American Bar Association

IMPUTED DISQUALIFICATION ARISING FROM CHANGE IN EMPLOYMENT BY NONLAYWER EMPLOYEE

June 22, 1988

A law firm that employs a nonlawyer who formerly was employed by another firm may continue representing clients whose interests conflict with the interests of clients of the former employer on whose matters the nonlawyer has worked, as long as the employing firm screens the nonlawyer from information about or participating in matters involving those clients and strictly adheres to the screening process described in this opinion and as long as no information relating to the representation of the clients of the former employer is revealed by the nonlawyer to any person in the employing firm. In addition, the nonlawyer's former employer must admonish the nonlawyer against revelation of information relating to the representation of clients of the former employer.

The Committee is asked whether, under the ABA Model Rules of Professional Conduct (1983, amended 1987), a law firm that hires a paralegal formerly employed by another lawyer must withdraw from representation of a client under the following circumstances. The paralegal has worked for more than a year with a sole practitioner on litigation matters. One of those matters is a lawsuit which the sole practitioner instituted against a client of the law firm that is about to hire the paralegal and wishes to continue to defend the client. The paralegal has gained substantial information relating to the representation of the sole practitioner's client, the plaintiff in the lawsuit. The employing firm will screen the paralegal from receiving information about or working on the lawsuit and will direct the paralegal not to reveal any information relating to the representation of the sole practitioner's client gained by the paralegal during the former employment. The Committee also is asked whether the paralegal's former employer must take any actions in order to comply with the Model Rules.

RESPONSIBILITIES OF EMPLOYING FIRM

The Committee concludes that the law firm employing the paralegal should not be disqualified from continuing to defend its client in the lawsuit, as long as the law firm and the paralegal strictly adhere to the screening process described in this Opinion, and as long as no information relating to the representation of the sole practitioner's client is revealed by the paralegal to any person in the employing firm. [FN1]

The Model Rules require that a lawyer make reasonable efforts to ensure that each of the lawyer's nonlawyer employees maintains conduct compatible with the professional obligations of the lawyer, including the nondisclosure of information relating to the representation of clients. This requires maintaining procedures designed to protect client information from disclosure by the lawyer's employees and agents. See infra note 4.

Although the Committee has not previously addressed the issues present when nonlawyers change employment from one law firm to another while both firms are representing clients with conflicting interests, courts and other ethics committees have considered these issues. In Kapco Manufacturing Co., Inc. v. C & O Enterprises, Inc., 637 F. Supp. 1231 (N.D. Ill. 1985), the court was presented with the question whether a law firm should be disqualified from continuing to represent a defendant in litigation following the employment of the office manager-secretary of the plaintiff's law firm. The disqualification motion was based on the fact that the employee had gained substantial confidential information about the plaintiff while with the former employer.

The court found that plaintiff had met its initial burden of presenting a prima facie case for disqualification of the defendant's law firm by proving that the office manager was privy to confidential information. Noting that the burden of going forward with evidence to rebut the presumption that this information had been shared with the new firm shifted to defendant, the court found that the defendant had met this burden. Although no formal 'Chinese wall' had been instituted, the law firm had taken appropriate steps to ensure that the office manager took no part in working on the defendant's case and that no one discussed the case with the employee. Accordingly, the motion to disqualify defendant's law firm was denied. The court distinguished Williams v. Trans World Airlines Inc., 588 F. Supp. 1037 (W.D. Mo. 1984), on the basis that in Williams there was no question but that confidential information had been obtained by the law firm from the newly hired employee, and this factor required disqualification of the law firm in that case. [FN2]

When a lawyer moves from one firm to another which is on the opposite side of a matter, the Model Rules permit continued representation by the new law firm only where the newly employed lawyer acquired no protected information and did not work directly on the matter while with the former employer. Rule 1.10. The Rules do not recognize screening the lawyer from sharing the information in the employing firm as a mechanism to avoid disqualification of the entire firm. [FN3] In the case of nonlawyers changing firms, however, additional considerations are present which persuade the Committee that the functional analysis in Kapco is more appropriate than would be a rule requiring automatic disqualification once the nonlawyer is shown to have acquired information in the former employment relating to the representation of the opponent.

It is important that nonlawyer employees have as much mobility in employment opportunity as possible consistent with the protection of clients' interests. To so limit employment opportunities that some nonlawyers trained to work with law firms might be required to leave the careers for which they are trained would disserve clients as well as the legal profession. Accordingly, any restrictions on the nonlawyer's employment should be held to the minimum necessary to protect confidentiality of client information.

Model Rule 5.3 imposes general supervisory obligations on lawyers with respect to nonlawyer employees and agents. The obligations include the obligation to make reasonable efforts to ensure there are measures in effect to assure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer. [FN4] With respect to new employees who formerly worked for other lawyers, these measures should involve admonitions to be alert to all legal matters, including lawsuits, in which any client of the former employer has an interests. The nonlawyer should be cautioned: (1) not to disclose any information relating to the representation of a client of the former employer; and (2) that the employee should not work on any matter on which the employee worked for the prior employer or respecting which the employee has information relating to the representation of the client of the former employer. When the new firm becomes aware of such matters, the employing firm must also take reasonable steps to ensure that the employee takes no action and does no work in relation to matters on which the nonlawyer worked in the prior employment, absent client consent after consultation. [FN5]

Circumstances sometimes require that a firm be disqualified or withdraw from representing a client when the firm employs a nonlawyer who formerly was employed by another firm. These circumstances are present either: (1) where information relating to the representation of an adverse party gained by the nonlawyer while employed in another firm has been revealed to lawyers or other personnel in the new firm, as was the case in Williams; or (2) where screening would be ineffective or the nonlawyer necessarily would be required to work on the other side of the same or a substantially related matter on which the nonlawyer worked or respecting which the nonlawyer has gained information relating to the representation of the opponent while in the former employment. If the employing firm employs the nonlawyer under those circumstances, the firm must withdraw from representing the client, unless the client of the former employer consents to the continued representation of the person with conflicting interests after being apprised of all the relevant factors.

RESPONSIBILITIES OF FORMER EMPLOYER

Under Model Rule 5.3, lawyers have a duty to make reasonable efforts to ensure that nonlawyers do not disclose information relating to the representation of the lawyers' clients while in the lawyer's employ and afterwards. On the facts presented to the Committee here, once the lawyer learns that the paralegal has joined the opposing law firm, the lawyer should consider advising the employing firm that the paralegal must be isolated from participating in the matter and from revealing any information relating to the representation of the lawyer's client. If not satisfied that the employing firm has taken adequate measures to prevent participation and disclosures, the lawyer should consider filing a motion in the lawsuit to disqualify the employing law firm from continuing to represent the opponent. See Philadelphia Bar Ass'n Opinion 80-119 (applying these principles to the case of a secretary under similar circumstances).

RESPONSIBILITIES UNDER CODE OF PROFESSIONAL RESPONSIBILITY

The standards expressed in this Opinion also are applicable under the predecessor ABA Model Code of Professional Responsibility (1969, amended 1980). Although the Disciplinary Rules under Canon 4 (Preservation of Confidences and Secrets) and under Canon 5 (Exercise of Independent Professional Judgment) regulate the conduct of lawyers and not the conduct of nonlawyers, DR 4-101(C) specifically requires a lawyer to 'exercise reasonable care to prevent [the lawyer's] employees, associates and others whose services . . . [the lawyer utilizes] from disclosing or using confidences or secrets of a client, except to the extent the lawyer. . .' may do so. [FN6] See also EC 4-2 (the exposure to nonlawyer employees of confidential professional information as a result of normal law office operations 'obligates a lawyer to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be preserved'); EC 4-5 ('. . . a lawyer should be diligent in his efforts to prevent the misuse of [information acquired in representation of a client] by his employees and associates').

The Committee accordingly is of the opinion that the same policy considerations are applicable under the Model Code as are applicable under the Model Rules. Therefore, the lawyer who hires the paralegal, under the circumstances before the Committee, must screen the paralegal from participating in the lawsuit with the employing law firm. Both the employing firm and the sole practitioner should admonish the paralegal not to disclose information relating to the representation of the plaintiff in the lawsuit and also of any other client of the sole practitioner for whom the paralegal formerly worked while with the former employer.

The standards expressed in this Opinion apply to all matters where the interests of the clients are in conflict and not solely to matters in litigation. The Committee also notes that these standards apply equally to all nonlawyer personnel in a law firm who have access to material information relating to the representation of clients and extends also to agents who technically may be independent contractors, such as investigators. See supra note 4, Comment to Rule 5.3.

FN1 The Committee notes that Model Rule 1.6 protects from disclosure a greater amount of information than does the predecessor ABA Model Code of Professional Conduct (1969, amended 1980). DR 4-101(A) of the Code protects 'confidences' and 'secrets' from disclosure. The term 'confidences' is defined as 'information protected by the attorney-client privilege under applicable law.' The term 'secrets' is defined as 'other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.' The term used in Model Rule 1.6, 'information relating to the representation of a client,' though not specifically defined, plainly encompasses in addition to confidences and secrets all information which pertains to the attorney-client relationship, even though it was not learned during the relationship and even though disclosure would not embarrass or be detrimental to the interests of the client.

FN2 Other courts and some ethics committees have employed the rationale applied in Kapco to allow firms to continue in matters where screening is effective to prevent the disclosure by the new employees of confidences of clients of their former employers. See, e.g., Herron v. Jones, 276 Ark. 493 (1982) (disqualification denied where no disclosure of confidential information by secretary occurred); Virginia State Bar Opinion No. 745 (1985) (lawyer may continue in case so long as adverse lawyer's former secretary

is required to maintain confidences gained in former employment); Philadelphia Bar Ass'n Opinions 80-77, 80-119 (screening process adequate to prevent disclosure of confidences of former employer's client may suffice to avoid disqualification). Contra State Bar of Michigan Opinion C1-1096 (1985) (informed consent of all opposing clients required); New Jersey Opinion 546 (1984) (presumption that confidences have been exchanged is irrebuttable, and disqualification is automatic).

FN3 Screening is permitted only in the case where the lawyer formerly worked for the government. See Rule 1.11. Although most cases which have considered the issue reject the application of screening mechanisms as a means to avoid disqualification of the entire firm where the conflict arises from the newly employed lawyer's earlier nongovernmental association, this is not the universal view. See, e.g., Nemours Foundation v. Gilbane, 632 F. Supp. 418 (D. Del. 1986), applying Delaware Rules which are substantially the same as Model Rules 1.9, 1.10 and 1.11; Schiessle v. Stephens, 717 F.2d 417 (C.A. 7 1983).

FN4 Rule 5.3(b) provides that 'a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.' The Comment to Rule 5.3 states that a lawyer should give to the lawyer's assistants, such as secretaries, investigators, law student interns and paraprofessionals, '. . . appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client. . . .'

FN5 See Developments in the Law: Conflicts of Interest in the Legal Profession, 94 Harv. L. Rev. 1244, 1367-70 (1981) (sets forth the elements for effective screening); Comment, The Chinese Wall Defense to Law-Firm Disqualification, 128 U. Pa. L. Rev. 677, 712-714 (1980) (discusses factors to be weighed where lawyers change employment in judging whether to accept screening, including the timing and features of the screening measures adopted).

FN6 DR 4-101(C) states:
(C) A lawyer may reveal:
(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
(3) The intention of his client to commit a crime and the information necessary to prevent the crime.
(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

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