

ADVISORY ETHICS OPINION 92-12

SYNOPSIS:

A law firm is not disqualified from continuing to represent a client in a pending civil case where the law firm hires a secretary who formerly worked for the corporate defendant in the pending case, provided the law firm takes appropriate precautions to prevent the firm's attorneys and other staff involved in the case from discussing the case with the secretary.

FACTS:

Law Firm A represents a plaintiff (the "Plaintiff") in a pending civil suit against Corporation B. The case is being handled primarily by Attorney X in Law Firm A. The case has been pending for several years. The jury drawing in the case is now being scheduled for the third time. Law Firm A has done extensive preparation for the trial. Recently Law Firm A hired Secretary Y. Secretary Y was employed previously by Corporation B in its Retail Sales/Corporate Department for approximately one year while the case was pending. Immediately prior to the scheduled jury drawing counsel for Corporation B moved to have Law Firm A disqualified from further representation of the Plaintiff. Corporation B alleges in its motion that Secretary Y has knowledge of the pending action and has handled documents and correspondence related to the case. Specifically, Corporation B's attorney has indicated that defense counsel received one or more pieces of correspondence signed by Secretary Y as "Corporate Secretary." No attorney in Law Firm A was familiar with the scope of Secretary Y's duties while in the employ of Corporation B. Law Firm A has indicated that it is willing to create a "cone of silence" or "Chinese Wall" around Secretary Y to limit the interaction between members of the firm handling the case and Secretary Y. Secretary Y works with another member of the firm and not with Attorney X.

QUESTIONS:

- (A) Is Law Firm A necessarily precluded from continuing to represent Plaintiff because Secretary Y now works for Law Firm A?
- (B) If there is no conflict that requires Law Firm A to cease representing Plaintiff, is the proposed Chinese Wall adequate to satisfy the requirements of the Code?

DISCUSSION:

The provisions of the Code of Professional Responsibility ("Code") which are relevant generally to questions related to the disqualification of a firm for conflicts of interest are DR 4-101 (Protection of clients' secrets and confidences), DR 5-105 (D) (A firm is disqualified if one of the attorneys in the firm is disqualified due to a conflict of interest), and EC 9-2 (A lawyer should avoid any appearance of impropriety). This Committee has addressed the issue of the scope of disqualification of law firms as it relates to legal assistants (Opinion No.78-2, 79-28, and 89-4), attorneys (Opinion 85-2) and law student/clerk (Opinion 85-8). There are a number of decisions of various courts related to the legal issues surrounding disqualification.¹

This Committee does not suggest or assume that Secretary Y will disclose information obtained during his/her employment with Corporation B, nor that Law Firm A will seek to learn confidential information related to Corporation B's case from Secretary Y.

The fact that Secretary Y did not work for a law firm is significant. The Code does not regulate the conduct of non-lawyers. Lawyers employing non-lawyers are obligated to regulate the conduct of their staff and other non-lawyers in their employ so that all of the goals of the Code may be preserved to the extent possible even as applied to non-lawyers. For instance, lawyers are required to exercise care in the selection and training of employees so that client's confidences and secrets are preserved (EC 4-2). This general rule does not apply to Secretary Y, however, because based on the information made available to the Committee, Secretary Y was not supervised by a lawyer or employed by a law firm. Had that been the case the principles developed in the prior opinions would be relevant.

Secretary Y and whatever information he/she may have that is relevant to the pending civil case are no different than any other employee of Corporation B. Secretary Y may be a fact witness to matters relevant in the case. The Code regulates contact with employees of corporate defendants under DR 7-104 and EC 9-2. Generally, an attorney may not contact a current employee in

¹ See e.g. *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corporation*, 518 F.2d 751 (1975) and *5&5 Hotel v. 777 S.H. CORP.*, 69 NY 2d 437 (1987).

a management position with a corporate defendant, without the consent of counsel.¹ Courts have held that this limitation applies to former management employees also, but the rule is not absolute.² A firm rule against contacting current and former employees not in management positions is less consistently applied.³ See also, *Upjohn Co. v. United States*⁴, holding that the attorney-client privilege extends to all current employees of a corporation, not just the "control group"). In order to avoid the appearance of impropriety, Law Firm A should not "contact" Secretary Y regarding the pending case without the consent of Corporation B's counsel. Under the present circumstances the Committee is of the opinion that Law Firm A may meet its ethical obligations to avoid contacting an employee of an opposing party regarding the substance of the case by erecting a "cone of silence" sometimes known as a Chinese Wall around Secretary Y. All employees of Law Firm A must be instructed not to discuss or comment upon the pending case in the presence of Secretary Y.

¹ *Wright v. Group Health Hospital*, 103 Wash. 2d 192, 691 P.2d 564.; *In Masa v. Eaton Corp.*, 109 F.R.D. 312 (W.D. Mich., 1985).

² See, *American Protection Insurance Co. v. MGM Grand Hotel-Las Vegas, Inc.* No. CV-LV 82-26 HDM (D. Nev. Mar. 13, 1986), 2 Law. Man. Prof. Conduct 89 (DC Nev 1986).

³ *Mills Land & Water Corp. v. Golden West Refining Co.* 1986 Cal. App. 3d at 130.

⁴ *Upjohn Co. v. United States*, 449 U.S. 383 (1981).