

DELAWARE STATE BAR ASSOCIATION COMMITTEE
ON PROFESSIONAL ETHICS
Opinion 1986-1

The Committee has been asked by a member of the Delaware Bar and by a law student who is seeking admission to the Delaware Bar to explore issues raised under the Delaware Lawyers' Rules of Professional Conduct¹ (the "Rules") when a law clerk, formerly employed by a firm (the "Plaintiffs' Firm") which is handling the prosecution of a group of related lawsuits, leaves that firm to accept employment with the firm (the "Defense Firm") representing some of the defendants in those suits.

FACTS

The Committee has received two letters of inquiry. The first is from the law student and the second is from a partner in the Plaintiffs' Firm. They make the same inquiry.

The law student was hired during the summer of 1984 and the summer 1985 and worked approximately ten weeks each year for a period of approximately 20 hours a week. His responsibilities as a law clerk included interviewing clients and reviewing their

¹Rule 61 of the Supreme Court of the State of Delaware provides:

The Delaware Lawyers' Rules of Professional Conduct promulgated by order of this Court dated September 12, 1985, and effective October 1, 1985, and to the extent applicable, the accompanying interpretive guidelines, comments, code comparisons, and committee comments, shall govern the conduct of members of the Bar of this State

files to develop information to be used in answering interrogatories. He also abstracted depositions, and on one occasion researched an issue that was included in a brief. His employers discussed tactical and strategic thinking regarding some of their cases in his presence, including legal theories to be developed against the defendants.

Prior to attending law school, the law student worked in the health care field. Because of his background, the student has been offered employment by the Defense Firm to assist in defending personal injury cases by reviewing the medical records of plaintiffs. The Defense Firm is defending many of the cases being prosecuted by the Plaintiff's Firm. The law student and the inquiring lawyer have asked the Committee to determine the scope of any restriction imposed under the Rules of Professional Conduct in connection with the employment of the law student by the defense firm.

DISCUSSION

At issue are the ethical obligations of the inquiring lawyer and the law student. Rule 5.3(b) provides that "a lawyer having direct supervisory responsibility over the non-lawyer [employed in his firm] shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer. . . ." Thus, the lawyers in the Plaintiffs' Firm have a responsibility to take appropriate steps to ensure that the confidences and secrets of its clients are not

compromised by the law student. Moreover, by accepting employment in a law office the law student accepts the duty of conducting himself in a fashion compatible with the Rules of Professional Conduct.

These inquiries present three issues: (a) the extent to which the law student's personal involvement in the prosecution of cases by the Plaintiffs' Firm will disqualify him from participation in the representation of clients of the Defense Firm; (b) the extent to which the law student's disqualification will extend to vicariously disqualify all attorneys in the Defense Firm; and (c) the extent to which the law student's employment by the Plaintiff's Firm will cause him to be disqualified from cases prosecuted by that firm with which he had no actual contact.

The Law Student's Disqualification.

Rule 1.6 obligates a lawyer (and by extension⁵, the law student) to maintain the confidences and secrets of his client. Rule 1.9 provides that a lawyer who has formerly represented a client in a matter shall not thereafter use information relating to the representation to the disadvantage of the former client.

The obligation to maintain the confidences and secrets of a client and to assure that they are not used to the client's disadvantage gives rise to the rule that an attorney may not

accept the representation of a party in a matter in which the parties interest is adverse to the attorney's former client and the present and former matters are "substantially related." T.C. Theater Corp. v. Warner Brothers, Inc., 113 F. Supp. 265, 268-69 (S.D.N.Y. 1953); Schlotter v. Railoc of Indiana, Inc., 546 F.2d 706, 710 (7th Cir. 1976).

In DSBA Opinion 1982-4², the Committee construed Canon 4 of the former Code of Professional Responsibility with Respect to the obligation of a lawyer to withdraw from the representation of a client where that client's interests were adverse to those of a former client. The Committee stated:

Analysis under Canon 4 focuses not on whether a lawyer actually has confidential information, but on whether "it can reasonably be said that in the course of his former representation the attorney might have acquired information related to the subject matter of this subsequent representation." T.C. Theaters Corporation v. Warner Brothers Pictures, 113 F. Supp. 265, 269 (S.D.N.Y. 1953). Where a subsequent representation has a "substantial relationship" with the attorney's former representation of that client, the courts have held that possession of confidential information will be presumed in order to preserve the spirit of Canon 4. Hull v. Celanese Corporation, 513 F.2d 568 (2d Cir. 1975). Cf. Kramer v. Scientific Control Corp., 534 F.2d 1085 1088 (3d Cir. 1986); ABA Standing Committee on Professional Ethics, Information Opinion No. 885 (November 2, 1965). Thus, an attorney may not undertake a second representation where it is "so closely connected with the subject matter of the earlier representation where it is "so closely connected with the subject matter of the earlier representation that

²Opinions of the Delaware State Bar Association Committee on Professional Ethics will be cited as "DSBA Opinion."

confidences might be involved." ABA Informal Opinion NO. 1233 (August 24, 1972).

Thus, where the two matters are "substantially related" the attorney will be conclusively presumed to have confidential information that prevents him from representing the second client whose interests are adverse to his first. In the matter presented to the Committee, there is clearly a "substantial relationship" in some matters. The law student seeks to be employed by the firm defending many of the cases being prosecuted by his former employer. Clearly, the law student would be prevented from assisting in the defense of those cases in which he had participated on behalf of the prosecution.

Vicarious Disqualification of the Defense Firm.

Rule 1.10(b) provides that when a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or substantially related matter in which the lawyer or a firm in which the lawyer was associated had previously represented a client whose interests are materially adverse to that person, if the lawyer acquired information protected by Rules 1.6 and 1.9(b).

As to those clients on whose files the law student actually worked, it is clear that the law student would be deemed to have acquired information protected ^{by} to Rules 1.6 and 1.9(b). It does not however, follow that the entire Defense Firm would

automatically be disqualified under the principle of disqualification in Rule 1.10(b). The Rules recognize an exception where the firm implements a screening mechanism by which to isolate the disqualified lawyer from the other lawyers in the firm. Rule 1.11 states: "A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screen^{ed} from any participation in the matter and is apportioned no part of the fee therefrom." Rule 1.11(b). The foregoing rule speaks specifically to former government attorneys who enter private practice, however, its provisions have been extended to apply to attorneys in private practice moving from one firm to another. Nemours Foundation v. Gilbane, et al., C. A. No. 83-58-JJF (D. Del. March 27, 1986). In the Gilbane case, Judge Farnan allowed a firm to continue to represent a defendant even though a lawyer formerly associated with a firm representing a party to the litigation had accepted a position as an associate with a firm representing an adverse party, because his new firm, upon recognizing the potential problem, isolated the disqualified attorney in a "cone of silence."

Other cases have also recognized the validity of an effective screening device as a means of preventing a particular attorney's disqualification from being extended to his entire firm, Ez Paints Corp. v. Padco, 746 F.2d 1459, 1462 (D. C. Cir. 1984); Armstrong v. McAlpin, 625 F.2d 443 (2d Cir. 1980) (En

Binc), and this Committee has similarly recognized the effectiveness of a screening device, cf. DSBA Opinion 1985-1.

Thus, the Defense Firm will not be disqualified from defending those cases on which the law student worked, so long as the law student is isolated from all activity with respect to the defense of those cases. The plaintiff's firm should list such cases to which the insulation procedure will be applied.

Disqualification of the Law Student by Virtue of his Association with the Plaintiff's Firm.

The presumption of confidential knowledge applies, and therefore the attorney disqualification is irrebutable, where a single attorney seeks to switch his allegiance from one client to another in substantially related or identical matters. DSBA Opinion 1985-2. However, where the issue arises not as a result of an individual attorney's actions, but rather by virtue of his association with a law firm, different principles obtain. This Committee has stated:

4 — The knowledge of secrets and confidences entrusted to members of the attorney's former firm will be imputed to him ~~of~~ if the circumstances are such that the members of the firm working on the matter could reasonably be expected to share the knowlege of the secrets and confidences of the client with the attorney. [State of Arkansas v. Dean Foods Product Co., 605 F.2d 380 (8th Cir. 1979); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2nd Cir. 1975)] However, "a peripheral representation" exception applies, and knowledge will be imputed, if it can be demonstrated that the lawyer was segregated from the prior matter in some way.

DSBA Opinion 1985-1.

Thus, where knowledge would be imputed to an attorney by virtue of his association with a firm, the attorney may rebut that imputation by showing he was not in a position to gain such knowledge, and if the lawyer played an extremely minor role, or no role at all, in his former firm's representation of a person who is adverse to his present firm's client, neither the lawyer nor his present firm must withdraw. Silver Chrysler Plymouth, supra.

A law student who serves as a law clerk for a Delaware law firm is in a circumstance analogous to that of an associate. The Committee agrees with the comment to the Model Rules where it is observed that when lawyers have been associated with a firm and then end their association, the fiction that the law firm is the same as a single lawyer ceases to be realistic. The comment states:

There are several competing considerations. First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having a reasonable choice of legal counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left the previous association. If the concept of imputed disqualification were defined with unqualified rigor, the result would be radical curtailment in the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to charge counsel.

The foregoing principles apply with special force in Delaware. Applicants for admission to the Bar of this state are required to serve a five month clerkship. Supreme Court Rule 52. If the concept of imputed disqualification were applied so that a law firm employing an associate who served his clerkship at a different firm would be disqualified from all cases in which the other firm represented adverse interests, the result would be dramatically to inhibit the ability of new layers to enter the practice of law.

The cases which have addressed situations analogous to the one presented to the Committee have fashioned a rebuttable presumption that a lawyer formerly associated with a firm had received confidential information transmitted by a client to another lawyer in the firm. Laskey Brothers of West Virginia, Inc. v. Warner Brothers Pictures, Inc., 224 F.2d 824, 826 (2d Cir. 1955), cert. denied, 350 U.S. 932 (1956); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975); Gas-A-Tron of Arizona v. Union Oil Co., 534 F.2d 322 (9th Cir. 1976).

In the Silver Chrysler-Plymouth, Inc. case, the court observed that large law firms often hire "summer associates between their second and third years of law school many of whom do not return to the same firms upon graduation." The quote went on to state:

Even after an initial association with the firm upon graduation, it is not uncommon for young lawyers to change their affiliation once or even several times. It is equally well known that the larger firms in the metropolitan areas have hundreds (collectively thousands) of clients. It is unquestionably true that in the course of their work at large firms, associates are entrusted with the confidences of some of their clients. But it would be absurd to conclude that immediately upon their entry on duty they become the recipients of knowledge as to the names of all the firms clients, the contents of all files relating to such clients, and all confidential disclosures by clients, officers or employees to any lawyer in the firm. Obviously, such legal osmosis does not occur. The mere recital of such a proposition should be self-refuting. And a rational interpretation of the Code of Professional Responsibility does not call for disqualification on the basis of such an unrealistic perception of the practice of law in large firms.

518 F.2d at 753-54.

In Laskey Brother of West Virginia, the court stated:

Since the degree of association to effect disqualification need not necessarily be that of a partner, young lawyers might seriously jeopardize their careers by temporary affiliation with large law firms. But even more important is the effect on litigants who may seriously feel they have claims worthy of judicial testing, but are prejudiced in securing proper representation. for the net effect of an overharsh rule of disqualification must be to hinder adequate protection of client's interests in view of the difficulty in discovering technically trained attorneys in specialized areas who were not disqualified, due to their peripheral or temporarily remote connections with attorneys for the other side.

244 F.2d at 827.

In Silver Chrysler-Plymouth, Inc., the court drew a distinction for disqualification purposes between lawyers who become heavily involved in the facts of the particular matter and those who enter briefly on the periphery for a limited and specific purpose relating solely to legal questions. With

respect to the latter category, the court concluded that "the attorney's role cannot be considered "representation" within the meaning of T.C. Theater Corp and Emele so as to require disqualification." 518 F.2d at 757. The court went on to observe

[T]hose cases and the Canons on which they are based are intended to protect the confidences of former clients when an attorney has been in a position to learn them. To apply the remedy when there is no realistic chance that confidences were disclosed would go far beyond the purpose of those decisions.

518 F.2d at 757.

For the foregoing reasons, the Committee concludes that neither the law student nor the Defense Firm would be disqualified from defending cases being prosecuted by the plaintiff's firm, even though those cases may have been active during the law student's tenure as a law clerk with the plaintiff's firm, so long as the law clerk had no meaningful contact with the such cases.

Summary

In summary, the Committee believes that the law student will be disqualified from participating in the defense of all cases on which he worked in a direct and material fashion during his tenure as a law clerk for the plaintiffs' firm. The defense firm will be similarly disqualified from the defense of those cases, unless it implements a system which completely insulates the law student from the defense of those cases. The Plaintiff's Firm should list those cases to which the insulation procedure will be applied.

The Committee does not believe that the law student or the Defense Firm would be disqualified from participating in the defense of cass which may have been pending in the Plaintiffs' Firm during the law students' period of employment, but with which the law student had no substantive contact.