suggest that the screen must be imposed immediately upon the firm's discovery that the new associate is "infected" by her awareness of her ex-employer's client's confidential information?

This exercise also helps prepare students to interpret other quasi-legislative authorities like court or evidentiary rules, administrative codes, and municipal ordinances.

Any ethics-based problem will give rise to some general interpretative issues. Most state ethics codes are based on the ABA's Model Rules in a way analogous to statutory schemes based on uniform acts. When a state modifies or declines to adopt some provisions of a model code, how does that affect the interpretation of the law as actually enacted? For example, the Model Rules include an explanatory comment about whether imputed disqualification applies when the bearer of confidential information acquired that information while a law student. Michigan's rules say nothing about this. The Model Rules specifically define "screened." Michigan does not. What interpretations, if any, flow from these differences?

From there, we turn to other interpretative questions: If the fact-finder has discretion to assess timing issues case by case, what factors should be considered? Do the rules themselves identify any such considerations, either on their face or by reasonable inference? Should students look to other timing requirements in the ethics rules to make arguments by analogy? What about cases, ethics opinions, or secondary sources? And, finally, how do these factors apply to the specific facts of the assignment?

As another general issue, the explanatory comments raise interesting questions of "legislative history," because they are designed to "explain[] and illustrate[] the meaning and purpose" of the rules. Yet the comments are only guides to meaning, and the text of the rules themselves is authoritative. How can students use these comments to help support their interpretation of a given rule?

One such way is for the students to shore up their policy arguments. Should a court err on the side of disqualification if there's any doubt whether secrets could have been disclosed before a screen was imposed? On the one hand, ensuring confidentiality of client secrets is a bedrock principle of the attorney/client relationship. On the other hand, interpreting the disqualification rules too strictly could hinder the ability of lawyers to move from firm to firm, and could be used as a litigation tactic to unfairly force opposing parties to be stripped of their chosen counsel.

In sum, basing a brief writing assignment on ethics codes allows me to reinforce statutory interpretation techniques introduced the previous semester, plus drive home some ethical lessons about maintaining client confidentiality and how law firms try to avoid conflicts of interest.

1 The problem was originally created by my Michigan colleague Phil Frost.

2 For an article on a similar theme, *see* Amy Montemarano, *Using Federal Rule of Civil Procedure 11 to Teach Statutory Construction*, 20 The Second Draft 9 (Dec. 2005).

3 Mich. R. Prof. Conduct 1.10(b). By contrast, the ABA's Model Rules of Professional Conduct do not formally authorize screens for lawyers moving laterally from firm to firm, and only allow screens in limited situations such as when government lawyers move to the private sector or when a prospective client reveals confidential information to an attorney during an initial interview. *See* Model R. Prof. Conduct 1.11(b) & 1.18(d).