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Committee on Professional Ethics

Opinion 905 (1/30/12)

Modifies N.Y. State 503 (1979)

Topic: Paralegal or Legal Assistant Who Becomes Lawyer; Obligations of Lawyer and Hiring Firm

Digest: Rules 1.9 and 1.10 do not apply to a lawyer who acquired confidential information while acting solely as a paralegal or legal assistant. A law firm that hires a lawyer who acquired confidential information while acting as a paralegal or legal assistant has an obligation to make reasonable efforts to ensure that the lawyer does not reveal the confidential information. A law firm should instruct the newly hired lawyer not to divulge confidential information. The firm should also perform a conflicts check reasonable under the circumstances. If the lawyer acquired confidential information in a matter while working as a paralegal or legal assistant, the lawyer ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that the firm has a duty to protect.

Rules: Rule 1.6(c), Rule 1.9(b), Rule 1.10(a), (c), Rule 5.1(a), Rule 5.3(a), Comment 4 to Rule 1.10.

QUESTION

1. What are a law firm's supervisory responsibilities upon hiring a newly-admitted lawyer who previously worked as a paralegal or legal assistant at a firm representing a party adverse to a client of the hiring law firm? Must the hiring law firm check for conflicts of interest and implement screening measures?

OPINION

2. The inquirer is an attorney at a law firm ("Law Firm A"), which would like to hire a law school graduate who has passed the bar, but has not yet been admitted to practice. While in law school, this prospective lawyer worked as a paralegal at another law firm ("Law Firm B") and continues to work in that capacity.[1] While working at Law Firm B, the prospective lawyer may have gained confidential information in a matter ("Matter X") in which Law Firm B represents the plaintiff in an ongoing litigation against a client of Law Firm A. Law Firm A does not know

[1] This Opinion addresses the obligations of a law firm that hires a paralegal or other similarly denominated person, such as a law assistant or law clerk. It does not address the hiring of a law school graduate who has passed the bar and is pursuing admission while at another firm, as that person's responsibilities and exposure to client confidences are typically greater than those of an ordinary paralegal or legal assistant.

the specific content of the confidential information, if any, but does know that the prospective lawyer's "contact in the case" was limited to an undefined "research project."

3. The inquirer notes that when the prospective lawyer begins to practice at Law Firm A, "he will have no contact with [Law Firm A's] client" in Matter X. He will work exclusively in the Law Firm A's Insurance Defense Practice Group "with little contact with the attorneys who practice with [the] client" in Matter X. Law Firm A's client in Matter X has contact only with the Health Care Practice Group. The firm's Insurance Defense Practice Group and its Health Care Practice Group "are completely independent practices with no cross over between attorneys."

4. The inquirer asks whether screening the prospective lawyer after he is admitted and joins the firm is a proper course of action. If not, the inquirer asks what steps should be taken to avoid violation of the New York Rules of Professional Conduct "and/or disqualification from the case."

5. The essence of this inquiry is whether the prospective lawyer would have a conflict of interest that will be imputed to other lawyers in Firm A under Rule 1.10 ("IMPUTATION OF CONFLICTS OF INTEREST") of the New York Rules of Professional Conduct. Rule 1.10(a) provides, among other things, that when a lawyer in a firm is prohibited from representing a client adverse to a former client under the dictates in Rule 1.9 ("DUTIES TO FORMER CLIENTS"), that conflict is imputed to all other lawyers in the firm. Rule 1.9(b) states that "[u]nless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same. . . matter in which a firm with which the lawyer formerly was *associated* had previously represented a client: (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired information protected by Rule[ ] 1.6 . . . that is material to the matter." (emphasis added). Additionally, Rule 1.10 (c) provides that "[w]hen a lawyer becomes associated with a firm, the firm may not knowingly represent a client in a matter that is the same as . . . a matter in which the newly associated lawyer, or a firm with which that lawyer was *associated*, formerly *represented* a client whose interests are materially adverse to the . . . current client unless the newly associated lawyer did not acquire any information protected by Rule 1.6 or Rule 1.9(c) that is material to the current matter." (emphasis added).

6. Assuming that, in the course of his work as a paralegal at Law Firm B, the prospective attorney acquired confidential information protected by Rule 1.6(a) that is material to the plaintiff in Matter X, a broad reading of Rules 1.9 and 1.10 would preclude Law Firm A from continuing to represent its client in Matter X if it hires the prospective lawyer and he is admitted to practice. *See* Michigan Formal Opinion RI-285 (1996) (interpreting provision similar to New York's Rule 1.9[b], opinion notes that "inquirer likely 'acquired protected information' in the former employment, whether the acquisition was as a lawyer or as a paralegal").

7. We interpret Rules 1.9 and 1.10 in a more limited manner. While the prospective lawyer was certainly employed by Law Firm B, he was not "associated" with that firm during his tenure as a paralegal. As used in Rules 1.9 and 1.10, the term "associated" denotes a more significant relationship, such as holding a position as partner, associate, or of counsel at the former law firm. While the prospective lawyer may have gained material confidential information pertaining to

Matter X in his work as a paralegal or legal assistant while at Law Firm B, he did not obtain it while "associated" with Firm B as an attorney. Nor can it be said that the prospective attorney "formerly represented" the client in Matter X while working at Law Firm B as a paralegal. *See* Rule 1.10 (c). Therefore, Rules 1.9 and 1.10 do not govern this inquiry.

8. Comment 4 to Rule 1.10 supports this conclusion. It notes, in pertinent part, that "[t]he rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary."

9. While Rules 1.9 and 1.10 do not apply here, there are other provisions that guide our resolution of this inquiry. Rule 1.6 ("Confidentiality of Information"), the centerpiece of the Rules of Professional Conduct, addresses a lawyer's duty to maintain confidential information. Rule 1.6(c) requires that "[a] lawyer … exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client…." *See* Rule 1.6, cmt. 16.

10. Rule 5.3 ("RESPONSIBILITY FOR CONDUCT OF NONLAWYERS") mandates that "[a] law firm … ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate." Rule 5.3(a). Comment 2 to Rule 5.3 acknowledges the reality that "[l]awyers generally employ assistants in their practice, including secretaries, investigators, law student interns and paraprofessionals." These nonlawyers "act for the lawyer in rendition of the lawyer's professional services." Rule 5.3, cmt. 2. While these "nonlawyers… are not themselves subject to these Rules, the purpose of the supervision is to give reasonable assurance that the conduct of all nonlawyers employed by or retained by or associated with the law firm is compatible with the professional obligations of the lawyers and firm." *Id.*; *see* N. Y. State 774(2004) (addressing supervisory duties of firm hiring paralegal or other nonlawyer). Furthermore, a lawyer may not order, direct, or permit a nonlawyer to engage in any conduct that, if engaged in by the lawyer, would subject the lawyer to discipline. Rule 5.3(b).

11. Based on Rules 1.6 and 5.3, Law Firm B, which currently employs the prospective lawyer, has an obligation to ensure that he preserves any confidential information he acquires regarding the plaintiff in Matter X. Law Firm A must similarly ensure that the plaintiff's confidential information is preserved. *Cf.* N.Y. State 774 (2004) (addressing duties of law firm hiring a paralegal or other nonlawyer and opining that law firm that "hires a nonlawyer who has previously worked at another law firm… must, as part of its supervisory responsibilities under [Rules 1.6 and 5.3], exercise adequate supervision to ensure that the nonlawyer does not reveal any confidences or secrets that the nonlawyer acquired while working at the other law firm."); N.Y. State 700 (1998) (opining, under a distinct set of facts, that an attorney "may not exploit the willingness of [a] former employee [of an adversary's law firm] to undermine the confidentiality rule."); N. Y. State 503 (1979) (a lawyer cannot undertake to cause another's employee to divulge confidential information) ; Rule 4.4(a)(" In representing a client, a lawyer shall not … use methods of obtaining evidence that violate the legal rights of [a third] person.").

12. Law Firm A also has an obligation to "make reasonable efforts to ensure that all lawyers in the firm conform to the [] Rules." Rule 5.1(a). Once the prospective lawyer is admitted to

practice and hired by Law Firm A, it too has an independent obligation to ensure that he does not reveal any confidential information learned while employed at Firm B.

13. As to the scope of the "reasonable efforts" that must be undertaken by Law Firm A upon hiring the prospective lawyer, we are informed by our analysis in NY State 774, where we examined a law firm's supervisory responsibilities upon hiring a secretary, paralegal or other nonlawyer who previously worked at another law firm. Based on that Opinion, it is advisable that Law Firm A remind the prospective lawyer to preserve the confidentiality of information obtained concerning clients of Law Firm B. *See* N.Y. State 422 (1975)(opining that an "attorney may employ the terminating secretary who has confidential information as to pending adversarial matters, *provided* he cautions the secretary not to divulge any confidential information and will not permit the secretary to do so."). Law Firm A should also instruct the prospective lawyer not to accept any work assignment involving a matter on which he worked while at Law Firm B, including Matter X. *See In re Columbia Valley Healthcare System, L.P.*, 320 S.W.3d 819 (Supreme Court of Texas 2010)

14. It is also advisable for Law Firm A, upon hiring the prospective lawyer, to perform a conflicts check reasonable under the circumstances. *Cf.* N.Y. State 720 (1999) (discussing required procedures for performing conflicts checks when hiring lateral attorney). If the prospective attorney played more than a ministerial role in the matter at Law Firm B, which appears to be the case in Matter X, screening of the prospective attorney may be required under Rule 5.1(a) to prevent the misuse of confidential information and to implement the "reasonable efforts" that must be undertaken under that provision to ensure that all lawyers conform to the Rules. *See* Rule 1.10, Comment 4 (a nonlawyer paralegal who has acquired confidential information "ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. *See* Rules 1.0(t), 5.3."); *In re Columbia Valley Healthcare System, L.P.*, 320 S.W.3d 819 (Supreme Court of Texas 2010) ("we conclude that a simple informal admonition to a nonlawyer employee not to work on a matter on which the employee previously worked for opposing counsel, even if repeated twice and with threat of termination, does not satisfy the 'other reasonable measures' a firm must take to properly shield an employee from the litigation. Instead the other reasonable measures must include, at a minimum, formal, institutionalized screening measures that render the possibility of the nonlawyer having contact with the file less likely"); *see also S.E.C. v. Ryan*, 747 F.Supp.2d 355, (N.D.N.Y. 2010) (in the face of an alleged conflict of interest caused by a firm's hiring of a paralegal who previously worked at the adverse party's firm, the court noted that screening "procedures are prudent under these circumstances and should remain in effect" and noted that "[e]ven a small law firm can erect appropriate and adequate isolation to protect the sharing of confidential information, as long as the firm exercises special care and vigilance").

15. In sum, the measures required to be taken by Law Firm A to preserve confidential information will vary depending on the circumstances. As noted generally in the Rules, "the degree of supervision required [by a law firm] is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter." Rule 5.1(c).

16. In N.Y. State 503, we recognized several of the principles enunciated above. In that Opinion, a lawyer was previously employed as a paralegal at another firm and gained confidential information regarding a client of his former firm. We concluded that the lawyer, who became an associate at a second firm, could not work on a matter involving the client of the former firm wherein the information he obtained as a paralegal might be of some relevance. In addition, we opined that the lawyer's conflict was imputed to all other lawyers at his firm, effectively disqualifying the entire firm from the proposed representation. We did not, however, address whether appropriate measures, such as screening, could avoid an imputed disqualification in these circumstances. We conclude today that if appropriate measures are taken to preserve the confidential information of the client of the former firm gained while the lawyer is a paralegal, imputed disqualification of the lawyer's entire firm under Rule 1.10(a) is not mandated.

17. If the prospective lawyer is admitted to practice and continues to work at Law Firm B before Law Firm A hires him, the resolution of this matter may be different. If the attorney, after being admitted to practice, acquires material confidential information about plaintiff while "associated" with Law Firm B, the newly admitted lawyer and Law Firm B would, of course, be subject to Rules 1.9 and 1.10. In these circumstances, screening could not prevent a conflict arising under Rule 1.9 or 1.10. *See* District of Columbia Opinion No. 227 (1992).

18. Under any scenario, whether a court will disqualify Law Firm A from representing its client in Matter X after it hires the prospective attorney is a question of law beyond the scope of this Committee's jurisdiction. *See, e.g.*, *Glover Bottled Gas Corp. v. Circle M. Beverage Barn, Inc*., 129 A.D.2d 678, 514 N.Y.S.2d 440 (2d Dep't 1987) (defendants' attorneys, who had hired paralegal who had previously been employed by the plaintiff's counsel and had worked on the litigation pending between the parties and had interviewed the plaintiff's manager concerning the facts of this case, were properly disqualified); *Riddell Sports, Inc. v. Brooks*, 1994 U.S. Dist. LEXIS 2290 (S.D.N.Y. 1994) (Leisure, J.) (denying a motion to disqualify where a large firm had terminated a paralegal upon learning that the paralegal had worked on a case still pending between the firms, even though the paralegal had no role in that case at the firm).

CONCLUSION

19. Rules 1.9 and 1.10 do not apply to a lawyer who acquired confidential information while acting solely as a paralegal or legal assistant. A law firm that hires a lawyer who acquired confidential information while acting as a paralegal or legal assistant has an obligation to make reasonable efforts to ensure that the lawyer does not reveal the confidential information. A law firm should instruct the newly hired lawyer not to divulge confidential information. The firm should also perform a conflicts check reasonable under the circumstances. If the lawyer acquired confidential information in a matter while working as a paralegal or legal assistant, the lawyer ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that the firm has a duty to protect.

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