NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 720 – 8/27/99

Topic: Conflict Of Interest - Successive Representation; Moving Lawyer; Conflict Check

Digest: When a lawyer moves from Firm A to Firm B, Firm B must request, and the moving lawyer may disclose, the names of clients represented and, depending upon the size of Firm A, the name of all clients of Firm A for a reasonable period of time, as long as such information is not protected as a confidence or secret of the clients of Firm A and disclosing this information does not violate any contractual or fiduciary duties of the lawyer to Firm A.

Code: DR 4-101(A), DR 4-101(B), DR 5-108(A), DR 5-105(D).

QUESTION

When a lawyer ("Moving Lawyer") is departing Firm A for Firm B, what information must Firm B seek and may the Moving Lawyer provide about his or her clients and representations to allow Firm B to perform conflicts checks?

OPINION

When a lawyer moves from one law firm (Firm A) to another, the new law firm (Firm B) must take steps to identify conflicts of interest that may arise under DR 5-108(A) and DR 5-105(D) of the Code of Professional Responsibility ("Code"). As recently amended, DR 5-108(A) provides in pertinent part:

> [A] lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure ... [t]hereafter represent another person in the same or a substantially related matter in which that person's interests are

> materially adverse to the interests of the former client [or] use any confidences or secrets of the former client. ...

This restriction has various implications for the Moving Lawyer. For example, most obviously, after having represented a client of Firm A in a pending litigation against a client of Firm B, the Moving Lawyer may not move to Firm B and represent the opposing party. Similarly, having learned confidences or secrets of a client of Firm A, the Moving Lawyer may not use them in the representation of a different client of Firm B.

This restriction has implications for Firm B as well, because under DR 5-105(D), if the Moving Lawyer is prohibited from representing a client at Firm B because of a conflict with a former client at Firm A, then all the lawyers in Firm B are similarly prohibited. The Code does not contain a provision for "screening" the personally disqualified lawyer (*i.e.*, adopting procedures to prevent that lawyer from participating in the representation) in order to permit other lawyers of the firm to undertake or continue a representation. The effect of this imputed disqualification of Firm B could be that, as a result of hiring Moving Lawyer, Firm B is disqualified from continuing to represent its existing clients in ongoing matters. If required to terminate a representation, it may also be subject to fee forfeitures, ethics complaints and malpractice claims.

In light of the rule of imputed disqualification, it has been the practice for law firms hiring a Moving Lawyer to perform a conflicts check during the hiring process to determine whether the Moving Lawyer or Firm A has engaged in representations that are substantially related to representations in progress at Firm B or future representations that Firm B envisions. Performing a conflicts check allows Firm B to identify potential conflicts of interest under DR 5-108(A) and to request the consent of the clients, if appropriate. *See* DR 5-108(A) (otherwise forbidden representation adverse to a former client may be undertaken with the former client's consent after full disclosure).

The practice of performing conflicts checks, previously engaged in as a matter of prudence, is now required by the Code. In 1996, the Code was amended to require New York law firms to institute formal systems to identify conflicts of interest involving current or successive representations or personal interests of lawyers. DR 5-105(E) provides:

> A law firm shall keep records of prior engagements, which records shall be made at or near the time of such engagements and shall have a policy implementing a system by which proposed engagements are checked against current and previous engagements, so as to render effective assistance to lawyers within the firm in complying with DR 5-105(D). Failure to keep records or to have a policy which complies with this subdivision, whether or not a

> violation of DR 5-105(D) occurs, shall be a violation by the firm. In cases in which a violation of this subdivision by the firm is a substantial factor in causing a violation of DR 5-105(D) by a lawyer, the firm, as well as the individual lawyer, shall also be responsible for the violation of DR 5-105(D).

Although this provision seems to apply by its terms to prior engagements of the firm,[1] we believe that the intent of the provision can only be effected if a firm adds to its system information about the representations of lawyers who join the firm.

The Law of Conflicts

The lawyer's ethical and legal obligations to former clients and the courts have been developed in two contexts: the confidentiality and conflict-of-interest provisions of the Code and the responses of the courts to disqualification motions. The relevant disciplinary rules and judicial opinions will inform Firm B's decision about how much information to seek from the Moving Lawyer in order to perform a reasonably effective conflict check.

The standard employed in ruling on disqualification motions is not invariably the same as the standard under the applicable disciplinary rules. In some cases, courts will decline to disqualify a law firm, even though its representation would appear to be forbidden by the disciplinary rules, in light of the client's interest in preserving an ongoing lawyer-client relation with its chosen counsel and other considerations of fairness and economy. *See, e.g.*, *S & S Hotel Ventures Limited Partnership v. 777 S.H. Corp.*, 69 N.Y.2d 437, 508 N.E.2d 647, 515 N.Y.S.2d 735, (1987); *see generally* Bruce A. Green, Conflicts of Interest in Litigation: The Judicial Role, 65 Fordham L. Rev. 71, 74-78 (1996).

Further, the standard employed in ruling on disqualification motions sometimes turns on distinctions that are not taken into account by the disciplinary rules. For example, depending on the size of the law firm, judicial decisions take different approaches to the question of whether to impute knowledge of client confidences and secrets to lawyers in a firm who did not participate in the particular representation. On one hand, in the seminal case of *Cardinale v. Golinello*, 43 N.Y.2d 288, 372 N.E.2d 26 (1977), the Court of Appeals disqualified a lawyer from Firm B from representing the plaintiff in an action against the client of Firm A, when Firm B had hired a lawyer from Firm A, which was a small firm. Holding that the presumption that confidences have been shared among attorneys in Firm A is irrebuttable, the court explained, "it is no answer that the [moving] lawyer did not in

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[1] DR 5-105(E) requires a firm to check "proposed" engagements against current and previous engagements. However, the vicarious disqualification provisions of DR 5-105(D) clearly require the firm to check existing representations against a Moving Lawyer's current and prior representations.

fact obtain any confidential information in connection with the first employment, or even that it was only other members of his firm who rendered the services to the client." *Id.*, 43 NY 2d at 295. Thereafter, in *Solow v. W.R. Grace & Co.*, 83 N.Y.2d 303, 632 N.E.2d 437 (1994), in a somewhat different factual context, the Court of Appeals revisited the question of whether there is an irrebuttable presumption that all lawyers in Firm A have shared the confidences of all of the firm's clients. That case involved a law firm that had formerly represented Grace, but later argued that it should be allowed to represent another client suing Grace, on the ground that the lawyers previously involved in representing Grace were no longer with the firm. The Court of Appeals concluded that the presumption that the departing lawyers had shared Grace's confidences with other lawyers in the firm should be rebuttable: "If the firm can demonstrate prima facie that there is no reasonable possibility that any of its [remaining] attorneys acquired confidential information concerning the client, a hearing should be held after which the court may determine that disqualification may be unnecessary." *Id.*, 83 N.Y.2d at 313. However, the court distinguished between large law firms, with attorneys in different departments who could not be assumed to have contact with one another, and smaller firms like the one in *Cardinale*, where there was a "constant cross pollination going on" and a "cross current of ideas" among the attorneys on all matters which the firm handled. *Solow*, 83 N.Y.2d at 311. The Court reiterated that "[i]n firms characterized by the informality exhibited by the Halperin firm in *Cardinale*, disqualification will be imposed a matter of law without a hearing." *Id.*

Further, the standard employed in ruling on disqualification motions varies from jurisdiction to jurisdiction. For example, the New York state courts have generally rejected "screening" as a means to protect Firm B from disqualification. *See, e.g.*, *Trustco Bank N.Y. v. Melino*, 625 N.Y.S.2d 803, 808 (Sup. Ct. 1995) (expressly rejecting the suggestion of erecting a screen where the Moving Lawyer was involved in a substantially related representation at Firm A, stating that to do so is tantamount to abandoning the irrebuttable presumption rule by substituting a "trust me" rule). The Federal courts are more amenable to screening a Moving Lawyer who had little or no involvement in the matter at Firm A. *See, e.g.*, *In re Del-Val Financial Corp. Sec. Litigation*, 158 F.R.D. 270 (S.D.N.Y. 1994); *Bank Brussels Lambert v. The Chase Manhattan Bank, N.A.*, *supra*; *Papanicolaou v. Chase Manhattan Bank, N.A.*, 720 F. Supp. 1080, 1086-87 (S.D.N.Y. 1989); *Yaretsky v. Blum*, 525 F. Supp. 24, 29-30 (S.D.N.Y. 1981).

The Federal courts are also more likely to hold that once Moving Lawyer leaves Firm A, the representations of Firm A are not attributed to the Moving Lawyer unless the Moving Lawyer personally participated in the representation. *See, e.g.*, *Great Western Resources, Inc.*, 655 F. Supp. 565, 572 (S.D.N.Y. 1987). Some Federal courts presume that the Moving Lawyer was privy to the confidences of all of Firm A's clients but allow the Moving Lawyer to rebut this presumption in the case of a former client for whom the Moving Lawyer did not personally work. If the Moving Lawyer does not possess any client confidences and this lawyer is screened

from the representation, Firm B may be permitted to undertake or continue a representation that is adverse to a client of Firm A, its new lawyer's previous firm. *See Schiessle v. Stephens*, 717 F.2d 417 (7th Cir. 1993).

In addition, the Federal courts will not necessarily assume that all lawyers who worked on a matter at Firm A "represented" the client within the meaning of the Code. For example, at least one court has distinguished between senior lawyers who become heavily involved in the facts and strategy of a particular matter and more junior lawyers who enter briefly on the periphery for a limited and specific purpose related solely to legal questions. *See Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975) (disqualification does not apply where the Moving Lawyer's involvement was limited to brief, information discussions on a procedural matter or research on a specific point of law); *see also Bank Brussels Lambert v. The Chase Manhattan Bank, N.A.*, 93 Civ. 5298 (S.D.N.Y.1996) (moving lawyer was privy to some confidences, but plainly was not a strategy-maker).

Despite the differences between the disciplinary rules and the disqualification decisions, as well as the variation among judicial decisions, as a practical matter a law firm would have to perform essentially the same conflicts check, whether it was seeking to comply with the dictates of the Code or whether it was seeking only to comply with the occasionally less stringent dictates of the disqualification case law. In any event, it would not be appropriate for a law firm to limit its inquiry with an eye to complying exclusively with the judicial decisions. Both DR 5-105(E) and the general requirements of DR 5-108 mandate that firms develop systems that are more rigorous than those that might be sufficient to avoid disqualification motions. Doing so will enable the law firm, where warranted, to seek the former client's consent or to take other steps to minimize the likelihood of a disqualification motion, as well as to avoid conflicts of interest that would not be the subject of a disqualification motion.

Conflicts Checks

Firm B must seek information concerning the clients of Firm A and, especially, the identity of those for whom the Moving Lawyer performed work and the nature of that work, in order to determine whether Firm B may have conflicts of interest and how the possible conflicts must be addressed under the Code and the applicable case law. DR 5-105(E), while requiring conflict checks, does not set forth detailed requirements. It sets forth a general requirement that the conflict check system enable the firm to check new representations against current and previous engagements, so as to render "effective assistance" to lawyers within the firm in complying with DR 5-105(D).[2]

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[2] Practical guidance may be found in the professional literature. *See generally* Evans, Ethical Issues and Financial Data, 1004 PLI/Corp 229 (1997), Novachick & Miller,

In developing a system for checking conflicts, lawyers must determine how long data on representations should be maintained in the system, and how many years worth of representations to request from Moving Lawyers. DR 5-105(E) does not offer a hard-and-fast numerical cut-off that would qualify as a "safe harbor". In some situations it will be reasonable for Firm B to limit the years of representations for which it requests information from a Moving Lawyer, while in other situations it will not. While it would be reasonable to take steps to identify all current litigations in which Firm A and Firm B are appearing on behalf of different clients, it might not be reasonably possible for Firm B to uncover every case in which it represents a client against a former client of Firm A from whom the Moving Lawyer may be presumed to have received confidences or secrets. For example, in the case of a Moving Lawyer who was practicing at Firm A for many years, Firm B should not be required to seek the identity of Firm A's former clients going back decades. As a practical matter, over time it becomes less likely either that a new or ongoing representation will relate to a past one or that information learned in a past representation will be material to a new or ongoing one; additionally, the likelihood also increases over time that information that would otherwise be protected as a client confidence or secret will become "generally known," so that the former lawyer is permitted to make use of it. *See* DR 5-108(A)(2) (lawyer prohibited from using confidences or secrets of a former client except as permitted by DR 4-101(C) or when they have become generally known).[3]

The nature and extent of the information sought may also vary depending on such considerations as the nature of Firm B's practice (*e.g.*, whether its practice involves litigation and, if so, where the litigation takes place) and the size of Firm A, from which the Moving Lawyer is arriving. For example, if Moving Lawyer is coming from a small firm, Firm B may wish to obtain a list of all clients of Firm A, since the courts may attribute to Moving Lawyer the confidences of all of Firms A's clients. If Moving Lawyer is coming from a larger firm, Firm B may be inclined only to ask the

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Conflict Avoidance Strategies: An Update, 21 No. 6 Law Prac. Mgmt. 32 (1995), Holtzman, Conflicts of Interest, A Practical Approach to Avoiding Disaster, 434 PLI/Lit 19 (1992). These articles suggest that records or databases of current and prior engagements include information as to clients represented and a brief description of the subject matter of each representation. For an example of a questionnaire used to elicit information from a Moving Lawyer, *see* Evans, *supra*, at 242-43.

[3] It may also be reasonable to distinguish between Moving Lawyers with different levels of responsibility at Firm A (*e.g.*, between partners and associates). For example, a firm may request a list of the Moving Lawyer's clients over a longer period of time if that lawyer is a law firm partner than if that lawyer is an associate, on the assumption that associates may not be deemed to have "represented" the client, or that an associate may have less exposure to confidences and secrets of the client. This assumption may not, however, be reasonable in all cases, since the associate may actually possess information that is still relevant to the substantially related matter.

Moving Lawyer for a list of clients at Firm A with respect to whom Moving Lawyer performed work or otherwise obtained confidences or secrets. Firm B's reasonable effort to obtain information from the Moving Lawyer and to check that information against the firm's records may meet DR 5-105(E)'s "effective assistance" standard even if it does not succeed in identifying all prior representations by Moving Lawyer that a former client might object to or that a court might hold required disqualification of Firm B.

The Problem of Confidentiality

A law firm's database with information about its own clients will usually include information as to the full name of each client and a brief description of the matter for which the firm was engaged. It may not, however, be possible for a Moving Lawyer to give such information, since the name of the client of Firm A and the fact and nature of the representation may constitute a confidence or secret of the client. DR 4-101 generally requires a lawyer to preserve the confidentiality of both "confidences" (*i.e.*, attorney-client privileged information) and "secrets" (*i.e.*, 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"). Although the fact that the client consulted a lawyer and the general nature of the consultation will not usually be privileged, *see, e.g.*, *Colton v. United States*, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963), the client's name, the fact that the client consulted a lawyer and the general nature of the consultation may nevertheless constitute "secrets" of the client which the lawyer may not disclose. Firm B should admonish a prospective hire not to disclose client confidences or secrets in responding to its conflicts questionnaire.

Where information identifying a client or the client's matter constitutes a confidence or secret that the Moving Lawyer may not ethically disclose, Firm B may be limited to obtaining more general information about the nature of the Moving Lawyer's prior work. General information will enable Firm B to identify some possible conflicts of interest. *See, e.g.,* Evans, *supra*, at 239. Additionally, the Moving Lawyer may make personal efforts to ascertain whether there are or may be conflicts of interest in light of any information that may not be disclosed. The Moving Lawyer may also seek to obtain the consent of the former client to the disclosure of additional information, where it is needed.

Firm A may believe that information about the names of Firm A's clients is proprietary to Firm A. If the information is not protected as a confidence or secret of Firm A's clients, then whether Firm A may prevent the disclosure by Moving Lawyer of such information which is known to Moving Lawyer is a matter of contract and fiduciary law governing the relationship between Firm A and Moving Lawyer, and not a matter of legal ethics on which this Committee may opine.

CONCLUSION

When a lawyer moves from Firm A to Firm B, Firm B must seek the names of clients represented by the Moving Lawyer and, depending upon the size of Firm A, the names of all clients of Firm A for a reasonable period of time, and the Moving Lawyer may provide this information, except to the extent that (a) this information is protected as a confidence or secret of the clients of Firm A or (b) the Moving Lawyer has a contractual or fiduciary duty to Firm A that forbids disclosing this information. If the information is protected from disclosure, then the Moving Lawyer may disclose only general information, not protected as a client confidence or secret, about the nature of his or her representations at Firm A.

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