ADVISORY ETHICS OPINION 85-08

SYNOPSIS:

A law firm cannot continue to represent a defendant in a civil action after hiring a law student-clerk who has already performed extensive work on the same case while employed by the law firm representing the plaintiff.

OPINION:

Our opinion is requested as to the propriety of a law firm continuing to represent a party to a civil action after the firm has employed a law student-clerk who was previously employed by the law firm representing the adverse party in the same civil action and who during the prior employment was extensively involved in the original trial and appeal of the action.

FACTS:

Law firms A and B were opposing counsel during the trial and pending appeal of *Smith v. Jones* in which a new trial may be mandated. During the trial and the appeal law student X was employed by law firm A. X became extensively involved in the action, prepared legal memoranda and briefs, attended and assisted at trial and may have participated in client conferences with Smith. X, now a third year law student, seeks a clerkship with law firm B with the expectation that X will become associated with the firm upon admission to the bar. Law firm B requests our opinion as to whether law firm B may continue to represent Jones in future proceedings related to *Smith v. Jones* if X is hired by the firm.

ANALYSIS:

A lawyer may not oppose a former client in a matter which is substantially related to the matter which was the subject of the earlier representation.[1] This proscription safeguards confidential information gained in the prior representation (DR4-101); eliminates any possible conflict of interest (DR5-105); and avoids the appearance of impropriety (Canon 9).

While X is not a lawyer, his reported involvement in the earlier trial and appeal of *Smith v. Jones* was significant. It must be assumed that X became privy to confidential client disclosures as well as firm discussions relating to legal theories and trial tactics. X's attendance at trial probably involved direct client contact and clearly brought X's connection with law firm A and Smith into the public eye. Were X to assist law firm B during a new trial. it would be impossible to dispel the almost certain public perception that law firm B had purchased X's confidential information in order to acquire an unfair advantage in the litigation. By permitting X to participate in *Smith v. Jones*, law firm B would unquestionably create an appearance of impropriety. Moreover, the fact that X is not a lawyer would heighten that appearance of impropriety since X, as a non-lawyer, is not bound by the Code requirements of confidentiality and loyalty.

We conclude, therefore, that law firm B should not permit X to participate in any future representation of Jones which is substantially related to the earlier trial and appeal. We do not suggest by this conclusion that either X or law firm B would use confidential information obtained from Smith to further Jones' case. We fully expect that both X and law firm B would make efforts to avoid any professional impropriety. We merely conclude that the appearance of impropriety would be unavoidable. We previously reached the same conclusion on similar facts in Professional Responsibility Committee Opinion No.79-28.

Still to be resolved is the question of whether the confidential information which disqualifies X should also be imputed to all members of law firm B in the event that X is hired by that firm.

It is clear that if X were a lawyer in possession of the same confidential information his employment by law firm B would disqualify the entire firm from any representation substantially related to *Smith v. Jones* and adverse to the interests of Smith.[2] The policy of imputed knowledge and disqualification has developed despite the additional safeguards provided by the stringent requirements of Canons 4 and 5 with respect to client confidentiality and loyalty. The concerns which give rise to the policy of imputed knowledge and firm disqualification are even more compelling on the present facts since the confidential information is possessed by a non -lawyer who, although filling a lawyer-like role, is not bound by the Code of Professional Responsibility. We come to the conclusion, therefore, that absent a waiver by Smith, law firm B should not continue to represent Jones if X is hired.

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[1] *Silver Chrysler Plymouth v. Chrysler Motors Corp.,* 518 F.2d 751 (2d Cir. 1975).

[2] *Cinema* 5 *Ltd. v. Cinema, Inc.,* 528 F.2d 1884 (2d Cir. 1976); *Government of India v. Cook Industries, Inc.,* 422 F.Supp.1057 (S.D.N.Y.) *aff'd*, 569 F.2d 737 (2d Cir. 1976); DR5-105(D).

The possibility of a waiver should not be overlooked by law firn B. If procedures can be implemented within the firm which shield X from any contact with the file or discussions relating to it, Smith may be willing to waive any disqualification claim against law firm B.[3]

Finally, if law firm B decides to hire X, Jones should be fully apprised either with or without Smith's waiver, of the ramifications of that decision.[4]

[3] *See Consolidated Theatres v. Warner Broth*ers *Circuit Management Corp.*, 216 F.2d 920 (2d Cir. 1954); *Interstate Properties v. Pyramid Company,* 547 F. Supp 178 (S.D.N.Y. 1982).
[4] *Lee Westinghouse Electric Corp v. Kerr-McGee Corp.,* 580 F.2d 1811, 1821 (7th Cir.). *cert. denied,* 489 U.S. 955 (1978); *Pennwalt Corp. v. Plough, Inc.* 85 F.R.D. 264 (D.Del. 1980).