

**LOS ANGELES COUNTY BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE**

OPINION NO. 524
May 16, 2011

**WHAT ARE THE ETHICAL RESPONSIBILITIES OF AN ATTORNEY
WITH REGARD TO THE HIRING OF NONLAWYER EMPLOYEES
WHO MAY BE IN POSSESSION OF CONFIDENTIAL INFORMATION?**

Summary

This Opinion addresses the duties of an attorney who hires a nonlawyer (such as a law clerk, secretary, researcher, investigator, etc)¹, who has previously worked in a capacity in which the nonlawyer may have been exposed to or acquired confidential information, pertaining to an adverse party, which may be material to matters on which the hiring firm is engaged.²

The Committee believes that it is the obligation of the hiring firm, before hiring a nonlawyer employee who has worked on matters at another firm, to conduct a reasonable investigation into whether the proposed employee has been exposed to or acquired confidential information during prior employment relevant to legal matters which may arise in the course of the new employment. The hiring firm should in particular ascertain whether the proposed employee's former firm is or has been opposing counsel to the hiring firm on any current cases, to determine whether the proposed employee has been exposed to confidential information of an adverse party or witness regarding those cases. However, the hiring firm must not attempt to delve into the substance of any information the nonlawyer may have acquired. It is the obligation of the hiring firm to instruct the nonlawyer employee, once hired, as to his or her confidentiality obligations, and, absent first obtaining the consent of the former employer or the affected client of the former employer, to promptly screen the nonlawyer employee from involvement in particular matters if the nonlawyer is in possession of confidential information which is materially related to matters in which the hiring firm represents an adverse party. The opinion also addresses the elements of an adequate screen.

¹ The discussion of nonlawyer employees does not include paralegals, for purposes of this Opinion, as paralegals are subject to the same confidentiality requirements as attorneys under the provisions of Business & Professions Code Section 6453.

² In this Opinion, and consistent with Proposed California Rule of Conduct 1.01(c), the term "firm" is used inclusively to refer to a law firm, a legal services organization, or the legal department of a government, corporate, or other organization.

Table of Authorities

Rules of Professional Conduct:

Rule 2-100 (Communication with a Represented Party)
Rule 3-110 (Failing to Act Competently)
Rule 3-310 (Avoiding the Representation of Adverse Interests)
Rule 3-500 (Communication)

Cases:

Adams v. Aerojet-General Corp., 86 Cal.App.4th 1324 (2001)
Flatt v. Superior Ct., 9 Cal.4th 275 (1994)
H.F. Ahmanson & Co. v. Salomon Brothers, Inc., 229 Cal.App.3d 1445 (1991)
In re Complex Asbestos Litigation, 232 Cal.App.3d 572 (1991)
Kirk, et al. v. First American Title Insurance Co., 183 Cal.App.4th 776 (2010)
Trousil v. State Bar, 38 Cal.3d 337 (1985).
Waysman v. State Bar, 41 Cal.3d 452 (1986)

Ethics Opinions:

ABA Informal Op. No. 88-1526 (1988)
Florida State Bar Association Ethics Op. No. 86-5 (1986)
Michigan State Bar Ethics Op. No. RI-115 (1992)
New York State Bar Association Ethics Op. No. 774 (2004)

Facts

An attorney at Second Firm hires two law clerks for the summer to work on intellectual property cases, including a case by Second Firm's client Writer against Studio over the genesis of a film project. The prior summer, both law clerks worked for First Firm, which represents Studio. In interviewing the law clerks, Second Firm learns that while employed by First Firm, Law Clerk A billed approximately 100 hours on investigating the origins of the film project in question, sitting in on a meeting with the client, and related legal research. While performing these tasks, Law Clerk A reviewed confidential memoranda and documents. Law Clerk B did no work on the particular film project in question, but billed 10 hours of time that was charged to Studio for Law Clerk B's generic research on the standards for summary judgment.

Discussion

A. Obligations of Nonlawyers

Non-attorney employees such as law clerks, secretaries, and investigators are not subject to the Rules of Professional Conduct. Instead, the duty of competence of members of the bar under Rule 3-110 encompasses the duty to supervise the work of non-attorney employees or agents. *See* CRPC 3-110 (Discussion), *citing, inter alia, Waysman v. State Bar*, 41 Cal.3d 452 (1986), *Trousil v. State Bar*, 38 Cal.3d 337 (1985). Attorneys are held accountable for their

employees' conduct, particularly where that conduct poses a clear threat to attorney-client confidentiality and the integrity of the judicial process. *In re Complex Asbestos Litigation*, 232 Cal.App.3d 572, 603 (1991).

B. Confidentiality

Confidentiality is fundamental to our legal system. Accordingly, Rule 3-310(E) of the California Rules of Professional Conduct prohibits attorneys from accepting employment adverse to clients or former clients “where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment,” unless the former client has given informed written consent. Under the rules, an attorney who possesses confidential information such as that obtained by Law Clerk A above would be prohibited from working on that matter or a substantially related matter at Second Firm. If no steps are taken to screen the newly hired attorney, and attorneys in Second Firm become exposed to confidential information of the adverse party, disqualification of Second Firm might result, because where one attorney is disqualified from representation because of a conflict, the disqualification generally extends to the entire firm. *Flatt v. Superior Ct.*, 9 Cal.4th 275, 283 (1994).³

It is important to emphasize that this opinion deals with the ethical obligations of the lawyers in Second Firm, not the legal standards for disqualification. However, disqualification is one of the potential consequences of an ethical violation, and thus is relevant for consideration. In the context of a disqualification motion, the California Court of Appeal has held that “an inflexible presumption of shared confidences would not be appropriate for nonlawyers,” because their “training, responsibilities, and acquisition and use of confidential information” differ from those of lawyers. *Complex Asbestos*, 232 Cal.App.3d at 593. The court endorsed instead a rebuttable presumption of shared confidences between nonattorney employees and their new employers as to matters on which the nonattorney worked, and allowed the presumption that information has been shared to be rebutted by showing that “the practical effect of formal screening has been achieved.” *Id.* at 596.

C. Duty to conduct reasonable inquiry without seeking to obtain confidential information

The Committee believes that in order to comply with their obligations under Rule 3-310(E), the hiring firm's attorneys have a duty to conduct a reasonable inquiry into the possibility that a prospective employee has been exposed to confidential information in the prior employment regarding a matter material to the current employment. The inquiry should not seek to delve into the substance of the information or confidences the prospective employee may have acquired, as the very act of doing so may trigger the divulging of confidential information. Rather, the purpose of the inquiry should be to determine whether the employee was likely to

³ The Court of Appeal has recently held that *Flatt* does not mandate automatic vicarious disqualification, and that there is instead a rebuttable presumption that an attorney's knowledge of client confidences is imputed to the new firm. The presumption may be rebutted by evidence that the new firm adequately screened the new attorney. *Kirk, et al. v. First American Title Insurance Co.*, 183 Cal.App. 4th 776, 801 (2010).

have been exposed to information which must be shielded from the hiring firm. One element of a reasonable inquiry would be to present the new hire with a list of matters on which the new employee's former firm and the hiring firm are opposing counsel and ask the new hire to indicate any matters on which he or she worked. Another might be to ask the new hire generally what type of cases or matters he or she worked on, while cautioning that no confidential information is sought. While this Opinion concerns the ethical duties of attorneys, which are distinct from the bases of disqualification, it is noted that a hiring firm's failure to conduct a reasonable inquiry into the likelihood that a new employee has been exposed to confidential information materially related to matters on which the hiring firm is adverse to a client or former client of the former firm carries the risk of disqualification and other adverse consequences.⁴

D. Hiring Firm's Obligations and Elements of an Adequate Screen

When a hiring firm determines that a new hire or prospective employee has been exposed to confidential information likely to be material to a matter at the new firm, one option is to seek the consent of the former employer before making the hire. (*See, e.g., Complex Asbestos*, 232 Cal.App.3d at 593 n9 (suggesting consent and noting that Rule 2-100 would preclude the hiring attorney from seeking the consent directly from the opposing party).

If consent is not available, the hiring firm can fulfill its obligation to ensure that its employees comply with duties of confidentiality by obligating the new hire to refrain from divulging confidential information, and by screening the new hire, so that the new hire cannot provide or receive information regarding the matter from which he or she is screened. Elements of an adequate screen include written notification to all legal staff to isolate the screened employee from communication regarding the matter, prevention of the screened employee's access to the relevant files, admonishment of the employee not to discuss the prior matter with the new firm, and a search of the firm's records to ensure that all cases on which the new employee's former firm is opposing counsel are identified. *Complex Asbestos*, 232 Cal.App.3d at 593-94, 596.⁵ The Committee believes that electronic security is also an important element of an effective screen. Electronic files should be password-protected and the password withheld from screened employees. Effective practices may also include documenting the continued existence and impermeability of the screen, for example by periodic electronic or written

⁴ The Committee notes that a nonlawyer may be subject to contractual confidentiality obligations and should have been instructed by his or her former firm as to these obligations prior to departure. This Opinion does not deal with the obligations of the firm from which a nonlawyer departs.

⁵ The Court of Appeal recently elaborated further on the elements of an effective screen for attorneys, including "(1) physical, geographic, and departmental separation [], (2) prohibitions against and sanctions for discussing confidential matters; (3) established rules and procedures preventing access to confidential information and files; (4) procedures preventing a disqualified attorney from sharing in the profits from the representation; and (5) continuing education in professional responsibility." *Kirk*, 183 Cal.App. 4th at 810-11. The Committee believes the same elements, other than prevention of profit-sharing, are applicable to nonattorney personnel.

reminders to all staff or by requiring periodic certification by screened staff that they have not breached the screen.

A similar conclusion regarding the appropriateness of screening has been reached by the American Bar Association and ethics authorities in several states, in some cases even before screening was accepted for attorneys. *See, e.g.*, ABA Inf. Op. 88-1526 (1988) (law firm hiring opposing firm's former paralegal can avoid disqualification by screening paralegal and admonishing paralegal against disclosure of any information related to representation of former firm's clients); NY Eth. Op. 774 (2004) (law firm hiring nonlawyer must remind nonlawyer to protect confidential information from prior employment and must instruct its lawyers not to seek or accept confidential information if nonlawyer fails to comply with this instruction); Fl. Eth. Op. 86-5 (1986) (hiring firm has duty not to seek or permit disclosure by nonlawyer of confidence or secrets of opposing firm's clients).⁶

Conclusion

With regard to the fact scenarios above, the Committee believes that Second Firm must screen Law Clerk A from any involvement in matters adverse to Studio which are substantially related to the work that Law Clerk A performed at First Firm the previous summer. The actions of sitting in on a client meeting and investigating the origins of the particular film project will have imparted confidential information to Law Clerk A which Law Clerk A must not share with Second Firm. Second Firm must therefore admonish Law Clerk A not to share any information about his or her work in the matter, must screen Law Clerk A from any involvement on related matters in which First Firm's clients are adverse to Studio, and must admonish all others in Second Firm not to discuss such matters with Law Clerk A.

The Committee does not believe that screening of Law Clerk B is necessary. Where a nonlawyer employee worked only a minimal number of hours on a matter, researched only general points of law and was not exposed to confidential information, there is no presumption that confidences were acquired, and therefore no need to screen that employee in subsequent employment. *C.f. H.F. Ahmanson & Co. v. Salomon Bros., Inc.*, 229 Cal.App.3d 1445, 1455 (1991) (in determining whether disqualification is required, court should take "pragmatic approach," focusing on the nature of the former representation, including the nature and extent of

⁶The Committee is aware of ethics opinions and case law in some states suggesting that the professional rules applicable to lawyers should apply to non-members, but rejects that standard in favor of the principles set forth in *Complex Asbestos* and this Opinion. *See, e.g.*, MI Eth.Op. RI-115 (1992) (rules for disqualification of law firms based on lawyers transferring employment apply equally to transfers of nonlawyer employees); *Williams v. Trans World Airlines*, 588 F.Supp. 1037, 1044 (W.D. Mo. 1984) (disqualification standard for attorneys and secretaries should be the same). *Compare Complex Asbestos*, 232 Cal.App. 3d at 593 ("There are obvious differences between lawyers and their nonlawyer employees in training, responsibilities, and acquisition and use of confidential information. These differences satisfy us that a rebuttable presumption of shared confidences provides a just balance between protecting confidentiality and the right to chosen counsel.")

the attorney's involvement.) However, screening of Law Clerk B might assist Second Firm in defending a motion for disqualification, should one be brought, and therefore may be prudent, even if not required. Moreover, the efficacy of a screen to avoid vicarious disqualification will be assessed on a case by case basis. *Kirk*, 183 Cal.App.4th at 811. Thus, the timing of the establishment of the nonlawyer employee's screen and the adequacy of its procedures weigh heavily in the determination whether or not a lawyer has complied with his or her ethical duties as to supervision and maintaining confidentiality.

Finally, the Committee believes that when a firm hires a nonlawyer who will be screened from involvement on a client's matter, and consent from the nonlawyer's former firm is not obtained, the hiring firm has a duty under Rule 3-500 to inform the client of that development, because of the possibility of a disqualification motion based upon the hire.

This opinion is advisory only. The Committee acts on specific questions submitted *ex parte* and its opinion is based on such facts as are set forth in the questions submitted.