DELAWARE STATE BAR ASSOCIATION

COMMITTEE ON PROFESSIONAL ETHICS

OPINION 1985-1

The Committee has been asked by a member of the Delaware Bar for its opinion as to whether a lawyer, formerly in private practice, who has been appointed to head the law department (the law department) of a political entity (the "entity") in Delaware can represent the entity in matters in which the entity's interests are adverse to those of the lawyer's former clients or clients of his former law firm. The Committee has also been asked whether, in the event the lawyer is compelled to withdraw from the representation of the entity in a given matter, the members of his law department would also be compelled to withdraw.

The lawyer formerly practiced with a Delaware law firm. Some of the firm's clients are involved in matters in which their interests are adverse to those of the entity. The lawyer worked on some of these matters. He also worked for clients whose interests, on other matters (with which he had no involvement) were adverse to those of the entity.

ISSUES

1. Under what circumstances may an attorney, formerly in private practice, represent a governmental entity in matters where the entity's interests are adverse to those of the lawyer's former clients or clients of his former firm?

2. If the head of a law department of a political entity must withdraw from the representation of the entity, under what circumstances may the law department continue to represent the entity?

Opinion

1. An attorney's obligation under Canon 4 to preserve the confidences and secrets of former clients, coupled with his obligation under Canon 9 to avoid the appearance of impropriety, requires that he withdraw from the representation of the governmental entity when the entity is involved in a matter which is the same as, or is subtantially related to, a matter in which the attorney formerly represented another party whose interests are adverse to those of the entity. The attorney must also withdraw when an adverse party was represented by the attorney's former firm and the circumstances are such that knowledge held by other members of his former firm may be imputed to him. In either case, the attorney need not withdraw where the former client consents to the subsequent representation.

2. If an attorney must withdraw from the representation of a public entity because of his previous involvement in the matter or one substantially related to it, his law department should also withdraw. However, this result may not be required where the attorney has promptly employed an effective "screening device" to separate himself from the other members of his law department with respect to that particular matter. Where an

attorney's withdrawal from the representation of the entity is required because of knowledge imputed to him from members of his former firm, the law department need not withdraw and the attorney need not be screened, because knowledge should not be imputed twice.

DISCUSSION

The committee has been asked to establish guidelines to assist an attorney in avoiding any breach of his duties under the Delaware Lawyer's Code of Professional Responsibility. In attempting this task, the Committee cautions that no set of guidelines can foresee all possible circumstances. Each case must be evaluated on its merits in light of its peculiar facts.

This inquiry falls generally within the scope of Canon 4 of the Delaware Lawyer's Code of Professional Responsibility. Canon 4 states that "a lawyer should preserve the confidence and secrets of a client." DR4-101(B) provides, in part, that a lawyer shall not "use a confidence or secret of his client to the disadvantage of the client." Also implicated in the analysis is Canon 9, which requires that a lawyer avoid the appearance of impropriety.

1. Circumstances under which the attorney must withdraw:

Prior representation of a party with an interest adverse to that of a present client will require a lawyer to withdraw from the representation of the new client in a particular matter when the matter in which the interests are adverse is the same or is substantially related to that in the previous relationship. LaSalle Nat. Bank v. County of Lake, 703 F.2d 252, (7th Cir. 1983); State of Ark. v. Dean Foods Products Co., 605 F.2d 380 (8th. Cir. 1979) ("Dean Foods"); Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221 (7th Cir. 1978); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d. Cir. 1975). If a "substantial relationship" exists between the previous and present matters, the attorney is presumed to have learned secrets and confidences of his former client, and is automatically disqualified. LaSalle; Dean Foods, 605 F.2d at 383.

There are many articulations of the "substantial relationship" test. In Canon v. U.S. Acoustics Corp., 398 F. Supp. 209, 223 (N.D. Ind. 1975) aff'd., 532 F.2d 1118 (7th Cir. 1976) the court held a substantial relationship "is determined by asking whether it could reasonably be said that during the former representation [that] attorney might have acquired information related to the subject matter of the subsequent representation". In making this determination the court will reconstruct the scope

of the prior representation, it will determine what confidential information it is reasonable to infer would have been given to a lawyer representing a client in those matters, and it will determine whether that information is relevant to the issues raised in the litigation pending against the former client. Westinghouse,588 F.2d at 225. LaSalle NationalBank, 703 F.2d at 255-56.

An attorney may also be required to withdraw when his former firm represented a party to the matter, even though he was not personally involved in the case. The knowledge of secrets and confidence, entrusted to members of the attorney's former firm will be imputed to him if the circumstances are such that the members of the firm working on the matter could reasonably be expected to share the knowledge of the secrets and confidences of the client with the attorney. Dean Foods, 605 F.2d at 385; Silver Chrysler Plymouth. However, "a peripheral representation" exception applies, and knowledge will not be imputed, if it can be demonstrated that the lawyer was segregated from the prior matter in some way. Silver Chrysler Plymouth. Typically, this exception applies only in law firms large enough so that certain clients or certain types of matters are handled by discrete groups of attorneys within the firm, or in firms large enough that the attorney was not in the position to assume any significant responsibility for the previous matter and could at most, have only been peripherally involved. Silver Chrysler Plymouth, 518 F.2d at 756-57.

While the ethical proscription against engaging in conduct that would create "the appearance of impropriety" is one of the underlying bases for the disqualification of attorneys who represent clients with an interest adverse to that of a former client, the appearance of impropriety alone without the violation of any other DR is not generally a ground for disqualification. United States v. Newman, 534 F. Supp. 1113, 1126 (S.D. N.Y. 1982); Westinghouse, 588 F.2d at 224. There must be at least a reasonable possibility that some specifically identifiable impropriety did in fact occur. Liddel v. Board of Education, 505 F. Supp 654 (E.D. Mo. 1980). In State of Arkansas v. Dean Foods Products Co., 605 F.2d 380, 383, (8th. Cir. 1979) it was observed that:

> Disqualification of counsel, like other reaches for perfection, is tempered by a need to balance a variety of competing considerations and complex concepts. Disqualification in spasm reaction to every situation capable of appearing improper to the jaundiced cynic is as goal-defeating as failure to disqualify in blind disregard of flagrant conflicts of interest. Between those ethical extremes lie less obvious influences on the interest of society in the orderly administration of justice, on the interest of clients in candid consultation and choice of counsel, and on the interest of the legal profession in its reputational soul.

For the reasons set forth above, the Committee concludes that the inquiring attorney should withdraw from the representation of the government entity in matters in which he

has previously represented another party or where he has been involved in matters substantially related to the present matter. Furthermore, consideration should be given to the question of withdrawal where the governmental entity is involved in a matter adverse to a party who was represented by the inquiring attorney's former law firm. In that circumstance, the attorney must satisfy himself that he was sufficiently removed from the case during his affiliation with his former law firm so that knowledge held by members of his former firm will not be imputed to him.

2. Withdrawal of the law department

Having determined that there are circumstances in which the attorney may be required to withdraw from representation of the entity, we turn to examine the situations in which the Department which he heads must also withdraw.

Actual knowledge by the attorney of confidences or secrets of a former client may be imputed to the rest of the law department in the same fashion and under the same circumstances as information known by members of his former firm might be imputed to him. Thus, where the governmental entity is opposed by one of the attorney's former clients and the matter is the same as, or substantially related to, the matter in which the attorney represented the former client, the attorney will be deemed to have actual knowledge of his former clients secrets and confidences. In the absence of an appropriate screening device,

his knowledge will be imputed to the law department, and it must therefore withdraw from the representation of the entity.

"Screening" of a potentially disqualified attorney has been widely recognized as a means of avoiding the disqualification of the attorneys with whom he works. LaSalle National Bank, 703 F.2d at 257-59; NFC, Inc. v. General Nutrition, Inc. 562 F. Supp. 332, 334 (D. Mass. 1983). Such screening achieves its salutary result only when the potentially disqualified attorney is screened with respect to his area of potential conflict at or before the time the conflict arises. The point is illustrated by comparing the LaSalle National Bank case with the NFC, Inc. case. In LaSalle National Bank, the attorney's entire firm was disqualified primarily because screening was not attempted until the filing of a motion to disqualify. In NFC, Inc., the disqualified attorney was "screened" immediately upon learning that he had participated in the preparation of the opposing party's case.

A more troublesome question arises in cases where the inquiring attorney must withdraw because of information imputed to him merely by virtue of his affiliation with his former firm. The issue is whether the imputed knowledge will be imputed a second time to members of the department. In Dean Foods, the court rejected the "double imputation" argument, holding that "[d]oubling upon the imputation theory of Canon 4 in this case would be logically unjustifiable - [the lawyer] could not impart

knowledge he did not have. It would also be ethically unjustifiable, requiring the invention of actual conflict when none exists." Dean Foods, 605 F.2d at 387. See also, American Can Company v. Citrus Feed Company, 436 F.2d 1125 (5th Cir. 1971); Dodson v. Floyd, 529 F. Supp. 1056, 1064 (N.D. Ga 1981).

Dean Foods, however, permitted disqualification of the attorneys at the office of the Attorney General who had worked with the disqualified attorney on the matter in question prior to his disqualification. These attorneys were disqualified on the ground that their participation in the case with the disqualified attorney created the appearance of impropriety. The Committee notes that, to this extent, Dean Foods is at variance with the preferred rule which is that the appearance of impropriety without the violation of any specific disciplinary Rule is not grounds for disqualification. See, e.g., U.S. v. Newman.

There are particularly strong reasons in cases such as Dean Foods and the present case to avoid an overly restrictive interpretation of the rules. The Committee recognizes the great importance of permitting an adequate flow of attorneys between the public sector and the private bar. The danger of disqualification, if too freely granted, would inhibit that flow. As was stated in the context of an attempt to disqualify the firm of an attorney who had left government service to enter private practice, but which is illustrative of this general concern:

> If past employment in government results in the disqualification of future

> employers from representing some of their long term clients, it seems clearly possible that government attorneys will be regarded as "Typhoid Marys." Many talented lawyers, in turn, may be unwilling to spend a period in government service if that risk makes them unattractive or risky for large firms to hire.

LaSalle National Bank, 703 F.2d at 258. Similarly, if employing or appointing attorneys with experience to positions in the law departments of public entities will result in the elimination of that department's ability to provide legal services to that public entity, such attorneys will be barred from public practice. The Committee opines, therefore, that, contrary to Dean Foods, the staff of the department would not be disqualified in situations where the attorney is disqualified because knowledge of members of his former firm is imputed to him.

3. Official Duties

Where matters arise in which the attorney must act in his official capacity as head of the law department and may not, by law, delegate his duties to a subordinate, the Committee believes that a court would not require his disqualification. The American Bar Association Model Rules, while not adopted in Delaware, provide some guidance in this area. The Model Rules, which purport,in part, to codify judicial interpretations of the existing Disciplinary Rules, provide that an attorney serving in an official governmental office need not withdraw from that office where: "under applicable law no one is, or by lawful

delegation may be, authorized to act in the lawyer's stead in the matter..."

The Model Rules recognize the need to avoid unnecessary prejudice to the lawyer and the political entity he serves. Thus, the Committee concludes that in such circumstances the attorney may fulfill such official functions not withstanding other ethical precepts which might require his withdrawal. However, the Committee cautions that the attorney's involvement should be limited to ministerial acts, and to the maximum extent possible he should be screened from substantive participation in such matters in order to avoid any potential compromise to the confidences and secrets of his former client.