ADVISORY ETHICS OPINION 78-02

SYNOPSIS:

A firm is not disqualified from handling a case because a paralegal employed in the firm formerly was enrolled in a paralegal training clinic which provided representation to an opposing party in litigation handled by the firm even though the paralegal had some involvement in that representation as long as the paralegal has no present involvement in the case and conveys no confidential information to firm attorneys.

OPINION:

This opinion request involves a situation where a paralegal who once worked on one side of a housing construction dispute while enrolled in a paralegal training program is subsequently employed by the firm representing the adversary in the dispute. The request comes from the lawyer actually handling the case in the firm presently employing the paralegal. The opposing party has objected to continuing involvement by the lawyer because of an asserted conflict of interest. The paralegal has not worked on the case while employed at the firm, has communicated no information about the case and does not remember having any prior specific involvement in the case.

Narrowly stated, the issue in the request is whether DR 5-105(D) or the policy stated therein applies when a paralegal rather than a lawyer is the source of the conflict question. That rule states:

> (D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.

It is obvious that the rule, as written, applies only when "a lawyer is required to decline employment" and thus doesn't apply where a paralegal might be required to decline employment. It is, however, often necessary in this area to look at the "appearance" of the matter and, for this reason, some analysis of the policy considerations is helpful.

Paralegals are not regulated directly by the Code or any other statute or rule. Since lawyers typically act through non-lawyers, however, it is fair to say that the Code intends to cover the conduct of non-lawyers acting under the control of the lawyer.[1] Once a non-lawyer leaves the control of a lawyer, however, any effective means of regulation is eliminated. Thus, there is no suggestion in the Code, for example, that a new lawyer/employer of a paralegal has a professional obligation to ensure the paralegal meets obligations to a former lawyer/employer.

Also to be considered is the basis for the rules on "side-switching." In general, "side-switching" where the present representation is substantially related to the former representation of the adversary has been found to be unethical without a detailed analysis of whether confidential information has been misused.[2] The prophylactic rule is justified by the appearance of impropriety.[3] In most cases (as in this one) the disqualification is imputed to other associated lawyers again on the rationale that protection of the appearance of impropriety outweighs the need for a specific inquiry into the misuse of confidential information.[4]

While this committee believes strongly in adherence to the policy considerations of DR 5-105 and the "side-switching" rule, it does not believe it appropriate to extend them to paralegals. As noted recently by the ABA Committee on Ethics and Professional Responsibility in Formal Opinion No. 342 (1975), wooden application of DR 5-105 and Canon 9 (appearance of impropriety) may create a greater injustice than it corrects. At least five factors argue strongly against such application in these circumstances: 1) Applying DR 5-105 (D) to paralegals extends that rule beyond its literal application; 2) such an extension is hard to fit in a regulatory system that covers paralegals only derivatively; 3) it would be difficult, if not impossible, to draw the lien at paralegals and not cover other law office staff; 4) the rule would operate to penalize paralegals in terms of availability of jobs and job mobility; and 5) the "appearance of impropriety" consideration is much less compelling.

In a comparable situation, Formal Opinion No. 342 (1975) sets down certain required controls to protect against misuse of confidential information:

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[1] See EC 3-6 (such delegation is proper if the lawyer . . . has complete professional responsibility for the work product).
[2] See Emle Industries, Inc. v. Patentex, 478 F.2d 562 (2d Cir. 1973).
[3] See, Id.
[4] See, Schloetter v. Railoc of India, Inc., 546 F.2d 706 (2d Cir. 1976).

> [T]he individual lawyer should be screened from any direct or indirect participation in the matter, and discussion with his colleagues concerning the relevant transaction or set of transactions is prohibited by those rules.

The Committee believes such controls are mandatory as to the paralegal involved in this request. We understand from the request letter that such rules have already been implemented.