Ethics Opinion No. 83-5

Whether a Law Firm Representing a Defendant is Disqualified From Further Representation Because it Hired an Associate Formerly Employed by the Law Firm Representing the Plaintiff.

The Committee has been asked to determine whether a law firm, representing a defendant in a contract action, is disqualified from further representation because it hired an associate formerly employed by the law firm representing the plaintiff. Under the facts as presented, it is our conclusion that the law firm representing the defendant is disqualified from further representation.

Attorney A was originally employed as an associate of the X law firm. During the time in which Attorney A was an associate of X, X was retained by plaintiff to prosecute a contract action against defendant. Although Attorney A was not the attorney in charge of the case, Attorney A participated to a substantial extent in pre-trial motion and discovery procedures.

Defendant retained Y law firm as its attorneys. Subsequent to substantial pretrial discovery and motion practice, Attorney A terminated his employment with X law firm and accepted employment with Y law firm as an associate. At the time Attorney A accepted the position with Y, the Y law firm had accomplished a very substantial amount of work in the case. The defendant had expended in excess of \$25,000.00 in defense costs. If new counsel is substituted, defendant will be prejudiced in at least increased defense costs, as a new counsel is required to develop the expertise necessary in the case.

Attorney A has committed to X law firm and the plaintiff that he will not disclose or otherwise take advantage of any confidential communication to which he may have been privy as a result of his employment with X law firm, and has not and will not discuss the case with any members of Y law firm nor participate in the case in any way.

The law firms involved are located in an isolated Alaskan community containing approximately 25 attorneys in private law practice. These attorneys are organized into several law firms of from 2 to 5 attorneys, with the remaining attorneys being solo practitioners. The Y law firm, representing defendant, consists of three attorneys, including Attorney A.

A similar situation with a relevant difference, was presented to the Alaska Bar Association in Ethics Opinion 78-3 adopted by the Board of Governors on December 2, 1978. In opinion 78-3, an attorney employee of Alaska Legal Services Corp. which represented a plaintiff in a divorce and child

custody case, terminated his employment with Alaska Legal Services and became an employee of a two-attorney partnership which represented the defendant. This took place in a rural community. While the two-attorney partnership maintained an office in that community, the two partners were not resident there and were present only part of the time. Thus, the employed attorney was the only representative of the partnership in the community on a regular basis. The employed attorney would, of necessity, become involved in the actual dealings with the defendant and the handling of the case.

Under these facts, Opinion 78-3 concluded that the partnership must be disqualified from representing the defendant because an appearance of impropriety had been created. In reaching this conclusion, Opinion 78-3 cites American Bar Association Formal Opinion No. 33 and Informal Decision No. C-493. It also cites *Aleut Corp. v. McGarvey*, 573 P.2d 473 (Alaska 1978), which, in dealing with a situation involving a partner rather than an associate as here, states that where one member of a firm is disqualified from representing a client, all members are. (See endnote 1)

The rule of Opinion 78-3 does not govern this situation, nor is per se disqualification mandated. Unlike the attorney in Opinion No. 78-3, it is arguably possible to screen Attorney A from participation in the case. Additionally, the American Bar Association has provided recent, relevant guidance in this area of ethical concern.

Rule 1.10 of the American Bar Association Model Rules of Professional Conduct, and the commentary, provide guidance in this type of case. Rule 1.10 is a general rule dealing with imputed disqualification, and provides:

- (a) When lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 and 2.2.
- (b) When lawyers terminate an association in a firm, none of them, nor any other lawyer with whom any of them subsequently becomes associated, shall knowingly represent a client when doing so involves a material risk of violating Rule 1.6 or Rule 1.9.

The commentary points out that the rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such a situation can be considered from the premise that a firm of lawyers is essentially one lawyer for the purpose of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated.

Paragraph (b) deals with the situation where lawyers have been associated in a firm, but then end their association. In this situation, the problem is more complicated, and the fiction that the law firm is the same as single lawyer is no longer wholly realistic. 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 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. In this connection, it should be recognized that today, and in Alaska, many lawyers practice in firms, many to some degree limit their practice to one field or another, and many move from one association to another several times in their careers. If the concept of imputed disqualification were defined with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek per se rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there is a presumption that all confidences known by a partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms, and does not address associations other than law firms; for example, lawyers associated in the law department of a government agency.

The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety proscribed in Canon 9 of the ABA Model Code of Professional Responsibility. This rubric has a twofold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It, therefore, has to be recognized that the problem of imputed disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client.

Confidentiality

Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs. It should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients. In the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

Relevant factors in determining the likelihood of actual access to information relating to representation of a client include the professional experience of the lawyer in question, the division of actual responsibility for the matters involved, the organizational structure of the law firm or other association involved, the sensitivity of the information and its relevance to the affairs of the affected clients, and the nature and probable effectiveness of screening measures. Application of this Rule can, therefore, depend on a situation's particular facts. In any such inquiry, the burden of proof should rest upon the lawyer whose disqualification is sought.

Independent of the question of disqualification a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented.

Adverse Positions

The second aspect of loyalty to the client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by Rule 1.9(a). (See endnote 2) Thus, if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the requirements of Rule 1.10(b) concerning confidentiality have been met.

In addition, EC 9-6 of the Alaska Code of Professional Responsibility requires all attorneys to conduct themselves so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of the clients and of the public, and to strive to avoid not only professional impropriety but also the appearance of impropriety.

Considering the particulars of this case in regard to EC 9-6 and guidance set forth in the American Bar Association Model Rules of Professional Conduct, it is the opinion of the Committee that the Y law firm should be disqualified from continuing to represent the defendant. Attorney A, prior to his change of employment, participated substantially in pretrial motion and discovery proceedings, thereby developing, of necessity, a thorough understanding of the facts of the case and the plaintiff's legal theories. Plaintiff, and X law firm, apparently object to Y law firm's continued participation. Y law firm consists of only three attorneys, including Attorney A. Thus, the possibility of screening Attorney A from the case is not as viable a possibility as it might be in a larger, departmentalized firm. Finally, as a general observation, this situation would present an appearance of impropriety to the public and the client involved as plaintiff. Basically, the appearance presented is that an attorney who engaged in substantial representation of the client and learned a lot about the client's case, has now switched allegiances to a firm which represents the opposing party in a substantial case. While there may not be any actual impropriety, and while the Committee accepts Attorney A's assurances that confidentiality will be maintained, there is a sufficient appearance of impropriety in this case such that Y law firm should be disqualified from further representation of the defendant in this case.

Please note: This opinion is limited to the narrow factual situation of this particular case. Our advice was not requested on whether the ethical questions discussed above could be cured by severing the employment of Attorney A from Y law firm.

Approved by the Board of Governors on August 27, 1983.

Endnotes:

Endnote 1:

The Alaska rule regarding imputed disqualification of a member of the firm of a disqualified attorney is narrower than the ABA rule. ABA Code DR 5-105(D) provides:

If a lawyer is required to decline or to withdraw from employment under a *Disciplinary Rule*, no partner, or associate, or affiliate with him or his firm, may accept or continue such employment.

Alaska, on the other hand, does not provide for imputed disqualification based on any disciplinary rule, but only on Alaska DR 5-105 itself. Hence, the "appearance of impropriety" of Alaska Canon 9 does not cause an imputed disqualification under the terms of Alaska DR 5-105(D).

Endnote 2:

Rule 1.9 provides:

Conflict of Interest: Former Client

A lawyer who has represented a client in a matter shall not thereafter: (a) represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of their former client unless the former client consents after disclosure consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.