ADVISORY ETHICS OPINION 2002-02

SYNOPSIS:

Where a law firm uses an independent paralegal, available for hire to other law firms, on behalf of clients, the responsible attorney must take care to supervise and instruct the nonlawyer in the ethical obligation not to disclose information relating to representation of the client or clients of a former employer. Since a supervising lawyer has a duty to ensure that non-lawyers protect client confidences, that attorney, in hiring an independent paralegal, must exercise care to verify that the independent paralegal understands and has a system in place for protecting against conflicts of interest. Providing steps have been taken to verify that the independent paralegal has a system for protecting against conflicts of interest, the hiring attorney may rely on inquiry to the independent paralegal to guard against conflicts of interest. At the very minimum, the hiring attorney should advise the independent paralegal of the nature of the representation and the identity of adverse or potentially adverse parties, prior to the retention. In certain circumstances, such as when the law firm's client and the client of another law firm employing the independent paralegal have adverse interests and the independent paralegal is asked to work on the directly conflicting representation, there will be a conflict of interest which would prevent retention of the independent paralegal for working on the particular matter. So long as the paralegal is not retained, this is a disqualification of the independent paralegal and not imputed to the law firm. Once employed, the hiring firm must develop methods for effectively screening the independent paralegal from information concerning other clients.

QUESTIONS PRESENTED:

If a law firm uses a nonlawyer (here, an independent paralegal service) to assist it in providing legal services to its clients, and other law firms use the same nonlawyer, will conflicts of interest be imputed between the nonlawyer and the law firms?

Relevant Provisions of the Vermont Rules of Professional Conduct

Rule 1.10. Imputed Disqualification: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

Rule 5.3. Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) 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; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ANALYSIS:

In Advisory Ethics Opinion 97-09 the Committee took up a related question, under the Vermont Code of Professional Responsibility, DR 4-101, of whether a firm was disqualified from representing an existing client when it hired a paralegal formerly employed by another firm to which the hiring firm is adverse in litigation on which the paralegal had worked while at the other law firm. The Committee adopted the reasoning of ABA Informal Opinion 88-1526, issued under the ABA Model Rules of Professional Conduct[1], and concluded that with appropriate screening and supervision, the paralegal could be hired without requiring the firm to withdraw from representation of the existing client. The Committee also concurred with ABA Informal Opinion that " it is important that paralegals have as much mobility of opportunity as possible consistent with the protection of clients' interests. … 'any restrictions on the non-lawyers' employment should be held to the minimum necessary to protect confidentiality of client information.'" The Committee is continues to find that clients and the legal profession are disserved if rules of professional conduct become the basis for restricting the employment of non-lawyers; use of independent paralegals can be a cost effective and important asset to the delivery of legal services by law firms with specialty practices, small firms and solo practitioners.

The question presented in the case of a freelance paralegal requires the hiring attorney, consistent with the responsibility imposed by Rule 5.3(b), to make reasonable efforts to ensure that the freelance paralegal's conduct is compatible with the professional obligations of the lawyer. In the case of freelance paralegals, the practical application of this responsibility is two fold. First, the hiring lawyer must exercise care to verify that the independent paralegal understands and has a system in place for protecting against conflicts of interest. In the same fashion as the lawyer must have in place a method for checking for conflicts of interest, the hiring lawyer is responsible for determining that the freelance paralegal has a method for checking conflicts of interest. Providing the freelance paralegal uses an appropriate method, the hiring attorney can avoid situations calling for disqualification by not hiring the freelance paralegal where there has been prior directly adverse representation. All other circumstances can be handled through screening the freelance paralegal from confidential information concerning other clients of the law firm. Second, the hiring attorney must also advise the freelance paralegal of the obligation not to disclose information relating to representation of the client and to maintain the confidentiality of that information.

The interrelationship of a lawyer's duty to supervise non-lawyers and ultimate responsibility for the professional ethical conduct of non-lawyers to the rule governing imputed disqualification is taken up in Comment [4] to the ABA Model Rule of Professional Conduct 1.10:

> The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

Usually, the answer to whether a firm must be disqualified based on employment of a non-lawyer hinges upon whether the non-lawyer assistant has been appropriately informed as to his obligations of confidentiality and whether the firm has implemented strict procedures for protecting client information and screening the assistant. *See* Herron v. Jones, 637 SW2d 569 (Ark. Sup. Ct. 1982) (no disqualification if secretary who changes firms was screened, firm took every precaution to prevent disclosure, and no disclosures occurred); see also ABA Informal Opinion 88-1526 (1988) (applies functional analysis to non-lawyers who switch firms: non-lawyer must be strictly screened,

[1] In substantial part, the Vermont Rules of Professional Conduct mirror the ABA Model Code Of Professional Conduct.

reveal no confidential information, and former firm must admonish the non-lawyer to maintain confidences); *accord* Maryland Ethics Opinion 90-17 (1990) (firm hiring former secretary of opposing firm may continue in case provided employing firm has effective screening mechanism in place and
secretary follows directives of former firm not to reveal any confidential information to the new employer).

If the screening is inadequate to prevent disclosure of confidences, the firm may be disqualified. *See*, *e.g.*, In re Complex Asbestos Litigation, 283 Cal. Rptr. 732 (Calif. Ct. App. 1st Dist. 1991) (firm hiring paralegal who had confidential information from former employment with opposing firm is disqualified because it failed to rebut presumption of shared confidences from paralegal; however, court does not apply automatic disqualification upon showing of substantial relationship between matters non-lawyer worked on since this would make non-lawyers unemployable "Typhoid Marys")[2].

The ABA/BNA Lawyers' Manual on Professional Conduct Reference Manual was relied upon for the discussion of the ABA Model Rule and case and ethics opinions from foreign jurisdictions.

[2] For a further discussion of a lawyer's responsibility regarding non-lawyer side-switching, see generally Randall, Do Your Clients' Confidences Go Out The Window When Your Employees Go Out The Door?, 42 Hastings L.J. 1667 (1991). For cases in which disqualification was required after hiring a non-lawyer consider: Glover Bottled Gas Corp. v. Circle M. Beverage Barn Inc., 514 NYS 2d 440 (NY Sup. Ct. App. Div. 2d Dept. 1987) (disqualification of defendant's firm that hired paralegal who had been employed by plaintiff's counsel, worked on litigation, and had interviewed plaintiff's manager); Williams v. Trans World Airlines Inc., 588 F. Supp. 1037 (DC W. Mo. 1984) (non-lawyer personnel must be subject to same restrictions as lawyers who leave legal employment with confidential information); Kansas Ethics Opinion 90-005 (1991) (applies to non-lawyers the rational of Parker v. Volkswagenwek Aktiengesellschaft, 781 P2d 1099 (Kan. Sup. Ct. 1989), which held that unilateral screening of associates who switch firms does not suffice; non-lawyer must also meet burden of proof that he did not obtain confidential information in his previous employment). *But see* Esquire Care Inc. v. Maguire, 532 So. 2d 740 (Fla. Dist.Ct. App. 2d. Dist. 1988) (disqualification not required of lawyer who hired opposing counsel's secretary; access to confidential information is insufficient to mandate disqualification; must show party obtained unfair advantage that can only be cured by lawyer's disqualification).