New York State Bar Association

Committee on Professional Ethics

Opinion 774 – 3/23/04

Topic: Law firm's supervisory responsibilities upon hiring a secretary, paralegal or other nonlawyer who has previously worked at another law firm.

Digest: When a law firm hires a secretary, paralegal, or other nonlawyer who has previously worked at another law firm, the law firm must adequately supervise the conduct of the nonlawyer. Supervisory measures may include i) instructing the nonlawyer not to disclose protected information acquired at the former law firm and ii) instructing lawyers not to exploit such information if proffered. In some circumstances, it is advisable that the law firm inquire whether the nonlawyer acquired confidential information from the former law firm about a current representation of the new firm or conduct a more comprehensive conflict check based on the nonlawyer's prior work. The results of such an inquiry will help determine whether the new firm should take further steps, such as seeking the opposing party's consent and/or screening the nonlawyer.

Code: DR 1-104(A)-(D),DR 4-101(B),(C), (D), DR 5-105(E)
EC 4-2, EC 7-10

QUESTION

Law firms often hire secretaries, paralegals, or other nonlawyers who have worked at other law firms. What are a law firm's supervisory responsibilities upon hiring a nonlawyer who has worked at other law firms? In particular, must the law firm check for conflicts of interest?

OPINION

I. A Law Firm's Supervisory Duties Over Nonlawyers Generally

DR 1-104(C) of the New York Code of Professional Responsibility provides that:

> A law firm shall adequately supervise, as appropriate, the work of partners, associates and *non-lawyers* who work at the firm. The degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter. (Emphasis added).

The requirement to supervise nonlawyers is intended to avoid conduct that would violate the Disciplinary Rules if engaged in by a lawyer. This objective is reinforced by DR 1-104(D), which provides that:

> A lawyer shall be responsible for a violation of the Disciplinary Rules by another lawyer *or for conduct of a non-lawyer employed or retained by or associated with the lawyer* that would be a violation of the Disciplinary Rules if engaged in by a lawyer if:
>
> 1. The lawyer orders, or directs the specific conduct, or, with knowledge of the specific conduct, ratifies it; or
>
> 2. The lawyer is a partner in the law firm in which the other lawyer practices *or the non-lawyer is employed*, or has supervisory authority over the other lawyer *or the non-lawyer*, and knows of such conduct, or in the exercise of reasonable management or supervisory authority *should have known* of the conduct so that reasonable remedial action could be or could have been taken at a time when its consequences could be or could have been avoided or mitigated. (Emphasis added).

In short, a law firm must supervise nonlawyers as if they were governed by the Disciplinary Rules. Also relevant are DR 1-104(A) and (B), which also impose supervisory duties on law firms. They provide as follows:

> A. A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules.

B. A lawyer with management responsibility in the law firm or direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the disciplinary rules.

One other relevant Disciplinary Rule, DR 4-101(D), provides that:

A lawyer shall exercise reasonable care to prevent his or her employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

The term "employees" in DR 4-101(D) refers by implication to nonlawyers. Thus, the Code of Professional Responsibility requires lawyers to take reasonable care to ensure that nonlawyers abide by DR 4-101 as if they were lawyers.

II. Supervision of Lateral Nonlawyers

A. Instruction

When a law firm hires a nonlawyer who has previously worked at another law firm, it is advisable that the law firm remind the nonlawyer to protect the confidentiality of information with respect to clients of the other firm. As expressed in EC 4-2, a lawyer is obligated "to exercise care in selecting and training employees so that the sanctity of all confidences and secrets of clients may be preserved." In N.Y. State 422 (1975), we were asked whether an attorney could hire a secretary who recently left a law firm that the hiring attorney is currently opposing. We opined that "the attorney may employ the terminating secretary who has confidential information as to pending adversarial matters, *provided* he cautions the secretary not to divulge any confidential information and will not permit the secretary to do so." N.Y. State 422. Therefore, we believe that a lawyer should ensure that nonlawyers under the lawyer's supervision are trained to protect the confidences and secrets learned at another law firm where the nonlawyer previously worked. Training might include instructing the nonlawyer not to accept any work assignment involving a matter on which the nonlawyer worked at the former firm.

As an additional element of its general supervisory duties under DR 1-104(A), it is advisable that a law firm instruct its lawyers not to solicit or listen to confidential information if the nonlawyer fails to comply with this instruction, and to alert the other firm lawyers involved with the matter. As we concluded in N.Y. State 700 (1998): "A lawyer who receives an unsolicited and unauthorized communication from a former employee of an adversary's law firm may not seek information from that person if the communication would exploit the adversary's confidences or secrets."

B. Checking for conflicts of interest

DR 5-105(E) requires law firms to keep contemporaneous records of prior engagements and to have "a policy implementing a system by which proposed engagements are checked against current and previous engagements." In N.Y. State 720 (1999), we said that the intent of this provision could be effected only "if a firm adds to its system information about the representations of lawyers who join the firm." We do not believe the same principle applies when nonlawyers join a law firm. A nonlawyer does not have former clients and does not "represent" clients at the new firm. Thus, DR 5-105(E) does not require law firms to search for conflicts that may be created when nonlawyers join the firm laterally.

Nevertheless, because DR 1-104(C) requires a law firm to "adequately supervise, as appropriate, the work of … nonlawyers who work at the firm," there are circumstances in which it is advisable for a law firm to check for conflicts when hiring a nonlawyer. For example, where a litigation paralegal is being hired by a small firm and worked for a sole practitioner who is now opposing counsel in litigation that was pending while the paralegal worked at the former firm, the risk that the paralegal acquired the opposing party's confidences and secrets is high and the law firm should check for conflicts. In such a case, the law firm should ask the paralegal about his or her role in the matter in question and whether he or she did in fact acquire confidences and secrets.[1]

On the other hand, when a personal injury firm hires a paralegal to perform work that is entirely unrelated to the real estate matters the paralegal worked on at the former employer's firm, we do not think a formal conflict check is necessary.

C. When the nonlawyer possesses confidential information from the former law firm

1. Duty not to exploit the confidential information

If a formal or informal conflict check reveals that a nonlawyer did acquire confidential information about an opposing party at the former job, the law firm must not exploit that information. In N.Y. State 700 (1998), this Committee opined that a lawyer could not take advantage of an offer by an opposing law firm's former nonlawyer employee to provide harmful information about the opposing party: "Just as a lawyer should never initiate contact with a former employee of an adversary's law firm for the purpose of obtaining confidential information of the adversary, neither may a lawyer

[1] *Cf. Glover Bottled Gas Corp. v. Circle M. Beverage Barn, Inc.,* 129 A.D.2d 678 (1987), in which a Suffolk County law firm hired a paralegal who had previously worked for opposing counsel and "had worked on the litigation pending between the parties and had interviewed the plaintiff's manager concerning the facts of this case." The plaintiff moved to disqualify. The Supreme Court denied the motion, saying that the Code of Professional Responsibility does not apply to nonlawyers, but the Second Department reversed. The Second Department agreed that the Code of Professional Responsibility does not apply to nonlawyers, but noted that "it does place a burden on attorneys to insure that their employees conduct themselves in accordance with the [C]ode."

take advantage of a former employee's willingness to violate the duty of confidentiality to the former employer's client." The Committee held that a lawyer has a duty to "refrain from encouraging a breach of client confidentiality by opposing counsel's staff."

EC 7-10 states that "The duty of a lawyer to represent the client with zeal does not militate against the concurrent obligations to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm." For example, the District Court of Connecticut and the American Bar Association's Ethics Committee have both held that an attorney may not ask an opposing party's former employees for privileged communications.[2] *Dubois v. Gradco Sys., Inc.,* 136 F.R.D. 341, 347 (D. Conn. 1991) ("plaintiff's counsel must take care not to seek to induce or listen to disclosures by the former employees of any privileged attorney-client communications to which the employee was privy"); ABA 91-359 ("the potentially-communicating adversary attorney must be careful not to seek to induce the former employee to violate the privilege attaching to attorney-client communications").

2. Duty to ensure the confidential information remains protected

Under DR 1-104(C), when a law firm is determining the degree of supervision required, an important factor is "the likelihood that ethical problems might arise in the course of working on the matter." The greater the responsibilities of the prospective nonlawyer employee in a matter while at an opposing law firm, the more likely it is that ethics problems will arise in the matter at the new firm, and the greater the degree of supervision that will be merited.

If, for example, at a former employer a secretary occasionally typed letters or took phone messages relating to a current matter of the new firm but does not recall any confidential information about it, a simple warning to the nonlawyer not to disclose any confidences and secrets acquired at the former firm would constitute adequate supervision. If, however, the secretary had played more than a ministerial role in the matter at the former firm and recalls confidential information, screening of the nonlawyer may be required to prevent the misuse of confidential information.[3]

Occasionally, however, a law firm will conclude that screening the nonlawyer will not adequately protect an opposing party's confidences and secrets. For example, if the nonlawyer had substantial exposure to relevant confidential information at the old

---

[2] Although the district court and ABA were applying Model Rule 4.4(a), which has not been adopted in New York, Model Rule 4.4(a) is analogous to EC 7-10, providing that: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such person."

[3] This situation was recently addressed in *Mulhern v. Calder,* 196 Misc. 2d 818 (Sup. Ct. Alb. Co. 2003), where the court refused to disqualify a law firm that had hired a secretary who had previously been a secretary/paralegal for opposing counsel and had assisted opposing counsel on the case in question. The court said that a hiring firm "can avoid disqualification by taking steps to ensure that non-lawyer employees with confidential information are kept from divulging or using confidences obtained at the prior firm." The court said that the law firm's timely construction of a screen around the secretary/paralegal was sufficient to protect the firm from disqualification.

firm and will now be working closely with the lawyers who are handling the opposite side of the same matter, or where the structure and practices of the firm make it difficult to isolate a nonlawyer from confidential conversations or documents pertaining to a given matter, a law firm may be obliged to adopt measures more radical than screening. Those measures may include the following:

(a) Obtaining consent from the opposing law firm's client;

(b) Terminating the nonlawyer, *see Riddell Sports, Inc. v. Brooks*, 1994 U.S. Dist. LEXIS 2290 (S.D.N.Y. 1994) (Leisure, J.) (denying a motion to disqualify where a large firm had terminated a paralegal upon learning that the paralegal had worked on a case still pending between the firms, even though the paralegal had no role in that case at the firm); or

(c) Withdrawing from the matter in question. *Cf. Glover Bottled Gas Corp. v. Circle M. Beverage Barn, Inc.,* 129 A.D.2d 678 (1987) (disqualifying law firm that hired paralegal who had previously worked for opposing counsel and "had worked on the litigation pending between the parties and had interviewed the plaintiff's manager concerning the facts of this case").

CONCLUSION

When a New York law firm hires a nonlawyer who has previously worked at another law firm, the hiring firm must, as part of its supervisory responsibilities under DR 1-104(C) and DR 4-101(D), exercise adequate supervision to ensure that the nonlawyer does not reveal any confidences or secrets that the nonlawyer acquired while working at the other law firm. A law firm should (i) instruct all newly hired nonlawyers not to divulge any such information and (ii) instruct lawyers not to exploit such information if proffered. The hiring law firm need not always check for conflicts, but should do so in circumstances where the nonlawyer may be expected to have acquired confidences or secrets of an opposing party. If a law firm learns that a nonlawyer did acquire information protected by DR 4-101(B) that is material to a matter in which the adversary is represented by the nonlawyer's former employer, the law firm should adopt appropriate measures to guard against improper disclosure of protected information.

(6-03)