NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 723 (10/12/99)

Modifies: N. Y. State 638 (1992)

Topic: Conflict of interest; former client; vicarious disqualification; confidences and secrets.

Digest: Absent former client's consent, a lawyer changing firms may not undertake representation adverse to the former client if (1) moving lawyer personally "represented" the client or otherwise acquired relevant confidences or secrets of the client, and (2) moving lawyer would be undertaking representation in the same matter or in a matter that is substantially related to one in which the moving lawyer or the old firm previously represented the former client. Absent client consent, if moving lawyer is disqualified from engaging in representation under this rule, the moving lawyer's new law firm is also disqualified.

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

QUESTION

Under what circumstances is a lawyer, previously associated with another firm, ethically precluded from representing clients of the lawyer's new firm? Under what circumstances is the lawyer's new firm precluded from representing certain clients?

OPINION

The inquirer is a member of a firm ("New Firm") that primarily represents claimants in hearings before the Workers' Compensation Board. New Firm proposes to hire a new associate ("L"), who is currently an associate with a firm ("Old Firm") that primarily does workers' compensation defense work. In the course of employment with Old Firm, L appeared at compensation hearings on behalf of employers and carriers.

On June 30, 1999, amendments to the New York Lawyer's Code of Professional Responsibility became effective. DR 5-108, which imposes certain limitations on representations that relate to former clients, was among the disciplinary rules amended. It now provides:

> A. Except as provided in DR 9-101(B) with respect to current or former government lawyers, a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure:
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> 1. Thereafter 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.
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> 2. Use any confidences or secrets of the former client except as permitted by DR 4-101(C) or when the confidence or secret has become generally known.

In addition, a new section, DR 5-108(B), was added. It provides:

> B. Except with the consent of the affected client after full disclosure, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
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> 1. Whose interests are materially adverse to that person; and
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> 2. About whom the lawyer had acquired information protected by DR 4-101(B) that is material to the matter.

In situations in which a lawyer is precluded by DR 5-108 from representation, DR 5-105(D) prohibits other lawyers associated with the lawyer from undertaking the representation as well:

> While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them

> practicing alone would be prohibited from doing so under...DR 5-108 (A) or (B)...except as otherwise provided therein.[1]

This Opinion applies these rules in a variety of fact situations raised by the proposal of New Firm to hire L.

A. Ongoing Litigation Involving Former Client

1. Moving Attorney Represented Client.

As an associate at Old Firm, L worked on a pending matter on behalf of a client, Jones Co., in which Smith is the claimant. If L joins New Firm, Jones Co. would become L's former client. DR 5-108(A) precludes L's representation of Smith because that would involve L in representing another person (Smith) in the same matter in which that person's interests are materially adverse to the former client (Jones Co.). If, however, the former client, Jones Co., provides consent after full disclosure, L may represent Smith. Further, absent consent, New Firm could not continue to represent Smith if it were to hire L, because New Firm is precluded from continuing employment when any one of the lawyers associated with the firm is prohibited from doing so by DR 5-108. DR 5-105(D).[2]

For purposes of DR 5-108(A), a lawyer has "represented a client" if the lawyer has obtained or had access to confidences or secrets of the former client. There are some circumstances, however, where a lawyer may bill work to a client, but not represent a client. For example, where a subordinate lawyer researched a point of law with respect to a matter, without knowing any underlying facts and without the possibility of acquiring any confidences or secrets of the client, the lawyer cannot be said to have "represented" the client. See *Kassis v. Teacher's Insurance and Annuity Ass'n,*____N.Y.2d ____(1999) (holding that the presumption of disqualification will not apply if the moving lawyer did not obtain any client confidences or did not have any opportunity to acquire confidential information in the former employment). We caution, however, that in most circumstances, any information about the client could constitute a confidence or secret. In some circumstances, the mere identity of the client may constitute a secret.

2. Moving Attorney Did Not Represent the Client

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1 DR 5-105(D) was amended effective June 30, 1999 to reflect the addition of DR 5-108(B) to the Code.

2 Neither DR 5-108(A) nor DR 5-105(D) provides authorization for the use of screening to avoid the ethical prohibition against the new firm's engaging in representation adverse to L's former client. *See Kassis v. Teacher's Insurance and Annuity Ass'n*, ____N.Y.2d ____ (1999).

While L was an associate at Old Firm, the firm represented Jones Co. on a pending matter, in which Smith is the claimant. L did not work on the matter and is now an associate at New Firm, which represents Smith.

Where the moving attorney did not personally represent a client in a matter, the attorney is precluded from representing another client in the same matter only where the new client' s interests are materially adverse to the former client *and* the lawyer acquired information protected by DR 4-101(B) about the client that is material to the matter. DR 5-108(B). Thus, even if L never worked on the Jones-Smith matter, L would be disqualified from representing Smith where L obtained confidences or secrets about Jones that are relevant to the pending litigation. If L is disqualified from representing Smith, New Firm is disqualified as well because New Firm is precluded from continuing employment when any one of the lawyers associated with the firm is prohibited from doing so by DR 5-108. DR 5-105(D). If, however, L did not obtain confidences or secrets from Jones Co., L is not precluded from representing Smith and therefore New Firm can continue its representation of Smith.

The prohibition of DR 5-108(A) is premised on the irrebuttable presumption that a lawyer who formerly represented a client will have obtained secrets and confidences of the client. *See Solow v. W. R. Grace*, 83 N.Y. 2d 303, 306 (1994) (where the lawyer was previously a sole practitioner, the lawyer is automatically disqualified from representing the opposing party because there is an irrebutable presumption that the attorney obtained confidences and secrets). The adoption of DR 5-108(B) reflects that this presumption is unwarranted where the moving attorney was associated with a multi-lawyer firm and did not acquire confidences and secrets relevant to the matter.

DR 5-108(B) provides that the lawyer must have "acquired" confidences and secrets. In some circumstances, the lawyer moving from a multi-lawyer firm may be presumed to have acquired confidences or secrets relevant to the pending matter. For example, if L worked for a small firm "whose activities were characterized by an understandable informality" in which "there was constant 'cross-pollination'" and "'cross current of discussion and ideas'" among the firm's lawyers, the moving lawyer is presumed to have had access to confidences and secrets. *Cardinale v. Golinello*, 43 N.Y.2d 288, 292 (1977). Under these circumstances, it is irrelevant whether the moving lawyer actually obtained or recalls obtaining confidences and secrets of the former client.[3] Thus, if Old Firm was a firm whose character made it inevitable that L would have had access to

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3 As the Court of Appeals noted in *Solow*, *supra,* at 309-10, a presumption serves to protect client confidences, avoids the appearance of impropriety, and encourages self-enforcement among attorneys. At the same time, however, the Court noted that a presumption imposes substantial costs on current clients, the public, and the legal profession by limiting a client 's choice of counsel and forcing the client to incur additional costs. Thus, an irrebuttable presumption should apply only in those cases in which the potential harm outweighs the costs to clients and the public.

confidences and secrets of Jones Co., absent consent, both L and New Firm are precluded from representing Smith in the matter against Jones Co. even if L did not actually "represent" Jones Co. in the matter while at Old Firm.

In some circumstances, the moving lawyer will not be presumed to have acquired confidences and secrets. Among the facts that might be used to demonstrate that the attorney did not acquire confidences or secrets are the large size of the firm and its organization into different departments, see *Silver Chrysler Plymouth v. Chrysler Motors Corp.,* 518 F.2d 751 (2d Cir. 1975), and the segregation of files, documents and the like from lawyers who do not work on the case, see *Severino v. DiIorio*, 186 A.D.2d 178 (2d Dep't 1992).

B. New Litigation Against Former Client

1. Moving Attorney Personally Represented Former Client

While L was an associate at Old Firm, L worked on a matter on behalf of a client, Jones Co,. in which White was the claimant. New Firm currently represents Brown as a claimant against Jones Co., which becomes a former client of L's if L moves to New Firm.

L and New Firm are precluded from representing Brown, whose interests are materially adverse to the interests of the former client Jones Co, *if Brown v. Jones Co. is a substantially related matter with respect to White v. Jones Co.* DR 5-108(A)(1). Even if, however, the matters are not substantially related, both L and New Firm are precluded from actually using confidences and secrets against the L's former client. DR 5-108(A)(2).

The substantial relationship test initially was a judicially developed standard for disqualification. Its genesis is found in *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265, 268 (S.D.N.Y. 1953)("where any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation"). In that case, the court noted that "the former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client." *Id*. at 268. Subsequent cases have rephrased the substantial relationship test without providing additional content. *See, e.g., General Motors Corp. v. City of New York,* 501 F.2d 639, 650 (2d Cir. 1974) (subsequent action is "substantially similar"); *Ceramco, Inc. v. Lee Pharmaceuticals,* 510 F.2d 268, 271 (2d Cir. 1975)("matter...was almost identical"); *Motor Mart, Inc. v. Saab Motors, Inc.*, 359 F. Supp. 156, 157 (S.D.N.Y. 1973)("essentially the same type of suit"). The substantial relationship test was subsequently adopted as an element of the ethical rules in DR 5-108. As we have noted previously, although the disciplinary standard and the disqualification standard need not be identical, N.Y. State 628,

at 3 (1992), we will look to judicial interpretations to provide guidance as to permissible ethical conduct, *id*. at 3 n.1.

Whether two matters are substantially related is a question of fact. It is clear, however, that the fact that both matters involve the same party as a defendant--here Jones Co.--does not make the matters necessarily "substantially related." *See Silver Chrysler Plymouth, Inc., supra*, at 756; *Jamaica Public Service Co. v. AIU Insurance Co.,* 92 N.Y.2d 631 (1998). We also believe that the fact that the underlying nature of the claim in both matters is the same-–here an issue of workers' compensation – does not itself make the matters related. *See* N.Y. County 717 (1996) ("the mere fact that two matters involved the same type of insurance coverage would not, by itself, make the matters substantially related"). Furthermore, the mere fact of the substantial involvement of the moving lawyer in the prior matter or the lawyer's longstanding relationship with the former client does not necessarily make the new matter substantially related to the past matter. *See* Charles W. Wolfram, Modern Legal Ethics 369 (1986).

Factors that would tend to show that the matters were substantially related would include an identity of issues in the two matters or a significant overlap of the contested facts. *See, e.g., Duncan v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.,* 646 F.2d 1020 (5th Cir. 1981). They would also include a situation where the issue in controversy in the second matter arose out of a transaction in which the lawyer represented the former client. *See, e.g., Tekni-Plex, Inc. v. Meyner and Landis*, 89 N.Y.2d 123 (1996) (defendant law firm negotiated the sale of a company in which representations and warranties were made that were the subject of the subsequent suit as well as counseling the company about an environmental permit that was also the subject of the second suit); 1 Geoffrey C. Hazard, Jr. and W. William Hodes, The Law of Lawyering § 1.9:202 (1998 Supp.) (lawyer who represented client in a real estate transaction cannot subsequently attack the conveyance).

The most important factor, however, is whether the moving lawyer did or could have obtained confidences and secrets in the former representation that should be used against the former client in the current representation. *See, e.g.,* N.Y. State 638 (1992); Nassau County 96-16 (1996). This requires L to determine whether the information gained (or that could have been gained) in the representation of Jones Co. constitutes a confidence or secret and whether it is necessary to use the information in the current representation against Jones Co.

A confidence is information protected by the attorney-client privilege and a secret is "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." DR 4-101(A). General information about workers' compensation law, for example, does not constitute a confidence or secret even if L obtained that information while

working on a matter for Jones Co. General information concerning the former client's financial exposure, corporate or financial structure, workplace rules, settlement policies, and the like, may be a "secret" (if not a "confidence") if the information is not generally known, but the acquisition of such information is not a disqualifying circumstance "unless there are peculiar aspects of the current representation making such information particularly relevant." N.Y. State 398, at 4; see also *United States Football League v. National Football League*, 605 F. Supp. 1448, 1460 (S.D.N.Y. 1985) ("knowledge of a former client's financial and business background is not in itself a basis for disqualification if the client's background is not in issue in the later litigation"); *Jamaica Public Service, supra. Cf. Analytica Inc. v. NPD Research*, 708 F.2d 1263, 1267 (7th Cir. 1983).

Thus, L must determine whether general knowledge gleaned from a past representation of Jones Co. is generally known and, if not, whether it is relevant to litigation in which Jones Co. is now a defendant and could be used to the former client's disadvantage. For example, suppose in a prior representation of Jones Co. in a workers' compensation matter, L obtained information about certain faulty machinery used in its factory. Even though the information is clearly a secret, L's knowledge of this secret does not make another representation against Jones Co. in a workers' compensation case a substantially related matter if L has no reason to use the information about the faulty machinery to the detriment of Jones Co. in the new matter.

If Brown v. Jones Co. is not a substantially related matter and L had no access to secrets and confidences of Jones Co. that could be used against Jones Co., L (or other lawyers associated with New Firm) may represent Brown. This is so even if the representation of Jones Co. by L was very recent. N.Y. State 628, at 5. Where the matters are substantially related, L or New Firm nevertheless may represent Brown, provided that the informed consent of the former client (Jones Co.) is obtained. DR 5-108(A); N.Y. State 628, at 6. In some circumstances, such as where the former client requires L to maintain certain confidences or secrets, the consent of the current client (Brown) is also necessary. *Id*. at 7 (explaining that the lawyer needs to obtain the current client's consent where the need to protect the former client's secrets might limit the lawyer's zealous representation of the current client and that in some circumstances informed consent may be impossible to obtain without violating the duty to the former client to maintain the secrets).

If, however, consent is not forthcoming and L is precluded from representing Brown, New Firm is also disqualified. DR 5-105(D).

2. Moving Lawyer Never Represented Former Client

If L never personally represented Jones Co. but others associated with L's former firm did, L (or any other lawyer associated with New Firm) may undertake

representation of Brown if there is no substantial relationship between the earlier matter and the current matter. DR 5-108(B).[4]

If the new matter is substantially related,[5] however, L may not undertake representation of a client whose interests are materially adverse to Jones Co. if L acquired confidences or secrets material to the new matter.[6] The mere acquisition of a confidence or secret from the former client is not sufficient to trigger disqualification. The confidence or secret must be one that is material to the matter. A confidence or secret that "must be used under Canon 7 to discharge faithfully and zealously the current proposed representation," N.Y. State 638, at 7, is always material to the current matter. If, however, the secret has become generally known, L is not precluded from using the information and thus, is not precluded from the representation. DR 5-108(A)(2); see also *Jamaica Public Service Co., supra* (holding DR 5-108(A)(2) not violated when knowledge about corporate structure of former client was used by former attorney where information was available in trade periodicals and regulatory filings).

If L is precluded from representing Jones Co. under DR 5-108(B), New Firm is prohibited from undertaking the representation as well. DR 5-105(D).

C. Litigation Where Client Represented by Same Insurer

While L was associated with Old Firm, L personally participated in the defense of Box Co. in a claim by White. Box Co was insured by the XYZ Insurance Co. New Firm currently represents Green, a claimant against Paper Co, who is also insured by the XYZ insurance company.

L and New Firm can continue to represent Green although the defending employer is insured by a company that also insured former clients of L. XYZ was not the client of Old Firm despite its interest in cases in which its insureds were defendants. *See* N.Y. State 519 (1980) (opining that insured and not liability insurer is the client even though lawyer is retained by the insurer and despite the insurer's statutory interest in the matter); N.Y. State 716 (1999); *see also* Maine Op. 122 (1992); Michigan Opinion RI-89 (1991). Although the insurer is noticed for hearings and appears on behalf of the employer in workers' compensation cases, the insured/employer remains the client. Because Box Co. was a client of neither L nor Old Firm, DR 5-108 has no application.

CONCLUSION

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4 N.Y. State 638, which interpreted DR 5-108 before the addition of subsection (B), is no longer applicable to the extent that it states that disqualification is appropriate even where the two matters are not substantially related.

5 For a discussion of when matters are substantially related, see B.1, *supra*.

6 For further discussion of the materiality of a confidence or secret, see B.1, *supra*.

Generally, absent the former client's consent, the moving lawyer may not undertake representation adverse to the former client if (1) the moving lawyer personally "represented" the client (that is, obtained or had access to a confidence or secret of the client) *or* otherwise acquired confidences or secrets of the client relevant to the current representation, and (2) the moving lawyer would be undertaking representation in the same matter or in a matter that is substantially related to one in which the moving lawyer or the old firm previously represented the former client. Further, absent client consent, if the moving lawyer is disqualified from engaging in the representation under this rule, then under DR 5-105(D) the moving lawyer's new law firm is also disqualified.

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