LEGAL ETHICS OPINION 1832

POTENTIAL CONFLICT OF INTEREST WHEN PROSPECTIVE CLIENT SPEAKS ONLY WITH THE SECRETARY AND HAS NO DIRECT CONTACT WITH THE LAWYER.

You have presented a hypothetical request in which a year ago, a woman, Ms. X, called a lawyer's office for an initial consultation. Ms. X communicated only with the lawyer's secretary, who scheduled an appointment for Ms. X to meet with the lawyer. Ms. X called the secretary a second time and advised the secretary that the lawyer had previously represented her ex-husband's sister. The secretary advised the lawyer of Ms. X's relationship to that former client. Prior to Ms. X's second call, the ex-husband had made an appointment to meet with the lawyer. The lawyer advised the secretary that he would not take Ms. X's case. The lawyer agreed to represent the ex-husband regarding petitions filed by Ms. X.

Ms. X now objects to that representation. Ms. X says she told the secretary "all the facts" about her case. Despite Ms. X's claim that she told the secretary all about her case, the lawyer and his secretary maintain they are in possession of no confidential information about Ms. X.

With regard to this hypothetical scenario, you have asked the Committee to opine as to whether it is ethically permissible for this lawyer to continue to represent the ex-husband against Ms. X. Resolution of your question involves a determination of whether this lawyer has a conflict of interest in representing the ex-husband after his office acquired information from Ms. X. The source of the conflict of interest is the lawyer's duty of confidentiality under Rule 1.6.[1] As set out below, the Committee believes that Ms. X's communication with the secretary is information the lawyer is obligated to keep confidential under Rule 1.6. Thus, any information obtained from Ms. X could not be used by the lawyer in representing the ex-husband.

Based on the facts you present, there was no agreement, express or implied, that the lawyer would undertake representation of Ms. X.[2] However, Ms. X's contact with the

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[1] Rule 1.6 would require the lawyer and the secretary to preserve the confidentiality of any confidences and secrets Ms. X claims to have imparted to the secretary. A lawyer has an ethical duty to ensure that non-lawyer employees comply with the duty of confidentiality. Rule 5.3.

[2] Whether or not a lawyer-client relationship was created is a legal issue outside the purview of the Committee. However, the Restatement (3d) of the Law Governing Lawyers, § 14 (2000) offers some guidance:

> A relationship of client and lawyer arises when:
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> (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either:
>
> > (a) the lawyer manifests to the person consent to do so; or
> > (b) the lawyer fails to manifest lack of consent to do so and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or
>
> (2) a tribunal with the power to do so appoints the lawyer to provide the services.

law firm via the secretary does raise ethical obligations with respect to any confidential information given the secretary.

In prior opinions, the Committee has stated that a person who consults with a lawyer may reasonably expect that confidential information a person shares with a lawyer is protected under Rule 1.6, even if the lawyer and client do not agree to a professional engagement. *See* LEO 629 (1984) (A lawyer who learns confidences during a professional discussion at a social engagement may not reveal the contents without the client's consent); LEO 1453 (1992) (potential client's initial consultation with lawyer creates reasonable expectation of confidentiality which must be protected even if no lawyer-client relationship arises in other respects); LEO 1546 (1993) (wife who had initial consult with lawyer during which confidential information was disclosed precluded another lawyer in the same firm from representing husband in divorce).

In LEO 1794 (2004), the Committee observed that the ethical obligation to protect confidential information of a prospective client encourages people to seek early legal assistance and such persons must be comfortable that the information imparted to a lawyer while seeking legal assistance will not be used against them. That Ms. X in the present scenario never retained the lawyer and never became a client does not relieve the lawyer of this duty of confidentiality.

There is, however, a significant factual difference between the present scenario and that of LEO 1794. In LEO 1794, the prospective client actually meets with the lawyer. In contrast, in the present scenario, the prospective client speaks only with the secretary and has no direct contact with the lawyer. The question then is whether the duties of Rule 1.6 are triggered by the provision of information to support staff rather than to a lawyer.

While the secretary in your scenario is not governed by the Rules of Professional Conduct applicable to lawyers, Rule 5.3 (b) imposes a duty on the lawyer to ensure that the secretary's conduct is compatible with the professional obligations of the lawyer. Comment [1] of that rule adds that: "[a] lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, *particularly regarding the obligation not to disclose information relating to representation of the client. . . .*" (emphasis added).

The Committee applied these ethical precepts in LEO 1800. In that opinion, the Committee analyzed whether the conflicts rules apply when a firm hires the secretary of the law firm representing the opposing party in a litigation matter. The opinion concludes that Rules 1.7 and 1.9 apply exclusively to lawyers, not to support staff. However, that conclusion did not end the discussion or the lawyer's duties in that situation. The opinion looked to Rule 5.3, which governs a lawyer's duty to supervise support staff so that staff conduct is consistent with the lawyer's ethical responsibilities. In other words, lawyers are required to train support staff to preserve client confidences and secrets.

In LEO 1800, the Committee opined that the lawyer in the hiring firm is directed to screen the secretary from the matter so that the secretary will not disclose information regarding the former employer's client to the lawyer. For prospective clients to feel

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See also LEO 1546 (1993) holding that a prospective client's initial consultation with an attorney creates an expectation of confidentiality that would conflict the firm if it later represented the opposing party in the same matter.

comfortable divulging information about their legal matters to law firms, those clients need assurance that the information will remain confidential, regardless of which individual at the firm does the intake interview and/or initial consultation. Without screening procedures, information obtained by support staff is imputed to the lawyers in a firm.

Returning to analysis of the present scenario, your facts state that Ms. X claims to have "told everything" to the secretary, but the lawyer and the secretary claim to have no confidential information. Further, when the secretary advised the lawyer of Ms. X's relationship to a former client, the lawyer advised that he had already agreed to represent the husband and that he would not represent Ms. X.

The Committee believes that LEO 1800 offers appropriate guidance in your scenario. To avoid the imputation of confidential information to the lawyer, and possible disqualification, the lawyer has an ethical duty to establish a screen between the secretary and lawyer as to Ms. X and the ex-husband's case. The lawyer must instruct the secretary that she cannot reveal to the lawyer any confidential information obtained from Ms. X. To preserve information protected by Rule 1.6, the lawyer must use another staff person in lieu of the secretary for any work performed relating to the representation of the ex-husband against Ms. X and should send a written communication to Ms. X or her lawyer that these measures have been taken.

In the event that the ethics "screen" is breached and the lawyer learns confidential information communicated by Ms. X to the secretary, the lawyer may find it necessary to withdraw from representing the ex-husband. The lawyer's duty of confidentiality to Ms. X may materially limit the lawyer's representation of the ex-husband, since he would be foreclosed from using any information Ms. X may have given the secretary. *See* Rule 1.7 (a)(2) (a conflict of interest exists if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or *a third person* or by a personal interest of the lawyer) (emphasis added). Even assuming that Ms. X is not a "client" or "former client" she is a third person to whom the lawyer owes a duty of confidentiality which may "materially limit" the lawyer's representation of the ex-husband. Whether such a conflict exists depends, of course, upon the extent that the "screen" was breached and the nature of the information actually learned by the attorney.

For the protection of clients, the law firm, and public, the Committee recommends that the firm train non-lawyer support staff to minimize confidential information obtained from prospective clients before they can perform the necessary conflicts analysis.

In rendering this opinion the Committee continues to reiterate its position that if confidential information learned by one lawyer in a firm results in disqualification that disqualification is imputed to all lawyers in the firm and a screen can only be used to cure a client conflict with client consent, pursuant to Rule 1.7 (b). Exceptions exist for conflicts that are carried with a departing lawyer pursuant to Rule 1.10 and government lawyers pursuant to Rule 1.11.

This opinion is advisory only, and not binding on any court or tribunal.

Committee Opinion
May 10, 2007