NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 715 – 2/26/99 (3-98)

Topic: Conflict of interest; sub-contractor to multiple law firms

Digest: A lawyer may be employed as a contract lawyer by one or more firms. The provisions of DR 5-105 and DR 5-108 apply to the lawyer personally representing clients with differing interests at different law firms. Whether the vicarious disqualification provision of DR 5-105(D) applies depends upon whether the relationship of the contract lawyer to each employing law firm rises to the level of an "association" with the firm, which depends on the facts and circumstances of the employment.

Code: DR 2-101(A), DR 2-103(A), DR 2-107(A), EC 2-22, DR 4-101(C), DR 5-105(A),(C),(D), DR 5-108(A),(B).

QUESTION

May a solo practitioner supplement the income from his or her own law practice by soliciting and taking on legal work on a temporary project basis from multiple law firms? Must the clients of the sponsoring firm on whose matters the lawyer works be informed that work is being performed by the lawyer?

OPINION

Solicitation

DR 2-103(A) currently prohibits a lawyer from soliciting employment in violation of any statute or court rule "from any *person*". Before the Code was made gender neutral in 1990, this prohibition applied to solicitation from a layman, and we believe it still relates only to solicitation of employment directly from potential clients, and not from other members of the legal profession, who certainly are capable of making informed

judgments about the engagement of lawyers. Consequently, lawyers may solicit, either in person or by written advertisements, other lawyers to employ them as employees or contract workers or to refer them for employment by clients, as long as the information in such solicitations is not false, deceptive or misleading within the meaning of DR 2-101(A).

Temporary Project Work

The application of the Code of Professional Responsibility will depend upon the precise nature of the relationship between Lawyer L and each of the firms with which he or she may have a temporary relationship. Temporary project work may be structured in numerous ways. For example: (1) Law Firm A might refer a matter to Lawyer L. The client might become the client solely of Lawyer L in the matter, or Law Firm A and Lawyer L might retain joint responsibility for the representation and share the fees of the representation in a referral arrangement under DR 2-107(A). (2) Law Firm A might employ Lawyer L as a contract worker (in this role, "Contract Lawyer") at hourly rates to work on one or several matters or parts of matters, or for a fixed period of time to meet temporary staffing needs. The Contract Lawyer might work from his or her own office or from home; or the Contract Lawyer might be provided with office space at the offices of Law Firm A.

Where Lawyer L does not work on the premises of any firm other than his or her own firm, and receives referrals of clients, then the referral relationship is covered by DR 2-107(A) and the lawyer's obligations under Canons 4 and 5 to maintain the confidentiality of client confidences and to refrain from representation of conflicting interests is the same as would apply to any other lawyer.

Where a Contract Lawyer is hired by one of more law firms (including other solo practitioners) to work on an hourly or per matter basis, the analysis is much more complicated, but has been the subject of numerous bar association ethics committee opinions. *See, e.g.* ABA Formal Op. 88-356, N.Y. City Opins. 1996-8, 1989-2, 1988-3 and 1988-3-A; State Bar of Arizona Opin. 97-09, Connecticut Bar Ass'n Inf. Opin. 88-15. The principal issues involved are how to apply the Code's provisions prohibiting conflicts of interest to simultaneous and successive clients, and whether the employing law firm must disclose the relationship with the Contract Lawyer and obtain client consent.

Conflicts of Interest of the Lawyer Individually

The principal problem that must be addressed whenever a Contract Lawyer works for more than one firm is that of conflicts of interest. DR 5-105(A) of the Code of Professional Responsibility prohibits a lawyer from representing conflicting interests:

> A lawyer shall decline proffered employment if ... it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105(C).

Thus a Contract Lawyer could not represent a client (Client 1) at Firm A (or at his or her own firm) and represent at Firm B a client with interests that differ from those of Client 1, unless consent were appropriate under DR 5-105(C). That section only allows client consent where it is obvious that the lawyer can adequately represent the interests of both clients. We believe it is impossible to represent opposite sides in the same litigation. Whether consent would be appropriate in a litigated matter where the respective clients are not adversaries or in a non-litigated matter would depend on the nature of the matter and the nature of the Contract Lawyer's role.

The subject of successive representations of clients is covered in DR 5-108, which provides that, except with the consent of a former client (Client 1), a lawyer who has represented a client in a matter may not thereafter represent another person (Client 2) in the same or a substantially related matter in which Client 2's interests are materially adverse to the interests of Client 1. Similarly, the lawyers may not use any confidences or secrets of Client 1 except as permitted by DR 4-101(C) or when the confidences or secrets have become generally known. See DR 5-108(A) and (B). Consequently, when Client 1 and Client 2 are opposing parties in litigation, a Contract Lawyer could not work on a matter for Client 1 at firm A, complete his or her work for Client 1, and then work on the same or a substantially related matter for Client 2 at firm B.

Representation

Is there some level of participation by the Contract Lawyer that would not be deemed to be representation of Firm A's client? For example, would it matter if the Contract Lawyer only prepared memoranda of law but was not knowledgeable about the facts of the case and had no access to client confidential information? In ABA 88-356, the ABA Committee on Ethics & Professional Responsibility concluded that a temporary lawyer who works on a matter for a client of a firm "represents" that client for purposes of the conflicts rules. In the context of a disqualification motion, at least one Federal court has distinguished between senior lawyers who become heavily involved in the facts and strategy of a particular matter and more junior lawyers who enter briefly on the periphery for a limited and specific purpose related solely to legal questions. *See Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp*., 518 F.2d 751 (2d Cir. 1975).

We believe that a lawyer should be deemed to represent a client if the lawyer is privy to factual information about the client that would constitute confidences or secrets of the client within the meaning of DR 4-101(A). In our opinion, this does not depend upon having any contact with the client.

Could a firm and its contract attorneys avoid any possible disqualification by ensuring that the Contract Lawyer does not know the identity of the client? We think not. DR 5-105(E) requires a law firm to keep records of prior engagements and to check proposed engagements against current and previous engagements "so as to render effective assistance to lawyers within the firm in complying with [DR 5-105(D)]."

We believe that both the Contract Lawyer and the firms that employ the Contract Lawyer must keep such a list of current and previous engagements so as to ensure compliance with the Code's prohibitions against direct and vicarious conflicts. Therefore, whenever a Contract Lawyer is doing more than pure legal research (*i.e.* whenever the Contract Lawyer is given any of the facts of the client's matter), the Contract Lawyer has a duty to inquire as to the identity of the client, so as to be able to perform a check for conflicts with present or future clients.

Vicarious Disqualification

The issue of conflicts of interest does not arise solely where the Contract Lawyer is personally involved in the representation. Under DR 5-105(D), lawyers who are "associated in" a firm cannot accept or continue employment when any one of them would be prohibited from doing so because of a conflict of interest:

> While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so under DR 5-101(A), DR 5-105(A), (B) or (C), DR 5-108 or DR 9-101(B) except as otherwise provided therein.

Consequently, if Firm A and Firm B represent opposite sides of a particular matter, then a Contract Lawyer may not work for both firms if he or she is deemed to be "associated" in both firms, even if the Contract Lawyer is not working on the matter at either firm, without the consent of the clients. See ABA 88-356 (observing that "if a temporary lawyer was directly involved in work [at Firm A]…, it would be inadvisable for a second firm representing other parties in the same matter whose interests are directly adverse to those of the client [at Firm A] to engage the temporary lawyer during the pendency of the matter, even for work on other matters").

The Code does not define the term "associated". Although the concept extends beyond lawyers who are partners, associates or "of counsel" in a firm, it does not apply to all lawyers who are in any way "connected" or "related". We agree with the ABA's conclusion in Formal Opin. 88-356 that whether a Contract Lawyer should be regarded as being associated with a firm while working on a matter for the firm depends upon the nature of the relationship, and especially whether the Contract Lawyer has access to information relating to the representation of firm clients other than the clients for which the Contract Lawyer is working directly.

A Contract Lawyer to whom a case is referred and who serves in the nature of co-counsel, working from his or her own office, should not be deemed to have access to the confidences and secrets of all clients of the employing firm. *See* Restatement, The Law Governing Lawyers, Section 203, Comment c(iii)(Proposed Final Draft No. 1)(co-counsel who associate for purposes of handling a particular case are not subject to vicarious disqualification). On the other hand, lawyers who share office space but who are not in the same firm have been deemed to be "associated" in a firm for purposes of

the conflicts rules and vicarious disqualification rules. *See* N.Y. County 680, N.Y. City 80-63.

Whether a Contract Lawyer who works in the offices of the employing firm should be deemed to have access to the confidences and secrets of all clients of the firm depends upon the circumstances, including whether the firm has a system for restricting access to client files and for restricting informal discussions of client matters. This, in turn, may depend upon the size of the firm and the formality of procedures for restricting access to such information. The mere fact that the Contract Lawyer has an office in the employing firm or uses its library or rest rooms does not necessarily mean that the Contract Lawyer should be presumed to have access to confidential information about all clients in the firm. If the Contract Lawyer has general access to the files of all clients of the firm and regularly participates in discussions of their affairs, then he or she should be deemed "associated" with the firm. However, if the firm has adopted procedures to ensure that the Contract Lawyer is privy only to information about clients he or she actually serves, then, in most cases, the Contract Lawyer should not be deemed to be "associated" with the firm for purposes of vicarious disqualification. See ABA 88-356, which recommends that an employing firm screen temporary lawyers from all information relating to clients for which the temporary lawyer does no work.

New York State courts have not adopted "Chinese Walls" as a means to protect a firm from disqualification where a lawyer with knowledge of client confidences moves from one firm to another. *See, e.g. Trustco Bank N.Y. v. Melino*, 164 Misc.2d 999, 625 N.Y.S.2d 803 (Sup. Ct. 1995). *But see Kassis v. Teacher's Insurance and Annuity Association*, 243 A.D.2d 191, 678 N.Y.S.2d 32 (1st Dep't 1998)(*leave granted*, __ N.Y.2d __ (1998)(First Department authorizes screening, in a 26-person firm representing defendant, of a lawyer one year out of law school who participated in specific assignments, including document review and interviews of witnesses, at firm representing plaintiff, where screening procedures were employed before the young lawyer joined the new firm, and the young lawyer's office would be far from the office of the partner handling the matter, where all of the client's files would be maintained). However, even if screens are not generally accepted as a means of preventing a tainted lawyer from disclosing information, we believe screens should be accepted as a means of ensuring that part time lawyers are not deemed to be "associated" with a law firm.

Several courts in this state have considered whether Firm A should be vicariously disqualified from representing Client 1 because (1) a lawyer in the firm previously worked at Firm B, which represented a client with interests adverse to those of Client 1, or (2) a lawyer who previously worked at Firm A and represented Client 2 has moved to Firm B and taken Client 2 with him or her. In determining whether confidential client information in a firm should be attributed to all lawyers in the firm, those courts have distinguished between large and small firms. *Compare Solow v. W.R. Grace & Co.*, 83 N.Y.2d 303, 632 N.E.2d 437 (1994) *with Cardinale v. Golinello*, 43 N.Y.2d 288, 372 N.E.2d 26 (1977).

In *Cardinale*, the Court of Appeals disqualified a lawyer from Firm B from representing the plaintiff in an action against a client of Firm A, when Firm B had hired a lawyer from Firm A. The court held that the presumption that confidences have been shared among attorneys in Firm A is irrebuttable: "[I]t is no answer that the [moving] lawyer did not in fact obtain any confidential information in connection with the first employment, or even that it was only other members of his firm who rendered the services to the client." *Id.*, 43 NY2d at 295. *Solow* involved a law firm that previously had represented Grace in a single matter. However, the partner, associate and paralegals who had performed the work were no longer with the firm. The Court of Appeals concluded that the presumption that confidences have been shared among attorneys in a firm should not be irrebuttable: "If the firm can demonstrate prima facie that there is no reasonable possibility that [the remaining lawyers] acquired confidential information, a hearing should be held after which the court may determine that disqualification may be unnecessary." *Id.*, 83 N.Y.2d at 313. Importantly, the court distinguished between large law firms, with attorneys in different departments who could not be presumed to have contact with one another, and smaller firms like the one in *Cardinale*, where there was a "constant cross pollination going on" among the attorneys on all matters which the firm handled. *Solow*, 83 N.Y.2d at 311. Consistent with these decisions, we believe it would be difficult for small firms hiring a Contract Lawyer to avoid vicarious disqualification where the Contract Lawyer is given office space at the firm.

To summarize, we believe the conflicts issues described above are likely to arise in the following circumstances:

1. Firm A and Firm B are on opposing sides in *Jones v. Smith*. Contract Lawyer is not working on *Jones v. Smith* at either law firm. Does either firm's continued employment of Contract Lawyer affect its ability to continue to represent its client in *Jones v. Smith*?

If a Contract Lawyer is denied access to all information relating to each firm's clients other than the ones he or she is working on, and the firms are large enough to rebut the normal presumption of cross pollination among lawyers in a law firm, then the Contract Lawyer is not considered to be "associated with" either firm and the two firms may continue their representation.

2. Same as Hypothetical 1 but Contract Lawyer is working on *Jones v. Smith* at Firm A, and the work rises to the level of representation. May Contract Lawyer work at Firm B on matters unrelated to *Jones v. Smith*?

Not during the pendency of the litigation. The vicarious disqualification provisions of DR 5-105(D) would require the disqualification of Firm B from representing Smith.

3. Firm A and Firm B are on opposing sides in *Jones v. Smith*. Contract Lawyer worked on unrelated matters at Firm A, then leaves Firm A. May Contract Lawyer work on *Jones v. Smith* at Firm B?

The answer depends upon the size of Firm A and the measures taken to ensure that Contract Lawyer was not privy to confidences of clients other than those upon which he or she worked.

Conflicts Checks

Because of the potential for conflicts of interest, it is very important for any firm that employs a Contract Lawyer for work on client matters that would be deemed to constitute "representation" of the client to perform an adequate conflicts check. Willful ignorance is not a defense to ethical violations.

Disclosure to the Client of the Employing Firm

In ABA 88-356, the ABA Committee concluded that, if a temporary lawyer is performing independent work for a client without the close supervision of a lawyer associated with the law firm, the client must be advised; however, where the temporary lawyer is working under the direct supervision of a lawyer associated with the firm, the participation by the temporary lawyer need not be disclosed to the client. The committee reasoned that firm clients expect that legal services may be performed by, and that disclosures of client confidences may be made to, firm personnel.

EC 4-2 provides:

> Unless the client otherwise directs, a lawyer may disclose the affairs of the client to partners or associates of his or her firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to non-lawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training employees so that the sanctity of all confidences and secrets of clients may be preserved.

On the other hand, EC 2-22 states: “Without the consent of the client, a lawyer should not associate in a particular matter another lawyer outside the lawyer’s firm.” This ethical consideration provides general background for DR 2-107(A) (“A lawyer shall not divide a fee for legal services with another lawyer who is not a partner or associate of the lawyer’s law firm unless the client consents to employment of the other lawyer after full disclosure that a division of fees will be made”).

We believe that, consistent with these provisions, whether a law firm needs to disclose to the client and obtain client consent for the participation of a Contract Lawyer depends upon whether client confidences will be disclosed to the lawyer, the degree of involvement of the lawyer in the matter, and the significance of the work done by the

lawyer. Thus, participation by a lawyer whose work is limited to legal research or tangential matters would not need to be disclosed. However, if a Contract Lawyer makes strategic decisions or performs other work that the client would expect of the senior lawyers working on the client's matters, we believe the firm should disclose the nature of the work performed by the Contract Lawyer and obtain client consent.

Disclosure to Client of Opposing Firm

Suppose that Firms A and B represent clients with conflicting interests and a Contract Lawyer employed by Firm B is simultaneously employed by Firm A or was previously employed by Firm A. Even if the Contract Lawyer and Firm B conclude that the provisions of DR 5-105 or DR 5-108 are technically not implicated by the employment of the Contract Lawyer, should the client of the second firm nevertheless be notified and given an opportunity to object? To the extent that continued employment of the Contract Lawyer with Firm B depends on a conclusion that the Contract Lawyer is or was not "associated" with Firm A, or that the Contract Lawyer had no access to confidential information of a client of Firm A, we believe the client of Firm A should be apprised of such conclusions, have an opportunity to offer information that calls such conclusion into question, and, if warranted, have an opportunity to challenge such conclusions by bringing a disqualification motion. Notice to the client of the other firm is therefore required. *Compare* ABA 342 (requiring a law firm that represents a client in a matter involving the government and that hires a former government lawyer to disclose the hire to, but not obtain the consent of, the government).

CONCLUSION

A lawyer may be employed as a Contract Lawyer by one or more firms. The provisions of DR 5-105 and DR 5-108 apply to the lawyer personally representing clients with differing interests at different law firms. Whether the vicarious disqualification provision of DR 5-105(D) applies depends upon whether the relationship of the contract lawyer to each employing law firm rises to the level of an “association” with the firm, which depends on the facts and circumstances of the employment.