

You have presented a hypothetical situation in which Attorneys A and B represent opposing parties in pending litigation. A's two-member firm used secretary X for all secretarial work for the office, including the present litigation. A's firm fired X. The following week, Attorney B's firm, also a two-lawyer office, hires X as a secretary.

With regard to the facts of your inquiry, you have asked the following questions:

- 1) Is there a conflict of interest requiring B's withdrawal from the litigation?
- 2) Would the answer to question one differ if X were a paralegal rather than a secretary?
- 3) Would the answer to question one differ if X met alone with A's client when the client reviewed and signed discovery responses?
- 4) Would the answer to question one differ if X's only duty for B on the litigation at issue was to answer the telephone?

The fundamental issue for this series of questions is whether an attorney's hiring of opposing counsel's secretary creates an impermissible conflict for the hiring attorney. The general conflict of interest provisions in the Rules of Professional Conduct are Rules 1.7 and 1.9, dealing with current and former clients, respectively. Those rules state as follows:

**RULE 1.7 Conflict of Interest: General Rule**

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another existing client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall

include explanation of the implications of the common representation and the advantages and risks involved.

RULE 1.9 Conflict of Interest: Former Client

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless both the present and former client consent after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related 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 Rules 1.6 and 1.9(c) that is material to the matter; unless both the present and former client consent after consultation.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to or gained in the course of the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Each paragraph of these rules begins with the clear phrasing, "a lawyer." There are no paragraphs in these rules directed at non-lawyer staff, nor are there any paragraphs addressing a lawyer hiring non-lawyer staff. Nothing in Rules 1.7 and 1.9 creates a conflict of interest for an attorney hiring non-lawyer staff. This committee declines to adopt the conclusion drawn in a minority of states that Rules 1.7 and 1.9 can be read, despite their clear language to the contrary, to apply to support staff as well as attorneys.<sup>1</sup>

This application of the current Rules of Professional Conduct is in line with a previous opinion finding that under the former Code of Professional Responsibility no conflict of interest arose for

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<sup>1</sup> See *Zimmerman v. Mahaska Bottling Co.* 19 P.3d 784 (Kan. 2001); D.C. Ethics Op. 227 (1992); and Kansas Ethics Op. 90-5 (1990).

an attorney hiring non-lawyer staff of the opposing counsel's firm during the course of the representation. *See*, LEO 745. Nonetheless, the Committee cautioned in that opinion, and reiterates here, that the hiring attorney must be mindful of the ethical supervisory duties regarding support staff.

Rule 5.3 governs an attorney's ethical responsibilities regarding non-lawyer assistants. As explained in the Comment to the rule:

A lawyer must 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..."

Thus, Attorney A and his partner should have made sure secretary X understood during his employment with the firm the critical importance of maintaining client confidentiality. Similarly, when X joined attorney B's firm, those attorneys should have made sure X understood that principle; any attempt by attorney B or his firm members to learn or use the confidential information acquired by X regarding a client of his former employer would be in violation of the requirements of Rule 5.3.<sup>2</sup> A minority of states have concluded that nothing more specific is required than a general nod to this Rule 5.3 supervisory duty.<sup>3</sup> However, this committee prefers the position taken in a majority of states, which is outlined in ABA Informal Op. 88-1526.<sup>4</sup> That position interprets Rule 5.3 such that the hiring firm must effectively screen the new employee with regard to the matter in question to ensure Rule 5.3 compliance.

Numerous factors will determine what is necessary for effective screening in any given instance; the size of the original firm, the size of the hiring firm, and the nature of the work performed by the employee at the first firm are only some examples of what a firm should consider in developing an appropriate screen. Thus, while there is no "one size fits all" screen, this committee presents the following list of possible elements that could support an effective screen:

- 1) educate the new staff member both about the general concept of client confidentiality and should be specific that he not discuss his work at the former firm on the matter in question;
- 2) confirm that the newly hired staff member brought no files or documents with him regarding the matter in question;

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<sup>2</sup> Note that Rule 8.4(a) prohibits an attorney from violating an ethics rule indirectly through the act of another.

<sup>3</sup> *See Williams v. TransWorld Airlines, Inc.*, 588 F.Supp. 1037 (W.D.Mo. 1989); Alabama Ethics Op. 2002-01; and South Carolina Ethics Op. 93-29 (1993).

<sup>4</sup> *See also Kapco Mfg. Co., Inc. v. C & O Enter., Inc.* 637 F. Supp. 1231 (N.D. Ill. 1985); *Daines v. Alcatel*, 194 F.R.D. 678 (E.D. Wash. 2000); *Herron v. Jones, Inc.*, 637 S.W.2d 569 (Ark. 1982); *Smart Industries Corp. Mfg. v. Yuma County Superior Court*, 876 P.2d 1176 (Ariz. Ct. App. 1994); *Liebowitz v. Eighth Judicial District*, 78 P.2d 515 (2003); *Hayes v. Central Orthopedic Specialists, Inc.* Okla. No. 96,663 (4/23/02); *In re American Home Products Corp.*, Tex. No. 97-0654 (1998); Maine Ethics Op. 186 (2004); Illinois-Chicago Ethics Op. 93-5; Tennessee Ethics Op. 2003-F-147; New Jersey Ethics Op. 665 (1992); and Vermont Ethics Op. 92-12.

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- 3) educate all of the attorneys and other staff members not to discuss the matter in question with that new staff member;
- 4) preclude in some practical way access to and/or involvement with the pertinent file by the staff member;
- 5) develop a written policy statement regarding confidentiality, which would include that the above steps are to be followed whenever staff members are hired from an opposing counsel's firm; and
- 6) note, on the cover of the file in question, the key information regarding confidentiality.

To reiterate, the committee presents this list as a suggestion; the list is not meant to be mandatory or exhaustive.

In conclusion, in answer to your first question, Attorney B is not automatically required to withdraw from the representation merely for having hired his opponent's secretary. Absent consent from the opposing party, Attorney B could remain in the case only if his firm effectively screened the secretary with regard to the matter in question. As to questions two through four, the answer to question one applies regardless of the specific title or duties of the non-lawyer staff. Those duties could however determine what screening elements were needed.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

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